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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1926

FROM APRIL 11, 1927 (IN PART)
TO AND INCLUDING JUNE 6, 1927

ERNEST KNAEBEL
REPORTER



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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.[2]
CHARLES ELMORE CROPLEY, Clerk.[2]
FRANK KEY GREEN, Marshal.

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

[2] See pp. V–IX, *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.

SUPREME COURT OF THE UNITED STATES

MONDAY, JUNE 6, 1927

PRESENT: THE CHIEF JUSTICE, MR. JUSTICE HOLMES, MR. JUSTICE VAN DEVANTER, MR. JUSTICE MCREYNOLDS, MR. JUSTICE BRANDEIS, MR. JUSTICE SUTHERLAND, MR. JUSTICE BUTLER, MR. JUSTICE SANFORD, AND MR. JUSTICE STONE.

THE CHIEF JUSTICE said:

The Court announces with deep personal sorrow the death of William Riley Stansbury, its clerk, at 5 o'clock on yesterday (Sunday) morning, June 5.

Mr. Stansbury was born May 25, 1856, so that he had reached the age of 71. He was born, and has always lived, in this District, except for a year or two spent in the Signal Service of the United States. He entered this Court as an assistant clerk in August, 1882, and has acted in every capacity as a subordinate in the clerk's office, having succeeded Mr. James D. Maher as clerk in October, 1921, six years ago. He was an accurate, faithful, earnest, and efficient public servant. He was saturated with the traditions of the office and familiar to the last detail with all the duties to be discharged in that important place. He endeared himself in every relation to the members of the Court. He was genial and accommodating and interested for every member of the public, and especially every one of the bar who had to transact business with the Court. He was a man of the utmost probity and of highest character in every respect.

The Court takes great pride in the history of the maintenance of the traditions of the clerk's office and of the length of service of those who administered it. Mr. Bayard was appointed clerk in 1791 and served until 1800. Mr. Caldwell was appointed in 1800 and served until 1825. Mr. Carroll was appointed in 1827 and served until 1863. Mr. Middleton was appointed in 1863 and served until 1880. Mr. James H. McKenney was appointed in 1880, having been for years the chief assistant of Mr. Middleton, and served until 1913. Mr. James D. Maher, having for many years since boyhood been an assistant in the clerk's office, was appointed clerk in 1913 and served until 1921. Mr. Stansbury having been appointed assistant clerk in 1882, and having served as the head of the office for six years, looked back to a record of forty-five years. Such lengths of service indicate not only fidelity but efficiency, for only by reason of the latter could the incumbents have continued during the term they served.

Because the Court adjourns this morning for the term of 1926, and for more than three months, and because no successor to Mr. Stansbury could be appointed during the vacation, it has been necessary for the Court, in spite of Mr. Stansbury's very recent death, to appoint his successor, in order that the successor may be installed, give his bonds, and begin the administration of his office, which, because of its public obligations, can not be suspended at all.

Mr. Philander Riley Stansbury, the brother of the late Clerk, has been an assistant for more than 30 years and has rendered faithful services. Because of the state of his health he has declined to be considered for the succession.

The Court has appointed as its Clerk, to succeed Mr. Stansbury, Charles Elmore Cropley, of Washington. Mr. Cropley has already served in the Court as Page and Assistant some 18 years, but is still in the prime of life.

He has great familiarity with the duties of the office and carries with him to its headship the traditions that have secured such distinguished and useful service by Mr. Stansbury and his predecessors, with the probability of a life of long usefulness.

The members of the Court will attend the funeral of Mr. Stansbury in a body, at half past 10 to-morrow (Tuesday) morning, at St. Andrews Episcopal Church, at the corner of Fifteenth and V Streets.

SUPREME COURT OF THE UNITED STATES

MONDAY, JUNE 6, 1927

PRESENT: THE CHIEF JUSTICE, MR. JUSTICE HOLMES, MR. JUSTICE VAN DEVANTER, MR. JUSTICE MCREYNOLDS, MR. JUSTICE BRANDEIS, MR. JUSTICE SUTHERLAND, MR. JUSTICE BUTLER, MR. JUSTICE SANFORD, AND MR. JUSTICE STONE.

ORDER

It is hereby ordered that Charles Elmore Cropley be appointed Clerk of this Court in the place of William R. Stansbury, deceased, and that he forthwith take the oath of office and give bond conditioned according to law.

ORDER

On the application of the Clerk, pursuant to Section 221 of the Judicial Code, it is ordered that Reginald C. Dilli be, and he is hereby, appointed a Deputy Clerk of this Court.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1926.

FAIRMONT CREAMERY COMPANY *v.* MINNESOTA.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 725. Argued February 23, 1927.—Decided April 11, 1927.

1. A state law (G. S. Minn., § 3907) punishing anyone engaged in the business of buying milk, cream, or butter fat for manufacture or sale, who discriminates between different localities of the State by buying such commodities in one locality at a higher price than he pays for the same commodity in another locality, allowance being made for any difference in actual cost of transportation from locality of purchase to that of manufacture or sale—infringes the liberty of contract guaranteed by the Fourteenth Amendment. P. 8.
2. Such a sweeping inhibition can not be sustained as a means of preventing some buyers from attempts to destroy competition or secure a monopoly in the business by paying excessive prices. P. 9.
3. It is the duty of the Court to inquire into the real effect of any statute duly challenged because of interference with freedom of contract, and to declare it invalid when it has no substantial relation to any evil which the State has power to suppress but is a clear infringement of private rights. P. 11.

168 Minn. 381, reversed.

ERROR to a judgment of the Supreme Court of Minnesota sustaining a conviction of the Creamery Company of "unfair discrimination" in purchasing butter fat for

manufacture and sale. See also, 162 Minn. 146, and 168 Minn. 378.

Mr. Leonard A. Flansburg, with whom *Messrs. E. J. Hainer, George A. Lee,* and *M. S. Hartman* were on the brief, for plaintiff in error.

Mr. Charles E. Phillips, Assistant Attorney General of Minnesota, with whom *Mr. Clifford L. Hilton,* Attorney General, was on the brief, for defendant in error.

The federal Constitution does not guarantee to the individual absolute freedom of contract. *Miller* v. *Wilson,* 236 U. S. 373; *Schmidinger* v. *Chicago,* 226 U. S. 578; *Chicago Co.* v. *McGuire,* 219 U. S. 549; *Williams* v. *Evans,* 139 Minn. 32. Statutes making it an offense to discriminate in prices between different localities, when "intent" or "purpose" to create a monopoly or to destroy competition is made an ingredient thereof, have been uniformly sustained. *Central Lumber Co.* v. *South Dakota,* 226 U. S. 157; *State* v. *Drayton,* 82 Neb. 254; *State v. Bridgeman, etc. Co.,* 117 Minn. 186; *State* v. *Standard Oil Co.,* 111 Minn. 85; *State* v. *Fairmont Creamery,* 153 Ia. 702; *State* v. *Rocky Mountain Elev. Co.,* 52 Mont. 487. Such a statute was enacted in Minnesota in 1909 (c. 468, Ls. 1909), and remained in force until the enactment of c. 120, Ls. 1923, here involved. Its validity was sustained in *State* v. *Bridgeman, etc., Co., supra.* In sustaining it the court found existing evils justifying this exercise of police power. In 1923 the legislature amended the law by striking therefrom the ingredient of intent or motive, thus making it an offense to discriminate in prices between localities, except as affected by the cost of transportation, whether done for the purpose of creating a monopoly or destroying competition or not (chapter 120). It was designed to meet and correct the same evils as the old statute. It must be assumed that in the judg-

ment of the legislature the remedy prescribed by the old law was ineffectual to accomplish the desired results. The State, having found the old law ineffective to prevent the evil because of the almost impossibility of proving by competent evidence that price discrimination between localities was for the purpose of creating a monopoly, determined in its legislative judgment to prohibit discrimination between localities without regard to intent or motive. A particular transaction, though lawful in and of itself, and although there inheres in it no purpose of creating a monopoly or destroying a competitor, may be prohibited if it be reasonably necessary so to do to suppress a substantial evil within the police power of a State to correct. *Booth* v. *Illinois,* 184 U. S. 425; *Otis* v. *Parker,* 187 U. S. 606; *Purity Extract Co.* v. *Lynch,* 226 U. S. 192; *Geer* v. *Connecticut,* 161 U. S. 519; *New York* v. *Hesterberg,* 211 U. S. 31; *State* v. *Shattuck,* 96 Minn. 45; *Merrick* v. *Halsey Co.,* 242 U. S. 568; *Rast* v. *Van Deman & Lewis Co.,* 240 U. S. 342; *Frisbie* v. *United States,* 157 U. S. 160.

Mr. Justice McReynolds delivered the opinion of the Court.

The Supreme Court of Minnesota sustained the conviction of plaintiff in error, a corporation of that State charged with violating § 1, Chapter 305, Laws 1921, as amended by Chapter 120, Laws 1923 (Minn. G. S. § 3907), which follows—

"Any person, firm, co-partnership or corporation engaged in the business of buying milk, cream or butterfat for manufacture or for sale of such milk, cream or butterfat, who shall discriminate between different sections, localities, communities or cities of this State, by purchasing such commodity at a higher price or rate in one locality than is paid for the same commodity by said person,

firm, co-partnership or corporation in another locality, after making due allowance for the difference, if any, in the actual cost of transportation from the locality of purchase to the locality of manufacture or locality of sale of such milk, cream or butterfat, shall be deemed guilty of unfair discrimination, and, upon conviction thereof, shall be punished by a fine not exceeding one hundred dollars, or by imprisonment in the county jail for not exceeding 90 days."

Chapter 468, Laws 1909, prohibited discrimination in prices between localities "with the intention of creating a monopoly or destroying the business of a competitor." The Act of 1921 forbade such discrimination with " the purpose of creating a monopoly, or to restrain trade, or to prevent or limit competition, or to destroy the business of a competitor." The Act of 1923, *supra,* eliminated purpose as an element of the offense.

The cause was begun in Cottonwood County by a complaint which alleged—

That the Fairmont Creamery Company on June 11, 1923, at the Village of Bingham Lake, Cottonwood County, committed the crime of unfair discrimination in the purchase of butter fat for manufacture and sale, in the manner following: Said company, while engaged in the business of buying milk, cream and butter fat for manufacture and sale and while maintaining regularly-established stations for purchases at Madelia, Mountain Lake, Bingham Lake and other villages for shipment to Sioux City, Iowa, there to be manufactured and sold, did wrongfully, unlawfully and unfairly discriminate between said localities by paying a higher price for butter fat at some stations than at others, after due allowance for transportation costs. And, more particularly, on June 11, 1923, the company purchased cream at Madelia for thirty-eight cents per pound, and on the same day purchased cream of like quality at Mountain Lake and Bingham

Lake for thirty-five cents per pound, all being intended for transportation to Sioux City, Iowa, there to be manufactured and sold. On that day the cost of transportation from Madelia to Sioux City was higher than from the other places.

Bingham Lake, Mountain Lake (in Cottonwood County) and Madelia (in Watonwan) are villages of Southern Minnesota, about 120, 130, and 160 miles, respectively, northeast of Sioux City, and are connected therewith by a single direct railroad line.

At the trial the accused company offered testimony to show: "That during the last nine years, the price paid for butter fat in the southern half of Minnesota, at the different towns, has varied in each town; that the variation has been from one cent to eight cents; that such price is exclusive of transportation charges; that such variation is the normal condition of the market in the sale of cream and butter fat, and is the result entirely of competitive conditions; that in certain localities there are many more competitors than there are in others; that the quality of cream differs in different localities; that the equipment and efficiency of creameries in the various localities differ, and that each of these things enters into the price that is paid for the butter fat in the particular locality where the sale is made, and that this variation in price, in each town, in the southern half of Minnesota, existed on the eleventh day of June, 1923, and that such variation is constant, and has existed for nine years previous to that time, and that these variations in price are due entirely to the economic conditions in each locality, and to competition."

The trial court excluded this evidence as immaterial, and the Supreme Court approved. We may, therefore, treat the facts stated as though established and held to have no bearing on the question of guilt or the validity of the enactment.

Defense was made on several grounds—That the venue was improperly laid in Cottonwood County; that the statute conflicted with the federal Constitution by denying equal protection of the laws and liberty to contract; and that it unduly interfered with interstate commerce.

The cause has been before the Supreme Court of Minnesota three times. 162 Minn. 146; 168 Minn. 378 (Aug. 27, 1926); 168 Minn. 381 (Oct. 27, 1926). Two opinions discuss the merits of the controversy; the last affirmed conviction upon the earlier ones.

Replying to the objection that venue was improperly laid in Cottonwood County, locality of the lower price, the Supreme Court said: "The gist of the offense is the discrimination between different localities by paying different prices in different localities after making due allowance for the cost of transportation from the point of purchase to the point of sale or manufacture. The statute chooses to define the offense by referring to a higher price at one point than at another. It might define it by referring to the payment of a lower price at one point than another. The meaning would be the same. . . . The offending fact is that there are sales at different prices and thereby discrimination."

It next held that the statute did not deny equal protection to those engaged in buying cream for manufacture or sale since they properly might be treated as a distinct class and subjected to peculiar regulations.

Concerning the claim that the statute undertakes to deprive plaintiff in error of property and liberty of contract without due process of law, contrary to the Fourteenth Amendment, the court said—

"There have developed in the State a large number of so-called centralized creameries which buy in different localities. We take it that the defendant is one. In addition there are coöperative creameries and independent creameries not usually maintaining other buying stations,

though some may. There is in the law nothing to prevent them doing so. We do not understand that the buying stations are commonly localized plants. [Counsel for the State say that creamery statistics for 1923 show then operating in the State six hundred and twenty-eight coöperative creameries, one hundred and twenty-seven independent or individual ones, and forty-eight 'centralizers.'] Often the buyer represents the creamery as an adjunct of his other business. Often his compensation is through a commission. He may have a place to receive the product or it may be delivered directly to the railroad station. A centralized creamery, supplied with ample capital and facilities, has the ability and meets the temptation to destroy competition at a buying station by overbidding, absorbing the resultant losses, if any, through the profits of its general business and, when competition is ended, to buy on a noncompetitive basis. If it does all this successfully, it has a monopoly, and may or may not treat producers justly. The statute seeks to prevent the destruction of competition by forbidding overbidding unless the dealer makes prices at other buying points correspond after proper allowances for the cost of transportation. If the statute is obeyed destroying competition is expensive. The statute limits the right of the creamery to contract at its buying points on a basis satisfactory to itself and its patrons. The State must concede this, and it does.

"The dairy industry, measured in money, is a large, perhaps just now the largest, productive industry of the State. . . . It is not surprising that in the marketing of so great a product, coming from so wide an area of production, under conditions such as obtain, those engaged in the industry claim abuses for which they seek legislative remedy. The exercise of the police power is not confined to measures having in view health or morals of the community. The welfare of a great industry and the people engaged in it may be guarded."

To the contention that the statute unduly burdens interstate commerce, the court replied: "A statute may indirectly or incidentally affect interstate commerce, as local police measures frequently do, without offending the commerce clause. . . . The defendant is a Minnesota corporation. The product which it purchased might have gone as well to a point in Minnesota for manufacture or resale. It so happened that it went to Iowa. The statute is not unconstitutional as an interference with interstate commerce."

Counsel for the State concede that the statute requires buyers to pay the same price for like commodities at all points of purchase, after proper allowances for transportation. Also, that it inhibits plaintiff in error from meeting local competition by increasing the price only at that place; also, from varying purchase prices to meet normal trade conditions.

They further admit that the State may not arbitrarily interfere with the right of one conducting a lawful business to contract at will; but they say that the federal Constitution does not guarantee absolute freedom of contract and the State may prohibit transactions not in themselves objectionable when within reason this may seem necessary in order to suppress substantial evil.

It seems plain enough that the real evil supposed to threaten the cream business was payment of excessive prices by powerful buyers for the purpose of destroying competition. To prevent this the statute undertook to require every buyer to adhere to a uniform price fixed by a single transaction.

As the inhibition of the statute applies irrespective of motive, we have an obvious attempt to destroy plaintiff in error's liberty to enter into normal contracts long regarded not only as essential to the freedom of trade and commerce but also as beneficial to the public. Buyers in competitive markets must accommodate their bids to

prices offered by others, and the payment of different prices at different places is the ordinary consequent. Enforcement of the statute would amount to fixing the price at which plaintiff in error may buy, since one purchase would establish this for all points without regard to ordinary trade conditions.

The real question comes to this—May the State, in order to prevent some strong buyers of cream from doing things which may tend to monopoly, inhibit plaintiff in error from carrying on its business in the usual way heretofore regarded as both moral and beneficial to the public and not shown now to be accompanied by evil results as ordinary incidents? Former decisions here require a negative answer. We think the inhibition of the statute has no reasonable relation to the anticipated evil—high bidding by some with purpose to monopolize or destroy competition. Looking through form to substance, it clearly and unmistakably infringes private rights whose exercise does not ordinarily produce evil consequences, but the reverse.

In *Adams* v. *Tanner*, 244 U. S. 590, 594, this court said: "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. Skilfully 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."

Concerning a price-fixing statute, *Tyson and Brother* v. *Banton et al.*, 273 U. S. 418, recently declared: "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." And see *Adkins* v. *Children's Hospital*, 261 U. S. 525; *Wolff Co.* v. *Industrial Court*, 262 U. S. 522, 537.

Booth v. *Illinois*, 184 U. S. 425, much relied upon by counsel for the State, sustained the validity of an Act forbidding options to sell or buy property at a future time, ultimate delivery being intended. The evident purpose was to prevent gambling contracts. The Supreme Court of Illinois pointed out that gambling was commonly incidental to dealings in futures, and held the Legislature

might properly conclude that the public interest demanded their suppression as a class in order to avert this evil. This court said: "A calling may not in itself be immoral, and yet the tendency of what is generally or ordinarily or often done in pursuing that calling may be towards that which is admittedly immoral or pernicious. If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the State thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law."

The State also relies upon *Otis* v. *Parker,* 187 U. S. 606; *Purity Extract Co.* v. *Lynch,* 226 U. S. 192; *Rast* v. *Van Deman & Lewis,* 240 U. S. 342; and *Merrick* v. *Halsey & Co.,* 242 U. S. 568. But all those cases recognize the duty of the court to inquire into the real effect of any statute duly challenged because of interference with freedom of contract guaranteed by the Fourteenth Amendment, and to declare it invalid when without substantial relation to some evil within the power of the State to suppress and a clear infringement of private rights.

We need not consider other points advanced by plaintiff in error.

The judgment of the court below must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE HOLMES, MR. JUSTICE BRANDEIS, and MR. JUSTICE STONE dissent.

OHIO PUBLIC SERVICE COMPANY *v.* OHIO EX REL. FRITZ.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

Nos. 210, 264. Argued March 10, 1927.—Decided April 11, 1927.

1. Of two writs of error to a state court, the one sued out pending motion for rehearing and the other after rehearing denied, the second may be relied on and the other dismissed. P. 12.
2. An ordinance of an Ohio village, in 1892, authorizing persons named to use the streets, etc., for the purpose of erecting, maintaining and operating electric light wire mains and apparatus complete for the distribution of electricity for light, heat and power, granted an assignable franchise for an unlimited time and not subject to termination at the mere will of the grantor. P. 13.
3. Subsequent legislation of the State destroying the assignability of the franchise would be invalid under the Contract Clause of the Federal Constitution. P. 14.

113 Oh. St. 325, reversed.

ERROR to a judgment of the Supreme Court of Ohio which affirmed a judgment in *quo warranto* ousting the Public Service Company from use of the streets in the Village of Orrville under a franchise to transmit and distribute electricity.

Messrs. C. H. Henkel and *Frank M. Cobb,* with whom *Mr. Franklin L. Maier* was on the brief, for plaintiff in error.

Messrs. Lyman R. Critchfield and *Alton H. Etling*, with whom *Mr. Joseph O. Fritz,* Prosecuting Attorney, was on the brief, for defendant in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

These two writs of error were sued out at different stages of the same cause; the first while a timely application for rehearing was pending; the second after this

had been denied. Under the circumstances, plaintiff in error may rely upon the latter writ and No. 210 will be dismissed.

By an action in *quo warranto* the State of Ohio, upon relation of the Prosecuting Attorney for Wayne County, seeks to oust plaintiff in error, a corporation under her laws, from use of the streets in the Village of Orrville. The corporation has general power to transmit and distribute electric energy and current, and claims the privilege to operate there as assignee of rights granted to Gans and Wilson and their successors by an ordinance of the Village Council passed February 1, 1892.

The Supreme Court treated the judgment of the Court of Appeals as establishing that the Orrville Light, Heat and Power Company, immediate successor to Gans and Wilson, acquired in 1893 the right to occupy the streets which the ordinance of 1892 gave them. But it held the franchise so acquired was revocable ten years after the original grant and had been terminated by appropriate village action. Also, that under the Act of the Legislature passed April 21, 1896, 92 Ohio Laws 204, this franchise could not lawfully be assigned to plaintiff in error's predecessor during 1907 without the consent of the village, which was not given. It accordingly affirmed the judgment of ouster pronounced by the Court of Appeals. 113 Oh. St. 325.

The ordinance of February 1, 1892, ordained—"Sec. 1. That Aurel P. Gans and Mellville D. Wilson of Canal Dover, Ohio, their associates, successors and assigns are hereby authorized and empowered to use the streets, lanes, alleys, and avenues of the Village of Orrville for the purpose of erecting, maintaining and operating electric light wire mains and apparatus complete for the distribution of electricity for light, heat and power."

Subsequent sections inhibited unnecessary obstruction of the streets, directed how the wires should be strung,

etc.; also that the grantee should furnish and the village should use and pay for a designated number of lights during a period of ten years at a specified rate, etc., etc.

The Ohio statute of 1896 applies to electric light and power companies and provides, that " in order to subject the same to municipal control alone, no person or company shall place, string, construct or maintain any line, wire fixture or appliance of any kind for conducting electricity for lighting, heating or power purposes through any street, alley, lane, square, place or land of any city, village or town, without the consent of such municipality. . . ."

We think it quite clear that the conclusions of the court below conflict with rulings heretofore announced by this court.

In *Northern Ohio Traction Co.* v. *Ohio,* 245 U. S. 574, we pointed out the state of the law in Ohio during 1892. It is plain enough from what was there said that in our view the franchise originally granted by the Village of Orrville was for an unlimited time and not subject to termination at the mere will of the grantor.

Louisville v. *Cumberland Telephone Co.,* 224 U. S. 649, 661, and *Owensboro* v. *Cumberland Telephone Co.,* 230 U. S. 58, 75, are enough to show that the rights acquired under the ordinance of 1892 were assignable without further consent by the village. If to enforce the Ohio statute of 1896 would destroy this right, it conflicts with the provision of the federal Constitution—No State shall pass any law impairing the obligation of contracts.

The judgment of the court below must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE HOLMES and MR. JUSTICE BRANDEIS dissent.

HODGSON *v.* FEDERAL OIL AND DEVELOPMENT COMPANY ET AL.

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

No. 166. Argued February 24, 25, 1927.—Decided April 11, 1927.

1. A motion in this Court to amend a bill on appeal, *overruled,* when it did not appear that the facts sought to be added were newly discovered, and in the absence of any affidavit concerning them. P. 17.
2. The provision of the Oil Land Leasing Act of February 25, 1920, that "all leases hereunder shall inure to the benefit of the claimant and all persons claiming through or under him" (§ 18), does not apply to one claiming an interest, not through or under the lessee but through the heirs of one of the original locators of the relinquished placer claim. P. 18.
3. Where the lease was secured by one who, having become part owner of a placer claim located by eight persons, had held exclusive adverse possession of it, claiming the whole, for many years before relinquishing it under the above Act and obtaining the lease, the heirs of one of the original locators, who were ignorant of having rights under the Act, and did not comply with its terms during the six months allowed, have no interest under the lease upon the theory that the lessee, as their co-tenant, was their fiduciary. P. 18.
4. If the interests of co-tenants accrue at different times, under different instruments, and neither has superior means of information respecting the state of the title, then either, unless he employ his co-tenancy to secure an advantage, may acquire and assert a superior outstanding title, where there is no joint possession. P. 19.
5. Uninterrupted possession of a mining claim by part of the owners for fifteen years, under assertion of right based on recorded conveyances purporting to pass to them the whole claim, with no recognition of others as co-owners, is exclusive and hostile, and not in any relationship of trust and confidence. P. 20.

5 F. (2d) 442, affirmed.

APPEAL from a decree of the Circuit Court of Appeals which affirmed a decree of the District Court dismissing

a bill seeking to hold the two appellee oil companies as trustees for the appellant to the extent of a one-eighth interest in a lease of oil land.

Mr. James M. Hodgson, pro se, with whom *Mr. F. E. Pendell* was on the brief, for appellant.

Mr. Harold D. Roberts, with whom *Messrs. Tyson S. Dines, Peter H. Holme,* and *J. Churchill Owen* were on the brief, for appellees.

Mr. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Appellant seeks to establish his right to a one-eighth interest in an oil and gas lease upon one hundred and sixty acres of land in Wyoming granted August 21, 1920, by the United States to appellee Federal Oil and Development Company under § 18, Act of Congress approved February 25, 1920, c. 85, 41 Stat. 437, 443. The lease was afterwards assigned to The Mountain and Gulf Oil Company upon conditions not here important.

The bill, filed May 26, 1922, proceeds upon the theory—

That January 11, 1887, George McManus and seven associates located a placer mining claim—The O'Glase—and thereafter perfected the same; McManus died in 1901, his one-eighth interest descended to his heirs and has never been forfeited, abandoned or lost; these heirs lived beyond Wyoming and were unaware of their interest in the claim for twenty years; the land is within the district withdrawn from entry by Executive order of September 27, 1909; the Federal Oil and Development Company, having become part owner of the claim, took possession and thereafter, asserting ownership to the whole, surrendered the same and procured the existing lease in its own name under the Act of 1920. The company became a co-tenant with the McManus heirs and, consequently, the lease ob-

tained by it inured to their benefit; appellant purchased their interest February 11, 1922, and may now impress a trust upon the lease.

The trial court held that no adequate ground for relief was disclosed and dismissed the bill upon motion. This was affirmed by the Circuit Court of Appeals. 5 Fed. (2d) 442.

A motion to amend the bill, first made in this Court, must be overruled. It does not appear that the alleged facts have been recently discovered and there is no affidavit in respect of them.

The Act of February 25, 1920, provides—

"Sec. 18. That upon relinquishment to the United States, filed in the General Land Office within six months after the approval of this Act, of all right, title, and interest claimed and possessed prior to July 3, 1910, and continuously since by the claimant or his predecessor in interest under the pre-existing placer mining law to any oil or gas bearing land . . . embraced in the Executive order of withdrawal issued September 27, 1909, and not within any naval petroleum reserve, and upon payment as royalty to the United States of an amount equal to the value at the time of production of one-eighth of all the oil or gas already produced . . . the claimant, or his successor, if in possession of such land, undisputed by any other claimant prior to July 1, 1919, shall be entitled to a lease thereon from the United States for a period of twenty years, at a royalty of not less than 12½ per centum of all the oil or gas produced . . .

"All such leases shall be made and the amount of royalty to be paid for oil and gas produced, except oil or gas used for production purposes on the claim, or unavoidably lost, after the execution of such lease shall be fixed by the Secretary of the Interior under appropriate rules and regulations . . . In case of conflicting claimants for leases under this section, the Secretary of the Interior is

authorized to grant leases to one or more of them as shall be deemed just. All leases hereunder shall inure to the benefit of the claimant and all persons claiming through or under him by lease, contract, or otherwise, as their interests may appear . . ."

"Sec. 32. That the Secretary of the Interior is authorized to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this Act . . ."

The following is one of the regulations established by the Secretary—

"24½. All proper parties to a claim for relief under section 18, 19, or 22 of the Act should join in the application, but, if for any sufficient reason that is impracticable, any person claiming a fractional or undivided interest in such claim may make application for a lease or permit, stating the nature and extent of his interest, and the reasons for nonjoinder of his co-owner or co-owners. In cases where two or more applications are made for the same claim or part of a claim, leases or permits will be granted to one or more of the claimants, as the law and facts shall warrant and as shall be deemed just."

Appellant insists that he is entitled to relief under the clause in the Act of 1920 which provides—"All leases hereunder shall inure to the benefit of the claimant and all persons claiming through or under him by lease, contract, or otherwise, as their interests may appear." But, we think, it is clear enough that he does not claim "through or under" either appellee, within the meaning of the Act. Whatever rights he has, if any, come through or under George McManus and his heirs.

He also maintains that out of the alleged co-tenancy there arose a relation of trust and confidence between the Oil and Development Company and the McManus heirs and therefore it cannot deny that the lease was procured

for the benefit of them as well as for itself, according to their respective interests.

If appellant's predecessors owned an interest in the placer claim, certainly they never put themselves in position to receive a lease from the United States under the Act of 1920. They made no effort to surrender their rights or comply with the prescribed prerequisites during the six months allowed. Prior to the granting of the lease they had no knowledge of rights now asserted. The Oil and Development Company did not obtain what otherwise would have been granted to them; and the principle under which the patentee was declared trustee for another in such cases as *Silver* v. *Ladd,* 7 Wall. 219, and *Svor* v. *Morris,* 227 U. S. 524, does not apply. *Anicker* v. *Gunsburg,* 246 U. S. 110, 117, holds: "In order to maintain a suit of this sort the complainant must establish not only that the action of the Secretary was wrong in approving the other lease, but that the complainant was himself entitled to an approval of his lease, and that it was refused to him because of an erroneous ruling of law by the Secretary."

In order to support the view that in equity and good conscience the Oil and Development Company acted for the McManus heirs in securing the existing lease, it would be necessary to allege definite facts (not mere conclusions) sufficient to show some fiduciary relationship between them. This has not been done, unless such a relationship necessarily arose because of co-tenancy. The rule as commonly stated forbids a co-tenant from acquiring and asserting an adverse title against his companions because of the mutual trust and confidence supposed to exist; but the rule does not go beyond the reason which supports it. If the interests of the co-tenants accrue at different times, under different instruments, and neither has superior means of information respecting the state

of the title, then either, unless he employs his co-tenancy to secure an advantage, may acquire and assert a superior outstanding title, especially where there is no joint possession. This exception to the general rule is recognized in *Turner* v. *Sawyer,* 150 U. S. 578, 586; *Elder* v. *McClaskey,* 70 Fed. 529, 546; Freeman on Co-Tenancy and Partition, § 155; *Shelby* v. *Rhodes,* 105 Miss. 255, 267; *Sands* v. *Davis,* 40 Mich. 14, 18; *Joyce* v. *Dyer,* 189 Mass. 64, 67; *Steele* v. *Steele,* 220 Ill. 318, 323. We know of no opinion by the courts of Wyoming to the contrary.

The bill shows that the Oil and Development Company and its predecessors were in uninterrupted possession of the mining claim from 1905 to August 21, 1920, when it relinquished the same to the United States and applied for the lease; that throughout this period they held under assertion of right based on recorded conveyances purporting to pass the whole claim to them (which undoubtedly gave color of title) and did whatever was necessary to preserve it. There is no suggestion that any of them acknowledged the title was other than what these conveyances purported to pass or recognized the heirs of McManus as co-owners. Such holding must be regarded as exclusive and hostile to all others and not in any relationship of trust and confidence. It continued for fifteen years, during which the McManus heirs asserted no conflicting right or objection. They do not appear to have been infants or under disability. In no admissible view of the leasing Act are they shown to have been entitled to the lease or any interest therein.

We need not discuss laches as an equitable defense, the effect of the ten-year limitation prescribed by the Wyoming statute or other points relied on by the appellees. In the circumstances nothing short of distinct allegations of all the facts necessary to support appellant's

claim for relief would suffice, and they are not to be found in the bill.

The decree of the court below must be

Affirmed.

HOFFMAN, JUDGE *v.* MISSOURI EX REL. FORAKER.

ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 225. Argued March 11, 1927.—Decided April 11, 1927.

An action under the Federal Employers Liability Act for death by negligence may be maintained against a railroad in the State of its incorporation, where it owns part of its line, operated in intrastate as well as interstate commerce, in a county where it has an agent and a usual place of business, though this be not the State where the cause of action arose. P. 22.

309 Mo. 625, affirmed.

ERROR to a judgment of the Supreme Court of Missouri, in mandamus, which directed the judge of an inferior court to set aside a judgment dismissing an action for damages, and to entertain jurisdiction over it.

Mr. Roy W. Rucker, with whom *Messrs. Edward J. White* and *James F. Green* were on the brief, for plaintiff in error.

Messrs. L. D. Mitchell and *Paul Barnett* were on the brief for defendant in error.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This is a writ of error to the Supreme Court of Missouri, which had granted, in an original proceeding, a peremptory writ of mandamus. 309 Mo. 625. Its judgment directed the judge of an inferior court to set aside a judgment dismissing an action and ordered him to entertain

jurisdiction. That action had been brought under the Federal Employers Liability Act by a citizen and resident of Kansas for the death of an employee of the Missouri Pacific Railroad. The accident occurred on its line in Kansas, and the deceased was a citizen of Kansas at the time of his death. The railroad is a Missouri corporation. The action was brought in a county traversed by the railroad, in which it had an office and an agent for the transaction of business. Under a statute of the State it was liable to suit there. 1919 Mo. Rev. Stat., § 1180.

The railroad contends that, as it could have been sued in Kansas where the accident occurred and the plaintiff resided, the statute, as applied, was void, under the doctrine of *Davis* v. *Farmers Cooperative Equity Co.*, 262 U. S. 312, and *Atchison, Topeka & Santa Fe Ry.* v. *Wells*, 265 U. S. 101, because a suit in Missouri would burden interstate commerce. In support of its contention, it was urged that the claims against the carrier for personal injuries are numerous; that the amounts demanded are large; that in many cases the carrier deems it advisable to leave the determination of liability to the courts; that in the action in question there were at least eleven employees working for it in Kansas who were material witnesses, without whose attendance it could not safely proceed to trial; that to procure their attendance at the trial in Missouri would cause absence from their work in interstate commerce; and that this would subject the carrier to expense.

These allegations remind of *Davis* v. *Farmers Coöperative Equity Co.* But other facts on which the decision of that case was rested are absent in the case at bar. Here, the railroad is not a foreign corporation; it is sued in the State of its incorporation. It is sued in a State in which it owns and operates a railroad. It is sued in a county in which it has an agent and a usual place of business. It is sued in a State in which it carries on doubtless intra-

state as well as interstate business. Even a foreign corporation is not immune from the ordinary processes of the courts of a State where its business is entirely interstate in character. *International Harvester Co.* v. *Kentucky,* 234 U. S. 579. It must submit, if there is jurisdiction, to the requirements of orderly, effective administration of justice, although thereby interstate commerce is incidentally burdened. Compare *Kane* v. *New Jersey,* 242 U. S. 160, 167; *St. Louis, Brownsville & Mexico Ry.* v. *Taylor,* 266 U. S. 200.

Affirmed.

LOWE *v.* DICKSON.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 158. Argued February 24, 1927.—Decided April 11, 1927.

A second or additional homestead entry, not authorized by law when made, but asserted and claimed in good faith until after the approval of the Act of May 22, 1902, allowing second entries, was validated by that Act, and segregated the land, other rights not having intervened, and became subject to a subsequent contest for abandonment and failure to improve and cultivate. *Prosser* v. *Finn,* 208 U. S. 67, distinguished. P. 26.

108 Okla. 241, reversed.

CERTIORARI (269 U. S. 547) to a decree of the Supreme Court of Oklahoma which affirmed a decree adjudging that a tract of land patented under the homestead law to Lowe (husband of the petitioner here) after a successful contest of an entry made by Dickson, was held in trust for the latter.

Mr. Samuel Herrick, with whom *Messrs. S. A. Horton, O. C. Wybrant, Charles Swendall,* and *Claude Nowlin* were on the briefs, for petitioner.

Mr. Patrick H. Loughran for respondent.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Respondent obtained a decree in an Oklahoma state court adjudging that a certain tract of land, for which a United States patent had been issued to Seward K. Lowe, was held by Lowe in trust for respondent. This decree was affirmed by the state supreme court. 108 Okla. 241. The suit was brought against Seward K. Lowe and Susan Lowe, his wife. On October 4, 1926, the death of Seward K. Lowe was suggested, and Susan Lowe substituted as the sole party petitioner.

The pertinent facts are as follows: On May 22, 1894, respondent made homestead entry of 160 acres of land, and, after final proof and payment, received a patent from the government. On March 3, 1902, he made a second homestead entry of other land at the proper local land office. His affidavit accompanying the application contained the statement that he had not theretofore made an entry under the homestead laws except that he had filed upon certain described land and "paid out on it about three years ago." In making the second entry, respondent acted in good faith, believing at that time that his right to make it had been conferred by law. On March 6, 1902, the local land officer informed respondent that his second entry was erroneously allowed because, by his former entry, he had exhausted his homestead right; that the entry would undoubtedly be held for cancellation by the Commissioner of the General Land Office on that account; and that respondent could, if he wished, relinquish that entry and apply for the return of his fees and commissions. Respondent took no action, and the entry, in fact, was not cancelled but was intact on and after May 22, 1902. On that date, an act of Congress, § 2, c. 821, 32 Stat. 203, was passed, the effect of which was to qualify respondent to make a second homestead entry.

After the passage of that act, respondent continued to claim the land as a homestead.

On March 13, 1903, Seward K. Lowe filed a contest against the second entry on a charge of abandonment, but subsequently withdrew it and instituted a new contest, January 28, 1905, charging abandonment for a period of six months and failure to improve and cultivate. June 20, 1906, the local land office found for Lowe and recommended cancellation of respondent's entry. On July 2, following, respondent made another application to enter the land as a homestead, reciting the two former entries and asserting that the second one had been erroneously allowed. This third application was rejected by the local land office on the ground that it conflicted with the subsisting second entry. Appeals to the Department of the Interior followed, respondent contending that his second entry was a nullity and, consequently, not contestable, and that his third application should have been allowed under the decision in *Jeremiah H. Murphy,* 4 L. D. 467, holding that a subsisting void entry is no bar to a subsequent legal application by the same person. The department held that (1) the original invalidity of the second entry was immaterial, because respondent's continued assertion of right thereunder after the passage of the act of May 22, 1902, cured the entry and made it valid, citing prior decisions; (2) the entry having thus been validated, the rule in the *Murphy* case was not applicable; and (3) the second entry having become valid, respondent was bound to pursue it in compliance with law and could not defeat a contest by electing, after the contest was waged, to treat the entry as invalid. On the merits, the charge of failure to reside upon and cultivate the land was found proved, and the entry was cancelled on that ground. Lowe made homestead entry of the land, and in time received final certificate and patent.

The state supreme court declined to follow this holding of the department, saying that while it was supported by a number of prior departmental decisions, which were entitled to great weight and should not be overruled unless clearly erroneous, a controlling conclusion to the contrary had been reached by this court in *Prosser* v. *Finn,* 208 U. S. 67.

The *Prosser* case involved the construction and application of § 452 Rev. Stats. — " The officers, clerks, and employés in the General Land Office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public land; and any person who violates this section shall forthwith be removed from his office." Prosser, a special agent of the General Land Office and held to be within the terms of the statute, made a timber culture entry of certain land and complied with the law in respect of cultivation and in other particulars. His entry was contested upon the ground, among others, that it was made in violation of § 452. The contest was sustained by the local land office, and its ruling affirmed by the department. Patent for the land was issued to Finn, and Prosser brought suit for a decree adjudging that the title was held for him in trust by Finn. The ruling of the department was attacked on the ground that long prior to the initiation of the contest, Prosser had ceased to have any connection whatever with the land department, and his entry, therefore, was validated by removal of the disability. This court held that the statute applied; that Prosser's entry was invalid; that his continuance in possession after ceasing to be special agent was not equivalent to a new entry; and that his rights were to be determined by the validity of the original entry at the time it was made.

Section 452 affects a class of persons having superior opportunities and power to perpetrate frauds and secure undue advantage over the general public in the acquisi-

tion of public lands. "The purpose of the prohibition is to guard against the temptations and partiality likely to attend efforts to acquire public lands, or interests therein, by persons so situated, and thereby to prevent abuse and inspire confidence in the administration of the public-land laws." *Waskey* v. *Hammer,* 223 U. S. 85, 93. The provision is to be so applied and enforced as to effectuate the purpose. And it is evident, that to deny an officer, clerk or employé of the land office the right to make an entry while occupying that relationship, but to validate such an entry upon his retirement from the service, would thwart the statutory policy, since the result would be to allow the entryman still to reap the fruit of his undue advantage, superior knowledge and opportunities, and, perhaps, of his fraud, which it is the aim of the statute to forestall.

But the restrictions of the homestead law which precluded the acquisition of a second homestead rest upon other and different considerations. The purpose of such restrictions was to limit the bounty of the United States; but when that bounty has been extended to include an additional homestead right, the policy of the law is not infringed by allowing an entry, honestly made, though unauthorized under the old law, to stand as though made under the new law; provided, of course, other rights have not intervened. In that case, to compel a cancellation of the unauthorized entry and the formal making of a new entry of the same land is merely to require unnecessary circuity of action to accomplish a permissible result. The land department for many years has uniformly held that the old entry may stand, *John J. Stewart,* 9 L. D. 543; *George W. Blackwell,* 11 L. D. 384; *Smith et al.* v. *Taylor,* 23 L. D. 440, and its decision should not be disturbed except for cogent reasons, *McLaren* v. *Fleischer,* 256 U. S. 477, 481; *United States* v. *Pugh,* 99 U. S. 265, 269, which here do not exist. On the contrary, as we

have indicated, the reasons convincingly are the other way. The *Prosser* case would have fallen within a like principle if, while Prosser was in possession of the land and resting upon his entry, the law itself had been so altered as to remove the disqualification imposed by § 452. Such a change in the law would have manifested a change of policy, with which, as in the present case, validation of the unauthorized entry, no adverse claims intervening, would not have conflicted.

It is well settled that, while § 2320 Rev. Stats. provides explicitly that "no location of a mining-claim shall be made until the discovery of the vein or lode within the limits of the claim located," a discovery after location will validate the location if no adverse rights have intervened. To require a new location under these circumstances "would be a useless and idle ceremony, which the law does not require." *Mining Company* v. *Tunnel Company,* 196 U. S. 337, 345, 348–352; *Union Oil Co.* v. *Smith,* 249 U. S. 337, 347; *Cole* v. *Ralph,* 252 U. S. 286, 296. So, where an alien has made a public land entry, his subsequent naturalization or declaration of intention to become a citizen will, in the absence of adverse claims, relate back and confirm the entry. *Bogan* v. *Edinburgh American Land Mortg. Co.,* 63 Fed. 192, 198. In *Manuel* v. *Wulff,* 152 U. S. 505, 511, the same rule was applied in the case of a purchase of a mining claim by an alien who became a citizen pending adverse proceedings. And the rule is the same where a homestead entry has been made by a minor who comes of age prior to the inception of an adverse claim. *Huff* v. *Geis,* 71 Colo. 7; *Dillard* v. *Hurd,* 46 L. D. 51. We are unable to perceive any substantial ground for denying the applicability of the logic of these decisions to the present case.

It follows, as the land department held, that Lowe's contest was filed against a validated and subsisting entry which had had the effect of segregating the land from the

public domain and thereby precluding the subsequent entry attempted to be made by Dickson. *Holt* v. *Murphy*, 207 U. S. 407, 412. And since Dickson's right to relief rests entirely upon his contention to the contrary, which the state court upheld, the decree of that court must be

Reversed.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY ET AL. *v.* UNITED STATES ET AL.

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

No. 190. Argued March 4, 1927.—Decided April 11, 1927.

1. An order of the Interstate Commerce Commission, in a proceeding to fix reasonable maximum rail-and-water rates, and purporting to do this by adopting the existing all-rail rates with a fixed differential, (alleged by complainant to represent the cost of water transportation insurance,) should not be construed as an attempt to equalize the two classes of rates merely because of its form or by laying undue stress upon recitals in the report. P. 32.
2. If the determination of the Commission finds substantial support in the evidence, the courts will not weigh the evidence nor consider the wisdom of the Commission's action. P. 33.
3. Under the Panama Canal Act, August 24, 1912, par. 13 of § 6, read with par. 4 of § 15 of the Interstate Commerce Act, and the Transportation Act, the Commission has power to require a rail carrier to embrace in a through rail-and-water route less than the entire length of its railroad lying between the termini of the through route proposed, irrespective of whether both rail and water "are used under a common control, management, or arrangement for a continuous carriage or shipment," Interstate Com. Act § 1. P. 34.
4. The right of the Commission to consider a case under a particular provision of the statute depends on the facts alleged and not on such provision's being formally referred to in the complaint. P. 36.
5. To plead the law relied on, is no more necessary in a proceeding before the Commission than it is in a judicial proceeding. P. 36.

5 F. (2d) 888, affirmed.

APPEAL from a decree of the District Court dismissing the bill in a suit by the Chicago, Rock Island & Pacific and St. Louis-San Francisco Railway Companies to enjoin enforcement of an order of the Interstate Commerce Commission establishing joint rail-and-water and rail-and-water-and-rail rates on cotton.

Mr. A. B. Enoch, with whom *Messrs. M. L. Bell, W. F. Dickinson, T. P. Littlepage,* and *M. G. Roberts* were on the brief, for appellants.

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

Mr. Daniel W. Knowlton, with whom *Mr. P. J. Farrell* was on the brief, for the Interstate Commerce Commission.

Mr. R. C. Fulbright for the Houston Cotton Exchange and Board of Trade, submitted.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This is a suit to annul, and enjoin the enforcement of, an order of the Interstate Commerce Commission prescribing joint rail-and-water and rail-water-and-rail rates (both hereinafter designated as rail-and-water rates) on cotton from points in Oklahoma, via Galveston and certain steamship lines, to New England destinations. The complaint before the commission was brought by the Houston Cotton Exchange and Board of Trade and other similar organizations against appellants and a number of other carriers, to have prescribed and established just and reasonable joint through rates on cotton from Oklahoma points through Texas ports to various points of destination in the northeastern part of the United States and Canada, including New England territory. The

modified final order of the commission required appellants to establish and maintain for the transportation of cotton from Oklahoma points, via Galveston and the lines of the Mallory Steamship Company and the Southern Pacific Company-Atlantic Steamship Lines, to destinations in New England territory, joint rail-and-water rates not exceeding "rates 4 cents per 100 pounds lower than the present all-rail rates from and to the same points,"—not, however, lower than $1.50 per 100 pounds. Prior to the commission's order, no joint rail-and-water rates on cotton were in effect between the points mentioned. The rate to New York consisted of the local rail rate to Galveston plus the water rate therefrom and a loading charge. To New England points, the rate was made by adding the rail rate beyond New York. The all-rail routes from Oklahoma to the New England territory points are through St. Louis, Memphis, and other Mississippi crossings; and the joint all-rail rates were lower to New England destinations than the combination of local rail-and-water rates. On commodities other than cotton, joint rail-and-water rates were in effect, and these were lower than the all-rail rates. The commission found that the establishment of joint rail-and-water rates on cotton between the points in question was desirable in the public interest, and that the existing rates for such transportation were unreasonable to the extent that they exceeded or may exceed rates constructed by the deduction of 4 cents from the present all-rail rates. 87 I. C. C. 392; 93 I. C. C. 268. The court below, consisting of three judges, after a hearing, entered a decree dismissing the bill for want of equity. 6 F. (2d) 888.

Appellants assign 21 specifications of error; but the objections to the commission's order, so far as necessary to be considered here, may be summarized as follows: (1) the commission undertook to equalize rail-and-water rates with the all-rail rates, a power which it does not

possess; (2) if the order be treated as made under the power to fix reasonable rates, it is arbitrary and without supporting evidence; (3) the result of the order is to short-haul appellants' lines contrary to paragraph 4, § 15, of the Interstate Commerce Act as amended by § 418 of the Transportation Act, 1920, c. 91, 41 Stat. 456, 485; and (4) the order is based upon paragraph (13) of § 6, added to the Interstate Commerce Act by the Panama Canal Act of August 24, 1912, c. 390, 37 Stat. 560, 568, and is, therefore, void because the authority of the commission was not invoked under that paragraph.

First. Appellants' argument under this head seems to be predicated upon the contention that the order of the commission established an exact relationship between the rail-and-water rates and the present all-rail rates, the differential of 4 cents being, it is said, the amount charged by insurance companies as a premium for insurance to cover the risk of water transportation; and that an analysis of the commission's order and report shows that the commission itself recognized that it was undertaking to make such an equalization. The complaint before the commission plainly sought the establishment of reasonable rates, and the order of the commission directed the carriers to discontinue the then existing rates made up of combinations of local rates and substitute the maximum joint rates which were prescribed in the words already stated. The commission found that rates were and would be unreasonable to the extent they exceeded or might exceed those prescribed. In form, the action of the commission was responsive to the case made by the complaint, and to hold that, in fact, its order was not one fixing reasonable rates but an order equalizing rates would be to put undue stress upon certain recitals contained in the report, to which our attention is called but which need not be detailed. If these recitals stood alone, they might give plausibility to the contention;

but from a consideration of the entire record we think it quite unfair to conclude that the commission undertook to exercise an authority entirely different and distinct from that which the complaint specifically invoked.

There is nothing in *Southern Pacific Co.* v. *Interstate Commerce Commission,* 219 U. S. 433, that requires a different conclusion. In that case it appeared upon the face of the record that the commission had not exerted its power to correct an unjust and unreasonable rate, but had made the order complained of upon the theory that it possessed the power to set aside a just and reasonable rate whenever the commission deemed that it would be equitable to shippers in a particular district to put in force a reduced rate. In reaching that conclusion the court thought that the complaint and answer presented the latter issue; that while the opinion of the commission might contain some sentences indicating the contrary, when considered as a whole, in the light of the record, it clearly appeared that the order was based upon that theory; and that this was borne out by the dissenting opinion, which proceeded upon the express ground that the order was an exertion of a power not possessed, with no language in the prevailing opinion to indicate the contrary. Here, it is true, the order fixes the rail-and-water rate by relating it in terms to the all-rail rate; but, since we accept the view that the former was, in fact, established as a just and reasonable rate, there can be no objection to the form of words adopted as a method of short and convenient description of that rate. The power of the commission to equalize rates, if its authority to that end should be invoked, is not involved.

Second. If the order of the commission be unsupported by the evidence, it is, of course, void. *New England Divisions Case,* 261 U. S. 184, 203. But if the determination of the commission finds substantial support in the evidence, the courts will not weigh the evidence nor consider

the wisdom of the commission's action. *Id.*, 204; *Virginian Ry. Co.* v. *United States*, 272 U. S. 658. The order here does not rest alone upon comparisons with the all-rail rates, as seems to be contended, but is supported by other established facts and circumstances as well. See *Western Chem. Co.* v. *United States*, 271 U. S. 268, 271. Nothing is to be gained by a review of the evidence. It is enough to say that both the commission and the lower court thought it was ample to justify the order, and, upon a consideration of the entire record, we find no reason to differ with them in that conclusion.

Third. Does the order of the commission result in short-hauling appellants' lines contrary to the provisions of paragraph 4 of § 15 of the Interstate Commerce Act, as amended by the Transportation Act, 1920? The pertinent provision of that paragraph is that the commission, in establishing a through route, shall not, "except where one of the carriers is a water line," require any railroad carrier to embrace in such route substantially less than the entire length of its railroad lying between the termini of the proposed through route. That the through routes here established by the commission's order do embrace substantially less than the entire length of appellants' railroads, etc., is not denied. And appellants' contention is that the exception, "where one of the carriers is a water line," has reference only to such a carrier as comes within the description of § 1 of the Interstate Commerce Act, which provides, among other things, that the provisions of the act shall apply to common carriers engaged in "(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water *when both are used under a common control, management, or arrangement for a continuous carriage or shipment;* . . ." c. 91, 41 Stat. 456, 474.

Appellees insist that the rail and water lines here involved come within the italicized portion of this provision.

But it is unnecessary to pass upon that question, since clearly the order in this respect can be sustained under the later and broader provisions of paragraph (13) of § 6, added to the Interstate Commerce Act by the Panama Canal Act, *supra.* That paragraph provides—

"When property may be or is transported from point to point in the United States by rail and water through the Panama Canal or otherwise, the transportation being by a common carrier or carriers, and not entirely within the limits of a single State, the Interstate Commerce Commission shall have jurisdiction of such transportation and of the carriers, both by rail and by water, which may or do engage in the same, in the following particulars, in addition to the jurisdiction given by the Act to regulate commerce, as amended June eighteenth, nineteen hundred and ten:

. . .

"(b) To establish through routes and maximum joint rates betwen and over such rail and water lines, and to determine all the terms and conditions under which such lines shall be operated in the handling of the traffic embraced."

This addition to the Interstate Commerce Act, materially extends the jurisdiction of the commission in respect of land and water transportation and the carriers engaged in it, whenever property may be or is transported in interstate commerce by rail and water by a common carrier or carriers; and the obvious intention of Congress would be substantially limited in effect if the quoted provisions were held to be subject to the restriction that both rail and water must be used under a common control, etc. The phrase, "except where one of the carriers is a water line," was introduced in an amendment made to the Interstate Commerce Act by the Transportation Act, 1920, and it is not unreasonable to include within the scope of its reference, the then existing paragraph (13)

of § 6. And this view is strengthened by the consideration that the Transportation Act, 1920, as a part of the new policy which it introduced in respect of the regulation of interstate transportation, *Wisconsin R. R. Comm.* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563, 585; *New England Divisions Case, supra,* p. 189, directed the commission to establish through routes, joint classifications, etc., both in respect of railroad and water carriers, " whenever deemed by it to be necessary or desirable in the public interest," etc. 41 Stat. 485. And the same act declares it to be " the policy of Congress to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation." Sec. 500, 41 Stat. 499.

These and other provisions emphasize the intention of Congress to broaden the control of the Interstate Commerce Commission over rail-and-water transportation and, generally, to extend the regulatory power of that body over all such transportation in the public interest. It would be quite inconsistent with that broad purpose to adopt the narrow construction of the statutory provisions under review which is advanced by appellants. On the whole, and especially in the light of the definite congressional policy which the legislation reflects, *Richardson* v. *Harmon,* 222 U. S. 96, 104; *Holden* v. *Stratton,* 198 U. S. 202, 213–214; *Minnesota* v. *Hitchcock,* 185 U. S. 373, 395, we find no difficulty in rejecting the construction thus advanced and adopting that which we have indicated, without, at the same time, doing violence to the fair meaning of the language actually employed.

Fourth. In disposing of the final objection, little need be said. The contention is that the commission was without power to predicate its order on paragraph (13) of § 6 of the act, because there is no formal reference in the complaint to that paragraph nor an order for an investi-

gation under it on the commission's own motion. But the allegations of the complaint in matters of fact were sufficient to authorize the commission to consider the case under that provision as well as others; and this is enough. To plead the law relied on, is no more necessary in a proceeding before the commission than it is in a judicial proceeding.

Decree affirmed.

BEDFORD CUT STONE COMPANY ET AL. *v.* JOURNEYMEN STONE CUTTERS' ASSOCIATION OF NORTH AMERICA ET AL.

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

No. 412. Argued January 18, 1927.—Decided April 11, 1927.

1. A combination or conspiracy of union stone-cutters to restrain the interstate commerce of certain building-stone producers by declaring their stone "unfair" and forbidding members of the union to work upon it in building construction in other States, for which it was extensively bought and used, and thereby coercing or inducing local employers to refrain from purchasing it—is a violation of the Anti-Trust Act. Pp. 45, 54.
2. The fact that the ultimate object was to unionize the cutters and carvers of stone at the quarries of the producers did not make the combination lawful. P. 47.
3. A private suit to enjoin a combination violative of the Sherman Act will lie under § 16 of the Clayton Act, where there is a dangerous probability of injury to the plaintiff, though no actual injury has been suffered. P. 54.

9 F. (2d) 40, reversed.

CERTIORARI (273 U. S. 677) to a decree of the Circuit Court of Appeals which affirmed the District Court in dismissing a bill brought by owners of limestone quarries in Indiana to enjoin a combination alleged to violate the Anti-Trust Act. The defendants were a general union

of stone-cutters, and some of its constituent locals, and their officers.

Messrs. Walter Gordon Merritt and *Daniel Davenport,* with whom *Mr. Charles Martindale* was on the brief, for petitioners.

Under the common law most courts have held combinations of this character to be illegal. *Purvis* v. *Local 500,* 214 Pa. 348; *Shine* v. *Fox Bros. Mfg. Co.,* 156 Fed. 357; *Lohse Sash & Door Co.* v. *Fuelle,* 215 Mo. 421; *Irving* v. *Joint Dist. Council,* 180 Fed. 896; *Newton* v. *Erickson,* 70 Misc. (N. Y.) 291; *People* v. *McFarlan,* 43 Misc. (N. Y.) 591; *Booth* v. *Burgess,* 65 Atl. 226; *Purington* v. *Hinchliff,* 219 Ill. 159; *Carlson* v. *Carpenters Contractors Assn.,* 303 Ill. 331; *Moores* v. *Bricklayers,* 21 Wkly. Law Bull. (Ohio) 665; *Piano Workers* v. *Piano Co.,* 24 Ill. App. 35; *Loizeaux Co.* v. *Carpenters,* Union County, N. J., August 1923. A few others have held the contrary. *Parkinson* v. *Building Trades Council,* 154 Cal. 581; *Bossert* v. *Dhuy,* 221 N. Y. 342.

It is not necessary for complainants to show any common law combination to injure or maliciously interfere with their business. On the contrary, they invoke the provisions of a drastic statute, whereunder every artificial barrier between producer and consumer, which obstructs interstate commerce, is condemned because it interferes with the rights of the purchasing public. This combination of the defendants, which follows the products of the complainants into various States and industrial centers for the purpose of burdening or hampering their use, comes squarely within the spirit and letter of this drastic law. This is not a case of incidental injury or restraint. Having failed to destroy the productive organization, the defendants' attention was turned to sales and distribution. The sole, direct and immediate purpose, whether you call it an end or a means, is to restrain trade.

so that, as a secondary result, complainants will be forced to change production conditions.

The defendants do not seek a benefit which incidentally restrains trade, but directly and unlawfully restrain trade in order to obtain a benefit as a secondary result.

The facts, no essential of which is contradicted, present a clear violation of the Sherman Act under authorities which are indistinguishable. *United States* v. *Brims,* 272 U. S. 549; *Duplex Co.* v. *Deering,* 254 U. S. 443. It has long since been settled that the statute applies to combinations of workers as well as of employers (*Loewe* v. *Lawlor,* 208 U. S. 288), and it has been repeatedly applied to situations where the unions alone were active in prosecuting the boycott, *Duplex Co.* v. *Deering, supra.*

There is no doubt that commerce can be unlawfully restrained by interfering with the product before it starts on its interstate journey, or after it arrives. *United States* v. *Brims, supra; Duplex Co.* v. *Deering, supra; Loewe* v. *Lawlor, supra; Boyle* v. *United States,* 259 Fed. 803.

A good motive or an entire absence of malice is no defense if the object is to restrain commerce. *Thomson* v. *Cayser,* 243 U. S. 66; *Sanitary Mfg. Co.* v. *Missouri,* 226 U. S. 20; *Int'l Harvester Co.* v. *Missouri,* 234 U. S. 199.

The fact that a factory operates on an anti-union basis does not justify the union in denying that company "unrestrained access to interstate commerce," and the right to such access is not curtailed or limited by the failure of the employers to reach an agreement with the union. If the Government could enjoin the defendants under the Anti-Trust Act, the complainants, who are injured by the acts in question, may likewise do so.

Mr. Moses B. Lairy, with whom *Messrs. Edward E. Gates* and *Frederick Van Nuys* were on the brief, for respondents.

The facts before the Court are not sufficient to show a violation of the Sherman Act by respondents or to render them amenable to its provisions. The respondent organization is not engaged in trade or commerce in any commodity which is the subject of interstate trade, and the evidence fails to show that the organization or any of its members are in league with, or have any agreement, understanding or connection with any other person, corporation or association which is engaged in any business in competition with that of petitioners. It can not be inferred from the evidence that the refusal of the members to work on the stone produced and shipped by petitioners was prompted by a motive or purpose to cut down the amount of Bedford stone moving in interstate commerce and thus reduce the supply so as to lessen or stifle the competition with other building stone and substitutes and thereby increase the price of such other building stone and substitutes therefor to the detriment of the public. *United States* v. *Brims,* 272 U. S. 549, distinguished.

The purpose of respondents was not directed against interstate commerce but their sole and only purpose, as disclosed by the evidence was to unionize the cutters and carvers of stone at the quarries. *United Leather Workers* v. *Herkert Co.,* 265 U. S. 459. They were endeavoring only to carry out the purposes of their organization in a legal manner; and, if their conduct in so doing had any effect in reducing the supply moving in interstate commerce, such effect was an incidental, indirect, and remote obstruction to such commerce. *Anderson* v. *United States,* 171 U. S. 604; *Smith* v. *Alabama,* 124 U. S. 465; *United Mine Workers* v. *Coronado Co.,* 259 U. S. 344; *United Leather Workers* v. *Herkert Co., supra.*

The modicum of injury attempted to be proven by petitioners is denied. There is no intent proven to interfere with interstate commerce and the necessary effect of such cessation of work does not bring the action of re-

spondents within the prohibited combinations declared in a long line of cases upon which the petitioner relies.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Petitioners, Bedford Cut Stone Company and 23 others, all, with one or two exceptions, Indiana corporations, are in the business of quarrying or fabricating, or both quarrying and fabricating, Indiana limestone in what is called the Bedford-Bloomington District in the State of Indiana. Their combined investment is about $6,000,000, and their annual aggregate sales amount to about $15,000,000, more than 75% of which are made in interstate commerce to customers outside the State of Indiana. The Journeymen Stone Cutters' Association of North America, sometimes called and hereinafter referred to as the "General Union," is an association of mechanics engaged in the stone-cutting trade. It has a constitution, by-laws and officers, and an income derived from assessments upon its members. Its principal headquarters are in Indiana, and it has a membership of about 5,000 persons, divided into over 150 local unions located in various states and in Canada, each of such local unions having its own by-laws, officers, and income derived from like assessments. By virtue of his membership, each member of these local unions is a member of the General Union. The members of the General Union and allied locals throughout the United States are stone cutters, carvers, curb cutters, curb setters, bridge cutters, planermen, lathemen, and carborundum moulding machine operators, engaged in the cutting, patching and fabrication of all natural and artificial stones; and the General Union claims jurisdiction over all of them.

This suit was brought by petitioners against the General Union and some of its officers, and a number of affiliated local unions and some of their officers, to enjoin

them from combining and conspiring together to commit, and from committing, various acts in restraint of interstate commerce in violation of the federal Anti-Trust Act, c. 647, 26 Stat. 209, and to petitioners' great and irreparable damage. The federal district court for the district of Indiana, after a hearing, refused a preliminary injunction and, subsequently, on final hearing, entered a decree dismissing the bill for want of equity. On appeal, this decree was affirmed by the court of appeals upon the authority of an earlier opinion in the same case. 9 F. (2d) 40.

The facts, so far as necessary to be stated, follow. Limestone produced by petitioners is quarried and fabricated largely for building construction purposes. The stone is first taken in rough blocks from the earth and, generally, then cut into appropriate sizes and sometimes planed. Part of this product is shipped directly to buildings, where it is fitted, trimmed and set in place, the remainder being sold in the rough to contractors to be fabricated. The stone sold in interstate commerce comes into competition with other kinds of natural and artificial stone. The principal producers of artificial stone are unionized and are located outside of Indiana. Before 1921, petitioners carried on their work in Indiana under written agreement with the General Union, but since that time they have operated under agreements with unaffiliated unions, with the effect of closing their shops and quarries against the members of the General Union and its locals. Prior to the filing of the bill of complaint, the General Union issued a notice to all its locals and members, directing its members not to work on stone "that has been started—planed, turned, cut, or semi-finished—by men working in opposition to our organization," and setting forth that a convention of the union had determined that "members were to rigidly enforce the rule to keep off all work started by men working in

opposition to our organization, with the exception of the work of Shea-Donnelly, which firm holds an injunction against our association." Stone produced by petitioners by labor eligible to membership in respondents' unions was declared "unfair"; and the president of the General Union announced that the rule against handling such stone was to be promptly enforced in every part of the country. Most of the stone workers employed, outside the State of Indiana, on the buildings where petitioners' product is used, are members of the General Union; and in most of the industrial centers, building construction is on a closed shop union basis.

The rule requiring members to refrain from working on "unfair" stone was persistently adhered to and effectively enforced against petitioner's product, in a large number of cities and in many states. The evidence shows many instances of interference with the use of petitioners' stone by interstate customers, and expressions of apprehension on the part of such customers of labor troubles if they purchased the stone. The President of the General Union himself testified, in effect, that generally the men were living up to the order and if it were shown to him that they did not do so in any place he would see that they did. Members found working on petitioners' product, were ordered to stop and threatened with a revocation of their cards if they continued; and the order of the General Union seems to have been enforced even when it might be against the desire of the local union. The transcript contains the record of a hearing upon these matters before the Colorado Industrial Commission, from which it appears that in obedience to the order of the General Union its members theretofore employed in Denver upon local building stopped work because petitioners' product was being used. The local contractor was notified merely that the men stopped work because the stone being used was

"unfair." The contractor personally had no trouble of any kind with the union, and no other reason for the strike than that stated above existed. B. F. James, a member and an acting officer of the General Union testified that the local union in conducting its strike against a local builder had no choice in the matter; that they had their orders from the General Union with which they complied; that there was no difference or feeling whatever between the union and the local employer; that the fight was with the Bedford stone producers and they were trying to affect them through the local employer.

"Q. And you people have no choice in the matter, you are just complying with the orders from the International [General Union]?

"A. We have no choice whatever.

"Q. Probably, if it was left up to you people here, knowing this employer as you do, why, your organization here, local organization, would not strike on this man?

"A. I don't believe we would, no.

"Q. But you have got to follow the orders of your International organization?

"A. Yes, sir."

The evidence makes plain that neither the General Union nor the locals had any grievance against any of the builders—local purchasers of the stone—or any other local grievance; and that the strikes were ordered and conducted for the sole purpose of preventing the use and, consequently, the sale and shipment in interstate commerce, of petitioners' product, in order, by threatening the loss or serious curtailment of their interstate market, to force petitioners to the alternative of coming to undesired terms with the members of these unions. In 1924, the president of the General Union said:

"The natural stone industry needs all the natural advantages it can possibly get, as there are so many kinds

of substitutes to take the natural stone's place in the building material market, that it behooves the natural stone employers to do their utmost to see that no handicap is in its way, and it is a well known fact that when any material is known to have labor grievances, it retards that material in the building market, as the building public do not want the stigma on their building that it was built by 'unfair labor,' and they are also afraid of stoppage of work and unnecessary disputes while their building is in course of construction, and no one can blame them for that."

In the Colorado inquiry, the witness James further testified that the strike order did not make any allowance for stone theretofore ordered. "We were trying to affect the Bedford people through the local man."

"Q. So the only person injured would be your own local man, who is your employer, and your personal friend, is that it?

"A. In a way. If it was finished that way, he would be the only one hurt. We are not fighting on this Denver man. We are trying to force these people through the other subcontractors all over the country.

. . .

"Q. You are trying to force the Bedford to employ members of your union to do this work?

"A. Yes, sir.

"Q. And irrespective of who it hurts, that is the object?

"A. That is the object. It is done from our headquarters.

"Q. Mr. Fernald, or anybody else, they have got to get out of the road, that is the object?

"A. We are trying to gain this point, irrespective of who it hurts."

From a consideration of all the evidence, it is apparent that the enforcement of the general order to strike against petitioners' product could have had no purpose other than

that of coercing or inducing the local employers to refrain from purchasing such product. To accept the assertion made here to the contrary, would be to say that the order and the effort to enforce it were vain and idle things without any rational purpose whatsoever. And indeed, on the argument, in answer to a question from the bench, counsel for respondents very frankly said that, unless petitioners' interstate trade in the so-called unfair stone were injuriously affected, the strikes would accomplish nothing.

That the means adopted to bring about the contemplated restraint of commerce operated after physical transportation had ended is immaterial. *Loewe* v. *Lawlor,* 208 U. S. 274, 301; *Boyle* v. *United States,* 259 Fed. 803, 805–806. The product against which the strikes were directed, it is true, had come to rest in the respective localities to which it had been shipped, so that it had ceased to be a subject of interstate commerce, *Industrial Assn.* v. *United States,* 268 U. S. 64, 78–79; and interferences for a purely local object with its use, with no intention, express or implied, to restrain interstate commerce, it may be assumed, would not have been a violation of the Anti-Trust Act. *Id.,* p. 77; *United Mine Workers* v. *Coronado Co.,* 259 U. S. 344, 410–411. But these interferences were not thus in pursuit of a local motive,—they had for their primary aim restraint of the interstate sale and shipment of the commodity. Interstate commerce was the direct object of attack " for the sake of which the several specific acts and courses of conduct [were] done and adopted." And the restraint of such commerce was the necessary consequence of the acts and conduct and the immediate end in view. *Swift & Co.* v. *United States,* 196 U. S. 375, 397. Prevention of the use of petitioners' product, which, without more, might have been a purely local matter, therefore, was only a part of the conspiracy, which must be construed as an

entirety; and, when so regarded, the local transactions become a part of the general plan and purpose to destroy or narrow petitioners' interstate trade. *Montague & Co.* v. *Lowry,* 193 U. S. 38, 45–46. In other words, strikes against the local use of the product were simply the means adopted to effect the unlawful restraint. And it is this result, not the means devised to secure it, which gives character to the conspiracy.

Respondents' chief contention is that "their sole and only purpose . . . was to unionize the cutters and carvers of stone at the quarries." And it may be conceded that this was the ultimate end in view. But how was that end to be effected? The evidence shows indubitably that it was by an attack upon the use of the product in other states to which it had been and was being shipped, with the intent and purpose of bringing about the loss or serious reduction of petitioners' interstate business, and thereby forcing compliance with the demands of the unions. And, since these strikes were directed against the use of petitioners' product in other states, with the plain design of suppressing or narrowing the interstate market, it is no answer to say that the ultimate object to be accomplished was to bring about a change of conduct on the part of petitioners in respect of the employment of union members in Indiana. A restraint of interstate commerce cannot be justified by the fact that the ultimate object of the participants was to secure an ulterior benefit which they might have been at liberty to pursue by means not involving such restraint. *Anderson* v. *Shipowners Association,* 272 U. S. 359; *Duplex Co.* v. *Deering,* 254 U. S. 443, 468; *Ellis* v. *Inman, Poulsen & Co.,* 131 Fed. 182, 186.

The case, therefore, is controlled, not by *United Mine Workers* v. *Coronado Co., supra,* and *United Leather Workers* v. *Herkert,* 265 U. S. 457, as respondents contend, but by others presently to be discussed. In the *United Leather Workers* case, it appeared that the strikes

were levelled only against production, and that the strikers (p. 471) "did nothing which in any way directly interfered with the interstate transportation or sales of the complainants' product;" and the decision rests upon the ground that there was an entire absence of evidence or circumstances to show that the defendants, in their conspiracy to coerce complainants, were directing their scheme against interstate commerce. *United Mine Workers* v. *Coronado Co., supra,* pp. 408–409, is to the same effect.

But in the second *United Mine Workers* case, 268 U. S. 295, 310, this court found sufficient evidence, even where the strike was directed against production, of an intent to restrain interstate commerce, and said:

"The mere reduction in the supply of an article to be shipped in interstate commerce by the illegal or tortious prevention of its manufacture or production is ordinarily an indirect and remote obstruction to that commerce. But when the intent of those unlawfully preventing the manufacture or production is shown to be to restrain or control the supply entering and moving in interstate commerce, or the price of it in interstate markets, their action is a direct violation of the Anti-Trust Act."

In the present case, since the strikes were directed against the use of the product in other states, with the immediate purpose and necessary effect of restraining future sales and shipments in interstate commerce, the determinative decisions to be applied are those pointed out in the *United Leather Workers* case, at p. 469:

"In *Loewe* v. *Lawlor,* 208 U. S. 274, and in *Duplex Co.* v. *Deering,* 254 U. S. 443, members of labor unions having a controversy with their employers sought to embarrass the sales by their employers of the product of their manufacture in other States by boycott and otherwise. They were held guilty of a conspiracy against interstate com-

merce because of their palpable intent to achieve their purpose by direct obstruction of that commerce."

Respondents cite and rely upon *Hopkins* v. *United States,* 171 U. S. 578, and *Anderson* v. *United States,* 171 U. S. 604. But of those cases we need say no more than that they involved agreements which neither in purpose nor in necessary result related to or had any direct effect upon interstate commerce.

With a few changes in respect of the product involved, dates, names and incidents, which would have no effect upon the principles established, the opinion in *Duplex Co.* v. *Deering, supra,* might serve as an opinion in this case. The object of the boycott there was precisely the same as it is here, and the interferences with interstate commerce, while they were more numerous and more drastic, did not differ in essential character from the interferences here. A short statement of the case will make this clear.

The complainant was a manufacturer of printing presses and conducted its business on the "open shop" policy. There had been an unsuccessful strike to enforce the "closed shop," the eight-hour day and the union scale of wages. The strikers and the local organizations to which they belonged were affiliated with an international association having a membership of more than sixty thousand. They entered into a combination to restrain complainant's interstate trade by means of a "secondary boycott," in pursuance of which complainant's customers in another state were warned not to purchase, install or operate its printing presses and threatened with loss and sympathetic strikes should they do so. The strikers threatened a trucking company with trouble if it should haul the presses; incited employees of the trucking company and other men employed by complainant's customers to strike in order to interfere with the hauling and

installation of presses; notified repair shops not to do repair work on the presses; threatened union men with loss of union cards and the blacklist if they assisted in installing the presses; and resorted to other methods of preventing the sale and delivery of complainant's presses in interstate commerce.

This court held that complainant's business of manufacturing presses and disposing of them in commerce was a property right entitled to protection against unlawful injury or interference; that unrestrained access to the channels of interstate commerce was necessary for the successful conduct of that business; and that the combination to hinder and obstruct such commerce by the means indicated was in violation of the Sherman Anti-Trust Act, as amended by the Clayton Act. The combination was held to constitute a "secondary boycott," defined as "a combination not merely to refrain from dealing with complainant, or to advise or by peaceful means persuade complainant's customers to refrain ('primary boycott'), but to exercise coercive pressure upon such customers, actual or prospective, in order to cause them to withhold or withdraw patronage from complainant through fear of loss or damage to themselves should they deal with it." Whether either kind of boycott was lawful or unlawful at common law was held to be immaterial, and the distinction between a primary and a secondary boycott was only important to be considered upon the question of the proper construction of the Clayton Act; and, as to that, it was distinctly determined that the Clayton Act was not intended to legalize the secondary boycott.

The court further held (p. 467–468) that by prior decisions of this court, it had been settled that a restraint of interstate commerce produced by peaceable persuasion was as much within the prohibition of the Anti-Trust Act as one accomplished by force or threats of force, and that there was nothing in § 20 of the Clayton Act (p. 473

et seq.) which modified that rule as applied to the case under review or justified a resort to the secondary boycott. And it was said (p. 477) that the harmful consequences of the opposite construction, adopted by the court below, were illustrated by that case where an ordinary controversy in a manufacturing establishment, concerning terms and conditions of employment there, had been held a sufficient occasion for imposing a general embargo upon the products of the establishment and a nation-wide blockade of the channels of interstate commerce against them. The conclusion was reached that complainant was entitled to an injunction under the Sherman Act as amended by the Clayton Act, and that it was unnecessary to consider whether a like result would follow under the common law or local statutes. Finally, it is important to note (p. 478) the scope of the injunction which was authorized. Not only were the association and its members to be restrained from interfering with the sale, transportation, or delivery in interstate commerce of the presses, but also from interfering with the "carting, installation, use, operation, exhibition, display, or repairing of any such press or presses, . . . and especially from using any force, threats, command, direction, or even persuasion with the object or having the effect of causing any person or persons to decline employment, cease employment, or not seek employment, or to refrain from work or cease working under any person, firm, or corporation being a purchaser or prospective purchaser of any printing press or presses from complainant, . . ."

Loewe v. *Lawlor, supra,* also dealt with a secondary boycott. The case arose before the enactment of the Clayton Act, but, in view of what has just been said, that is not important. The defendants, certain labor organizations and the members thereof, undertook to compel complainants to unionize their factory. Being unsuccessful, the members of the labor organizations withdrew from com-

plainants' service and endeavored to persuade others to do the same. Defendants then declared a boycott against hats manufactured by complainants found in the hands of their customers in other states, with the purpose and intent to destroy or curtail complainants' market in other states and thereby coerce compliance with defendants' demands. This was held (pp. 292–294) to be a combination falling " within the class of restraints of trade aimed at compelling third parties and strangers involuntarily not to engage in the course of trade except on conditions that the combination imposes," and an unlawful restraint of interstate commerce as defined by the Anti-Trust Act. Referring to earlier cases, it was said (p. 297) that the Anti-Trust Act had a broader application than the prohibition of restraints of trade unlawful at common law, and that its effect was to declare illegal " every contract, combination or conspiracy, in whatever form, of whatever nature, and whoever may be the parties to it, which directly or necessarily operates in restraint of trade or commerce among the several States."

In *United States* v. *Brims,* 272 U. S. 549, a criminal case, this court dealt with a combination of manufacturers, contractors and carpenters in Chicago, having for its object the destruction of the competition of nonunion mills in Wisconsin and elsewhere by the employment in Chicago of union carpenters only, with the understanding that they would refuse to install nonunion-made millwork. There was evidence tending to show that so-called outside competition was cut down and thereby interstate commerce directly and materially impeded, and that this result was within the intention of the combination, which, upon these facts, was held to be in violation of the Anti-Trust Act.

In *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418, 438–439, this court said that the restraining powers of the courts extend to every device whereby commerce is ille-

gally restrained; and that—"To hold that the restraint of trade under the Sherman anti-trust act, or on general principles of law, could be enjoined, but that the means through which the restraint was accomplished could not be enjoined would be to render the law impotent."

In cases arising outside the Anti-Trust Act, involving strikes like those here under review against so-called unfair products, there is a sharp conflict of opinion. On the one hand, it is said that such a strike is justified on the ground of self-interest; that the injury to the producer is inflicted, not maliciously, but in self-defense; that the refusal of the producer to deal with the union and to observe its standards threatens the interest of all its members and the members of the affiliated locals; and that a strike against the unfair material is a mere recognition of this unity of interest, and in refusing to work on such material the union is only refusing to aid in its own destruction. The opposite view is illustrated by such cases as *Toledo, etc., Ry. Co.* v. *Pennsylvania Co.*, 54 Fed. 730; *Thomas* v. *Cincinnati, etc., Ry. Co.*, 62 Fed. 803, 817, *et seq.*; *Moores* v. *Bricklayers' Union*, 23 Wkly. Cin. Law Bull. 48 (affirmed by the Supreme Court of Ohio without opinion); *Burnham* v. *Dowd*, 217 Mass. 351; *Purvis* v. *United Brotherhood*, 214 Pa. St. 348; *Booth & Brother* v. *Burgess*, 72 N. J. Eq. 181, 188, 196; *Piano & Organ Workers* v. *P. & O. Supply Co.*, 124 Ill. App. 353.

But with this conflict we have no concern in the present case. The question which it involves was presented and considered in the *Duplex Co.* case, *supra*, as the prevailing and the dissenting opinions show; and there it was plainly held that the point had no bearing upon the enforcement of the Anti-Trust Act, and that since complainant had a clear right to an injunction under that Act as amended by the Clayton Act, it was "unnecessary to consider whether a like result would follow under the common law or local statutes."

Whatever may be said as to the motives of the respondents or their general right to combine for the purpose of redressing alleged grievances of their fellow craftsmen or of protecting themselves or their organizations, the present combination deliberately adopted a course of conduct which directly and substantially curtailed, or threatened thus to curtail, the natural flow in interstate commerce of a very large proportion of the building limestone production of the entire country, to the gravely probable disadvantage of producers, purchasers and the public; and it must be held to be a combination in undue and unreasonable restraint of such commerce within the meaning of the Anti-Trust Act as interpreted by this court. An act which lawfully might be done by one, may when done by many acting in concert take on the form of a conspiracy and become a public wrong, and may be prohibited if the result be hurtful to the public or to individuals against whom such concerted action is directed, *Grenada Lumber Co.* v. *Mississippi,* 217 U. S. 433, 440; and any suggestion that such concerted action here may be justified as a necessary defensive measure is completely answered by the words of this court in *Eastern States Lumber Ass'n* v. *United States,* 234 U. S. 600, 613, that "Congress, with the right to control the field of interstate commerce, has so legislated as to prevent resort to practices which unduly restrain competition or unduly obstruct the free flow of such commerce, and private choice of means must yield to the national authority thus exerted."

The record does not disclose whether petitioners at the time of bringing suit had suffered actual injury; but that is not material. An intent to restrain interstate commerce being shown, it is enough to justify equitable interposition by injunction if there be a dangerous probability that such injury will happen; and this clearly appears. The Anti-Trust Act " directs itself against that dangerous probability as well as against the completed result." *Swift*

& Co. v. *United States, supra,* p. 396; *Vicksburg Waterworks Co.* v. *Vicksburg,* 185 U. S. 65, 82; *Thomson Machine Co.* v. *Brown,* 89 N. J. Eq. 326, 328.

From the foregoing review, it is manifest that the acts and conduct of respondents fall within the terms of the Anti-Trust Act; and petitioners are entitled to relief by injunction under § 16 of the Clayton Act, c. 323, 38 Stat. 730, 737, by which they are authorized to sue for such relief "against threatened loss or damage by a violation of the anti-trust laws," etc. The strikes, ordered and carried out with the sole object of preventing the use and installation of petitioners' product in other states, necessarily threatened to destroy or narrow petitioners' interstate trade by taking from them their customers. That the organizations, in general purpose and in and of themselves, were lawful and that the ultimate result aimed at may not have been illegal in itself, are beside the point. Where the means adopted are unlawful, the innocent general character of the organizations adopting them or the lawfulness of the ultimate end sought to be attained, cannot serve as a justification.

Decree reversed.

MR. JUSTICE SANFORD, concurring.

I concur in this result upon the controlling authority of *Duplex Company* v. *Deering,* 254 U. S. 443, 478, which, as applied to the ultimate question in this case, I am unable to distinguish.

The separate opinion of MR. JUSTICE STONE.

As an original proposition, I should have doubted whether the Sherman Act prohibited a labor union from peaceably refusing to work upon material produced by non-union labor or by a rival union, even though inter-

state commerce were affected. In the light of the policy adopted by Congress in the Clayton Act, with respect to organized labor, and in the light of *Standard Oil Co.* v. *United States,* 221 U. S. 1; *United States* v. *American Tobacco Co.,* 221 U. S. 106, 178–180, I should not have thought that such action as is now complained of was to be regarded as an unreasonable and therefore prohibited restraint of trade. But in *Duplex Printing Press Co.* v. *Deering,* 254 U. S. 443, these views were rejected by a majority of the court and a decree was authorized restraining in precise terms any agreement not to work or refusal to work, such as is involved here. Whatever additional facts there may have been in that case, the decree enjoined the defendants from using "even persuasion with the object or having the effect of causing any person or persons to decline employment, cease employment, or not seek employment, or to refrain from work or cease working under any person, firm, or corporation being a purchaser or prospective purchaser of any printing press or presses from complainant, . . ." (p. 478). These views, which I should not have hesitated to apply here, have now been rejected again largely on the authority of the *Duplex* case. For that reason alone, I concur with the majority.

MR. JUSTICE BRANDEIS, dissenting.

The constitution of the Journeymen Stone Cutters' Association provides: "No member of this Association shall cut, carve or fit any material that has been cut by men working in opposition to this Association." For many years, the plaintiffs had contracts with the Association under which its members were employed at their several quarries and works. In 1921, the plaintiffs refused to renew the contracts because certain rules or conditions proposed by the Journeymen were unacceptable.

Then came a strike. It was followed by a lockout, the organization by the plaintiffs of a so-called independent union, and the establishment of it at their plants. Repeated efforts to adjust the controversy proved futile. Finally, the Association urged its members working on buildings in other States to observe the above provision of its constitution. Its position was " that if employers will not employ our members in one place, we will decline to work for them in another, or to finish any work that has been started or partly completed by men these employers are using to combat our organization."

The trial court dismissed the bill. The United States Circuit Court of Appeals affirming the decree said:

"After long negotiations and failure to reach a new working agreement, the union officers ordered that none of its members should further cut stone which had been partly cut by non-union labor, with the result that on certain jobs in different states stone cutters, who were members of the union, declined to do further cutting upon such stone. Where, as in some cases, there were few or no local stone cutters except such as belonged to the union, the completion of the buildings was more or less hindered by the order, the manifest object of which was to induce appellants to make a contract with the union for employment of only union stonecutters in the Indiana limestone district. It does not appear that the quarrying of stone, or sawing it into blocks, or the transportation of it, or setting it in buildings, or any other building operation, was sought to be interfered with, and no actual or threatened violence appears, no picketing, no boycott, and nothing of that character."

If, in the struggle for existence, individual workingmen may, under any circumstances, co-operate in this way for self-protection even though the interstate trade of another is thereby restrained, the lower courts were clearly right in denying the injunction sought by plaintiffs. I have

no occasion to consider whether the restraint, which was applied wholly intrastate, became in its operation a direct restraint upon interstate commerce. For it has long been settled that only unreasonable restraints are prohibited by the Sherman Law.[1] *Standard Oil Co.* v. *United States,* 221 U. S. 1, 56-58; *United States* v. *American Tobacco Co.,* 221 U. S. 106, 178-180; *Chicago Board of Trade* v. *United States,* 246 U. S. 231, 238; *United States* v. *Trenton Potteries Co.,* 273 U. S. 392, 396. Compare *United States* v. *Terminal Ass'n,* 224 U. S. 383; *United States* v. *Reading Co.,* 226 U. S. 324, 369. And the restraint imposed was, in my opinion, a reasonable one. The Act does not establish the standard of reasonableness. What is reasonable must be determined by the application of principles of the common law, as administered in federal courts unaffected by state legislation or decisions. Compare *Duplex Printing Co.* v. *Deering,* 254, U. S. 443, 466. Tested by these principles, the propriety of the unions' conduct can hardly be doubted by one who believes in the organization of labor.

Neither the individual stonecutters nor the unions had any contract with any of the plaintiffs or with any of their customers. So far as concerned the plaintiffs and their customers, the individual stonecutters were free either to work or to abstain from working on stone which had been cut at the quarries by members of the employers' union. So far as concerned the Association, the individual stonecutter was not free. He had agreed, when he became a member, that he would not work on stone " cut by men working in opposition to " the Association. It was in duty bound to urge upon its members observance of the obligation assumed. These cut stone companies, who alone are seeking relief, were its declared

[1] The contrary view was unsuccessfully contended for by Mr. Justice Harlan, dissenting, in *Standard Oil Co.* v. *United States,* 221 U. S. 1, 85–100.

enemies. They were seeking to destroy it. And the danger was great.

The plaintiffs are not weak employers opposed by a mighty union. They have large financial resources. Together, they ship 70 per cent. of all the cut stone in the country. They are not isolated concerns. They had combined in a local employers' organization. And their organization is affiliated with the national employers' organization, called "International Cut Stone & Quarrymen's Association." Standing alone, each of the 150 Journeymen's locals is weak. The average number of members in a local union is only 33. The locals are widely scattered throughout the country. Strong employers could destroy a local "by importing scabs" from other cities. And many of the builders by whom the stonecutters were employed in different cities, are strong. It is only through combining the 5,000 organized stonecutters in a national union, and developing loyalty to it, that the individual stonecutter anywhere can protect his own job.

The manner in which these individual stonecutters exercised their asserted right to perform their union duty by refusing to finish stone "cut by men working in opposition to" the Association was confessedly legal. They were innocent alike of trespass and of breach of contract. They did not picket. They refrained from violence, intimidation, fraud and threats. They refrained from obstructing otherwise either the plaintiffs or their customers in attempts to secure other help. They did not plan a boycott against any of the plaintiffs or against builders who used the plaintiffs' product. On the contrary, they expressed entire willingness to cut and finish anywhere any stone quarried by any of the plaintiffs, except such stone as had been partially "cut by men working in opposition to" the Association. A large part of the plaintiffs' product consisting of blocks, slabs and sawed work was not

affected by the order of the union officials. The individual stonecutter was thus clearly innocent of wrongdoing, unless it was illegal for him to agree with his fellow craftsmen to refrain from working on the "scab"-cut stone because it was an article of interstate commerce.

The manner in which the Journeymens' unions acted was also clearly legal. The combination complained of is the co-operation of persons wholly of the same craft, united in a national union, solely for self-protection. No outsider—be he quarrier, dealer, builder or laborer—was a party to the combination. No purpose was to be subserved except to promote the trade interests of members of the Journeymens' Association. There was no attempt by the unions to boycott the plaintiffs. There was no attempt to seek the aid of members of any other craft, by a sympathetic strike or otherwise. The contest was not a class struggle. It was a struggle between particular employers and their employees. But the controversy out of which it arose, related, not to specific grievances, but to fundamental matters of union policy of general application throughout the country. The national Association had the duty to determine, so far as its members were concerned, what that policy should be. It deemed the maintenance of that policy a matter of vital interest to each member of the union. The duty rested upon it to enforce its policy by all legitimate means. The Association, its locals and officers were clearly innocent of wrongdoing, unless Congress has declared that for union officials to urge members to refrain from working on stone "cut by men working in opposition" to it is necessarily illegal if thereby the interstate trade of another is restrained.

The contention that earlier decisions of this Court compel the conclusion that it is illegal seems to me unfounded. The cases may support the claim that, by such local abstention from work, interstate trade is restrained. But ex-

amination of the facts in those cases makes clear that they have no tendency whatsoever to establish that the restraint imposed by the unions in the case at bar is unreasonable. The difference between the simple refraining from work practiced here, and the conduct held unreasonable in *Duplex Printing Press Co.* v. *Deering,* 254 U. S. 443, appears from a recital in that opinion of the defendants' acts:

"The acts embraced the following, with others: warning customers that it would be better for them not to purchase, or having purchased not to install, presses made by complainant, and threatening them with loss should they do so; threatening customers with sympathetic strikes in other trades; notifying a trucking company usually employed by customers to haul the presses not to do so, and threatening it with trouble if it should; inciting employees of the trucking company, and other men employed by customers of complainant, to strike against their respective employers in order to interfere with the hauling and installation of presses, and thus bring pressure to bear upon the customers; notifying repair shops not to do repair work on Duplex presses; coercing union men by threatening them with loss of union cards and with being blacklisted as 'scabs' if they assisted in installing the presses; threatening an exposition company with a strike if it permitted complainant's presses to be exhibited; and resorting to a variety of other modes of preventing the sale of presses of complainant's manufacture in or about New York City, and delivery of them in interstate commerce, such as injuring and threatening to injure complainant's customers and prospective customers, and persons concerned in hauling, handling, or installing the presses." (pp. 463–4.)

The character of the acts held in *Duplex Printing Press Co.* v. *Deering* to constitute unreasonable restraint is fur-

ther shown by the scope of the injunction there prescribed (pp. 478-479):

"There should be an injunction against defendants and the associations represented by them, and all members of those associations, restraining them, according to the prayer of the bill, from interfering or attempting to interfere with the sale, transportation, or delivery in interstate commerce of any printing press or presses manufactured by complainant, or the transportation, carting, installation, use, operation, exhibition, display, or repairing of any such press or presses, or the performance of any contract or contracts made by complainant respecting the sale, transportation, delivery, or installation of any such press or presses, by causing or threatening to cause loss, damage, trouble, or inconvenience to any person, firm, or corporation concerned in the purchase, transportation, carting, installation, use, operation, exhibition, display or repairing of any such press or presses, or the performance of any such contract or contracts; and also and especially from using any force, threats, command, direction, or even persuasion with the object or having the effect of causing any person or persons to decline employment, cease employment, or not seek employment, or to refrain from work or cease working under any person, firm, or corporation being a purchaser or prospective purchaser of any printing press or presses from complainant, or engaged in hauling, carting, delivering, installing, handling, using, operating, or repairing any such press or presses for any customer of complainant. Other threatened conduct by defendants or the associations they represent, or the members of such associations, in furtherance of the secondary boycott should be included in the injunction according to the proofs."

The difference between the facts here involved and those in the *Duplex* case does not lie only in the character of the acts complained of. It lies also in the occasion and

purpose of the action taken and in the scope of the combination. The combination there condemned was not, as here, the co-operation for self-protection only of men in a single craft. It was an effort to win by invoking the aid of others, both organized and unorganized, not concerned in the trade dispute. The conduct there condemned was not, as here, a mere refusal to finish particular work begun "by men working in opposition to" the union. It was the institution of a general boycott, not only of the business of the employer, but of the businesses of all who should participate in the marketing, installation or exhibition of its product. The conduct there condemned was not, as here, action taken for self-protection against an opposing union installed by employers to destroy the regular union with which they long had had contracts. The action in the *Duplex* case was taken in an effort to unionize an open shop. Moreover, there the combination of defendants was aggressive action directed against an isolated employer. Here it is defensive action of workingmen directed against a combination of employers. The serious question on which the Court divided in the *Duplex* case was not whether the restraint imposed was reasonable. It was whether the Clayton Act had forbidden federal courts to issue an injunction in that class of cases. See p. 464.

In *Loewe* v. *Lawlor,* 208 U. S. 274; *Gompers* v. *Bucks Stove Co.,* 221 U. S. 418; and *Lawlor* v. *Loewe,* 235 U. S. 522, the conduct held unreasonable was not, as here, a refusal to finish a product partly made by members of an opposing union. It was invoking the power of the consumer as a weapon of offensive warfare. There, a general boycott was declared of the manufacturer's product. And the boycott was extended to the businesses of both wholesalers and retailers who might aid in the marketing of the manufacturer's product. Moreover, the boycott was to be effected, not by the co-operation merely of the few members of the craft directly and vitally interested

in the trade-dispute, but by the aid of the vast forces of organized labor affiliated with them through the American Federation of Labor.

In *United States* v. *Brims,* 272 U. S. 549, the combination complained of was not the co-operation merely of workingmen of the same craft. It was a combination of manufacturers of millwork in Chicago, with building contractors who cause such work to be installed, and the unions whose members are to be employed. Moreover the purpose of the combination was not primarily to further the interests of the union carpenters. The immediate purpose was to suppress competition with the Chicago manufacturers. As this Court said:

"The respondent manufacturers found their business seriously impeded by the competition of material made by nonunion mills located outside of Illinois. . . . They wished to eliminate the competition of Wisconsin and other nonunion mills which were paying lower wages and consequently could undersell them. . . . The local manufacturers, relieved from the competition that came through interstate commerce, increased their output and profits; they gave special discounts to local contractors; more union carpenters secured employment in Chicago and their wages were increased. These were the incentives which brought about the combination."

In *United Mine Workers* v. *Coronado Co.,* 259 U. S. 344; 268 U. S. 295; *United Leather Workers* v. *Herkert,* 265 U. S. 457; *Industrial Association* v. *United States,* 268 U. S. 64, as in *Hopkins* v. *United States,* 171 U. S. 578; *Anderson* v. *United States,* 171 U. S. 604; *Montague* v. *Lowry,* 193 U. S. 38, and *Swift & Co.* v. *United States,* 196 U. S. 375, the questions put in issue were not the reasonableness of the restraint, but whether the restraint was of interstate commerce.

Members of the Journeymen Stone Cutters' Association could not work anywhere on stone which had been cut at the quarries by "men working in opposition" to it,

without aiding and abetting the enemy. Observance by each member of the provision of their constitution which forbids such action was essential to his own self-protection. It was demanded of each by loyalty to the organization and to his fellows. If, on the undisputed facts of this case, refusal to work can be enjoined, Congress created by the Sherman Law and the Clayton Act an instrument for imposing restraints upon labor which reminds of involuntary servitude. The Sherman Law was held in *United States* v. *United States Steel Corporation,* 251 U. S. 417, to permit capitalists to combine in a single corporation 50 per cent. of the steel industry of the United States dominating the trade through its vast resources. The Sherman Law was held in *United States* v. *United Shoe Machinery Co.,* 247 U. S. 32, to permit capitalists to combine in another corporation practically the whole shoe machinery industry of the country, necessarily giving it a position of dominance over shoe-manufacturing in America. It would, indeed, be strange if Congress had by the same Act willed to deny to members of a small craft of workingmen the right to cooperate in simply refraining from work, when that course was the only means of self-protection against a combination of militant and powerful employers. I cannot believe that Congress did so.

MR. JUSTICE HOLMES concurs in this opinion.

NORTHERN RAILWAY COMPANY *v.* PAGE ET AL., ADMINISTRATORS.

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

No. 136. Argued January 17, 1927.—Decided April 11, 1927.

Costa Rican troops on a railway train fired into a train of the defendant and shot the plaintiff, a passenger. The negligence alleged was that defendant knew the troops had reasonable cause to believe the passenger train was transporting armed hostile forces and failed

seasonably and adequately to inform the government troops that this was not so. *Held,*

1. Plaintiff had the burden to show that the specified negligence was the proximate cause of his injuries, and a verdict in his favor can not be sustained if essential facts are left to conjecture and speculation. P. 72.

2. There being no evidence that the conductor did not notify those in charge of the troops that there were no hostile forces on the passenger train, his failure to testify on that point does not permit an inference that he was not in position so to state. P. 73.

3. The mere fact of the shooting does not tend to show defendant was at fault; the uncontradicted evidence shows that the shooting could not reasonably have been anticipated as the natural and probable result of the failure of defendant to inform the government forces, earlier or otherwise than was done, that there were no insurrectos on the train. P. 75.

3 F. (2d) 747, reversed.

CERTIORARI (269 U. S. 542) to a judgment of the Circuit Court of Appeals which reversed a judgment of the District Court, entered on an alternative verdict for defendant, and directed the District Court to enter judgment on the verdict of damages for the plaintiff, in an action for personal injuries suffered by the plaintiff while a passenger on defendant's railway in Costa Rica, when the train was fired upon by Costa Rican troops.

Mr. Robert G. Dodge, with whom *Mr. John M. Raymond* was on the brief, for petitioner.

Mr. Charles F. Perkins, with whom *Mr. Paul F. Perkins* was on the brief, for respondents.

MR. JUSTICE BUTLER delivered the opinion of the Court.

This action was brought in the District Court of Massachusetts by Michael B. Ryan against the petitioner and the United Fruit Company to recover damages for personal injuries sustained by him, February 23, 1918, in Costa Rica while a passenger on a railway train alleged to have been operated by both companies. A verdict was directed for the Fruit Company. No question as to its

liability is presented here. We may refer to the railway company as the defendant.

On the day before plaintiff was hurt a small insurrection broke out in a part of Costa Rica west of San José, the capital. Plaintiff was traveling on the regular morning passenger train running easterly from that city to Port Limon on the Atlantic coast. At Turrialba, about 65 miles from Port Limon, the train was held up by insurrectos. Its seizure was reported to the Governor at Port Limon, and he sent out a train containing government troops. After detention for some hours the passenger train was allowed to go. The railroad is a single track line having sidings at various places. Both trains were given orders to meet at La Pascua. The passenger train was the first to arrive at that place and went upon the side track to let the troop train pass. The officers of the troop train gave an order to, and the troops did, fire upon the passenger cars. Some passengers were killed and others, including the plaintiff, were seriously injured.

At the close of the evidence, the district judge, doubting whether there was anything to show negligence on the part of the defendant, submitted the case to the jury; and, in accordance with the practice in Massachusetts and that federal district, directed the jury that, if they found for the plaintiff, they should also return an alternative verdict for defendant, which could be entered if later it should be held as a matter of law that plaintiff was not entitled to recover. General Laws of Massachusetts, c. 231, § 120; *Automatic Pencil Sharpener Co.* v. *Boston Pencil Pointer Co.*, 279 Fed. 40. The jury gave plaintiff a verdict for $25,000 and made the alternative finding as directed. Afterwards, on motion of the defendant, the district judge set aside the verdict for plaintiff and entered the alternative verdict. He held that there was no evidence to support a finding against defendant. Subsequently, plaintiff died; his administrators were made parties, and judgment

was entered for defendant. The case was taken to the Circuit Court of Appeals, and that court vacated the judgment of the District Court, set aside the verdict for defendant, and remanded the case with directions to reinstate the verdict and give judgment for plaintiffs. 3 F. (2d) 747. This Court granted defendant's petition for a writ of certiorari. 269 U. S. 542.

At the trial plaintiff called a witness familiar with Costa Rica law. He testified in substance: One who through his fault causes injury to another is bound to make reparation. If a corporation is to be held, the negligence must be that of a person who stands in position of representative. One in immediate charge of a train is held to be the representative of the railroad company for the purpose of that operation. The rule that a high degree of care is owed by a railroad carrier to its passengers does not prevail in that country. The duty owed is uniform. It is the care exercised by a diligent head of a family—a prudent and diligent person who is his own master. In the absence of negligence on the part of the carrier, it is not liable for injuries sustained by passengers. The witness cited §§ 1045 and 1048 of the Code of Costa Rica. Plaintiff sought recovery on the ground that defendant knew that the troops had reasonable cause to believe that the passenger train was transporting armed hostile forces and failed seasonably and adequately to inform the government troops and their officers that there were no insurrectos on the passenger train.

There is little or no controversy as to the facts. The passenger train left San José at eight in the morning and was due at Port Limon at 4.30 in the afternoon. It consisted of locomotive, five freight cars, a combination baggage and second-class passenger car, one or two first-class coaches, and a pay car carrying gold, silver and express parcels. Ramsay was the conductor; he and other members of the crew were regular employees of defendant.

The passengers were men, women and children—some natives and some foreigners. The train arrived at Turrialba at half after eleven. There the insurrectos held it up and searched for persons connected with the Government. One was taken on suspicion, but no one else was molested. The officers in command gave assurance that the train would be detained only while the insurrectos used the engine to destroy track between that place and San José. About a quarter before six, the train was allowed to go. As it was leaving, an officer ordered some insurrectos to go and blow up the bridge at Torito, which is about two miles east of Turrialba. When the train arrived at Torito, all the insurrectos got off. The train went to Peralta, four or five miles further on, where the conductor received an order to pass a special train at La Pascua, which was five or six miles ahead. No information was given him that this was the train carrying troops. That train left Port Limon about half after three. It was also in charge of regular employees of the defendant. The train crew and the officers in command of the troops knew that the passenger train had been held up by the insurrectos. The troops were ordered to Turrialba to meet the rebels. At Las Lomas orders were received to pass an extra or special train at La Pascua, about six miles west. The troop train arrived at La Pascua about seven o'clock.

We quote from the record:

"Grant, a witness called for the plaintiff, testified on direct examination as follows: 'When the cars came close enough you could see guns sticking out of the windows in perfect alignment, and see troops standing on the steps, . . . I believe somebody on the ground, Mr. Ramsay or Mr. Veitch or somebody else there, mentioned that it was a troop train going up to attack these revolutionists.' When the locomotive of the troop train arrived opposite the combination baggage and pas-

senger car, Ramsay flagged it and told the engineer to look out for the Torito bridge where he had left revolutionists, that he would probably find it torn up. Two officers then alighted from the troop train and one said to Ramsay 'What train is this?' . . . he replied that it was the regular passenger train from San José to Limon. He told the officer in English and then in Spanish that there were no revolutionists on board. Ramsay testified that he knew the officer by sight as he had traveled on his train before. At the same time the other officer was speaking to one Veitch . . . He asked Veitch what the train was, and Veitch replied that it was the passenger train from San José to Limon, and that there were no revolutionists on board. Veitch had been an importer and banana grower in Costa Rica for eleven years prior to 1918, and was then consular agent for the Italian Government. Ramsay then signaled his train to proceed, the officers demanded that it be halted, which was done. The troop train then began to move forward, the officers walking beside it. When the passenger cars of the troop train were approximately opposite the passenger coaches of the passenger train, and while the troop train was still in motion, although coming to a stop, one of the officers raised his sword and waved it and an order to fire was given. Immediately the firing began by the troops, some kneeling in the car with their guns extending out of the windows about three feet, and some on the platforms."

The record contains nothing that in any material or substantial particular conflicts with that account of what there occurred. In fact, it is supported by the testimony given by plaintiff in his own behalf. He said: The passenger train went upon the siding at La Pascua and was there five or ten minutes before the troop train arrived. He remained in the coach. Some of the passengers got off the train and walked about. When the troop

train first stopped the engines were about opposite each other. He saw Conductor Ramsay and the officers in command of the troops talking, but did not hear what they said. There was nothing to indicate that any one was alarmed or expected trouble. The troop train pulled up and stopped so that a troop car was opposite plaintiff's car. The weather was warm and the windows of the passenger cars were open. There was nothing to indicate that it was other than an ordinary passenger train. There had been no sign of hostility. The troops, lined up in their car, fired into the windows of the passenger cars. There were about twenty passengers in plaintiff's car; some were in the aisle and some were looking out the windows. And plaintiff testified that it was light enough so that one could see a considerable distance; that, when the troop train first stopped, he could see Conductor Ramsay apparently talking to the officers in charge of the troops, "That would be probably 100, 150 maybe 200 feet. I don't remember. It was the full length of the train. We were pretty nearly back." He said that it was light enough for him to see Ramsay and the officers at that distance; and, although it was dusk at the time, there was good visibility up to 200 feet.

Veitch, called as a witness for defendant, testified that, when the troop train stopped and while Ramsay was talking to one of the officers, he talked to the other officer and told him that it was a passenger train from San José to Port Limon and that there were no revolutionists on board. Later he heard this officer give command to the troops to fire, and firing began immediately. He stood there until he saw guns pointed at him and then went under the train; they put two bullets through his clothes and two through a valise he was carrying; and he saw them shoot and kill a man who was leaning out of a coach window.

On the day of the shooting, the general manager of the company was at its offices at Port Limon. He testi-

fied that, when he learned that the insurrectos had held up the train, he notified the Governor who was also at Port Limon; and that, when he learned the insurrectos were ready to release the train, he so informed the Governor and the latter instructed him to move the passenger train; that he reminded the Governor that there was a troop train on the line. "I told him he had better notify the troop train. He said he would. Afterwards he said he did." And the general manager testified that he promptly telephoned to the yard master at Siquirres, a station east of Las Lomas, to get word to the conductor of the troop train that the passenger train was carrying non-combatants, including women and children. The railway superintendent testified that he notified the Governor of the release of the passenger train and asked and procured authority to move it to Port Limon. The assistant train dispatcher, who came on duty at five o'clock, testified that about a quarter after five Ramsay reported that the train had been released, and later reported from Peralta that all of the revolutionists had got off at Torito to destroy a bridge; that, when the troop train was at Siquirres, he notified the conductor that the passenger train had been released and that "meet orders" would be given later; that he communicated with the troop train at Las Lomas that the other train had no revolutionists aboard and gave orders to pass it at La Pascua.

The burden was on plaintiff to show that defendant's negligence, as specified above, was the proximate cause of his injuries. Under familiar rules, plaintiff was entitled to prevail if the evidence and the inferences that a jury might legitimately draw from it were fairly and reasonably sufficient to warrant a finding in his favor. Otherwise the judgment must be for defendant. *C. M. & St. P. Ry.* v. *Coogan,* 271 U. S. 472, 478, and cases cited. The verdict cannot be sustained if essential facts

are left in the realm of conjecture and speculation. *St. Louis, etc. Ry.* v. *Mills,* 271 U. S. 344, 347.

The record does not include or purport to contain all the evidence. It does not show that Ramsay failed to testify as to what he said to the officers in command of the troops before the order to fire was given. It shows that he testified that when the shooting began he called out to the troops that they were firing on passengers and that there were no revolutionists on the train. And, in the paragraph quoted, the bill of exceptions shows that plaintiff's witness, Grant, testified that when Ramsay flagged the troop train, he told one of the officers that his was the regular passenger train and that there were no revolutionists on board. In the opinion of the majority of the Circuit Court of Appeals it is said (p. 752): "The jury might have found that, inasmuch as Ramsay, the conductor, did not testify as to what he said to the officers in charge of the troops prior to the shooting, but did testify that when the shooting began he cried out that there were no revolutionists on the train, nothing of the kind was said until after the shooting began; that the troops and their officers never received any information as to the harmless character of the occupants of the train, or received it too late and under such circumstances as to render it unavailable."

This view cannot be sustained. There was no basis for the court's assumption. There was nothing reasonably to warrant the rejection of Grant's testimony. Indeed, plaintiff's own testimony tended to corroborate Grant. And the district judge in charging the jury assumed as an undisputed fact that when the train stopped the officers were informed by Ramsay and Veitch that there were no revolutionists on the train. The case having been so put to the jury, it is to be assumed that they considered the matter on that basis. Defendant was not required

to satisfy the jury that it was not guilty of the negligence alleged against it. If Ramsay had not testified at all, his failure so to do could not be taken as substantive evidence of any fact. If, instead of showing that Ramsay had told the officers that no insurrectos were on his train, plaintiff had put in testimony that no such information had been given to the government forces and then Ramsay had remained silent, it would have been permissible to draw an inference that he was not in position to assert the contrary. But that is not the situation here presented. *Tully* v. *Fitchburg Railroad,* 134 Mass. 499, 502; *Poirier* v. *Terceiro,* 224 Mass. 435, 437; *W. F. Corbin & Co.* v. *United States,* 181 Fed. 296, 304; *Owens Bottle-Machine Co.* v. *Kanawha Banking & Trust Co.,* 259 Fed. 838, 842. There is nothing to support a finding that the officers in charge of the troops were not informed at La Pascua before the order to fire was given that there were no insurrectos on the passenger train. The record discloses no reason for rejecting the testimony of Grant and Veitch. It is to be taken as established that such information was given.

And, assuming that a jury properly might decline to believe the testimony of defendant's officials going to show that the troop train and officers in charge had been so informed before they left Las Lomas, actionable negligence was not made out. There was no evidence that the officers in charge of the troops had any reason to believe that the train they were directed to meet at La Pascua was then carrying insurrectos. Even if there was evidence that they had ground for such belief and that defendant failed to take some precaution, there is nothing to show that such failure caused plaintiff's injuries. If the direct and positive information as to the harmless character of the train given on the spot by Ramsay and Veitch was not

sufficient, it must be deemed a matter of speculation and conjecture whether any information that defendant could have given would have prevented the shooting. *St. Louis, etc. Ry.* v. *Mills, supra,* 347. The mere fact that the troops shot into the passenger train does not tend to show that defendant was at fault. And, when regard is had to the facts and circumstances shown by uncontradicted evidence, it is clear that the shooting was an occurrence that could not reasonably have been anticipated or foreseen as the natural and probable result of any failure of defendant earlier or otherwise to inform the government forces that there were no insurrectos on the passenger train. It follows that there is no ground on which defendant can be held liable for the injuries inflicted on plaintiff by the government forces. *Scheffer* v. *Railroad Co.,* 105 U. S. 249, 252; *Milwaukee, etc. Railway Co.* v. *Kellogg,* 94 U. S. 469, 475; *American Bridge Co.* v. *Seeds,* 144 Fed. 605, 609; *Jarnagin* v. *Travelers Protective Ass'n.,* 133 Fed. 892, 896; *Cole* v. *German Savings and Loan Soc.,* 124 Fed. 113.

In his memorandum on the motion to set aside the verdict, the trial judge said: "I am unable to discover in the evidence anything on which a finding of negligence can be supported or to say, even after the event, in what the defendant's agents and servants failed. The jury might, of course, reject the testimony of the defendant's witnesses; but that would not supply evidence of negligence on the defendant's part. The attack took place, apparently, because the officers in command of the troops lost their heads and behaved with incredible folly. It was an extraordinary occurrence which the defendant had no reason to anticipate and for which it is not liable." The record fully sustains that statement.

Judgment reversed.

SOUTHERN RAILWAY COMPANY *v.* KENTUCKY.

DAVIS, DIRECTOR GENERAL, *v.* KENTUCKY.

ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY

Nos. 33, 34. Argued March 15, 16, 1926.—Decided April 11, 1927.

1. A State may tax property permanently within its jurisdiction belonging to one domiciled elsewhere and used to carry on commerce among the States. Where railroad property is a part of a system and has its actual use only in connection with other parts of the system, that fact may be considered even though other parts of the system are outside the State. The mileage basis of apportionment can not be adopted in the taxation of railroad franchises where the result is shown to be arbitrarily excessive. P. 80.
2. The value of the physical elements of a railroad—whether that value be deemed actual cost, cost of reproduction new, cost of reproduction less depreciation or some other figure—is not the sole measure of or guide to its value in operation; much weight is to be given to present and prospective earning capacity at rates that are reasonable, having regard to traffic available and competitive and other conditions prevailing in the territory served. P. 81.
3. No intangible element of substantial amount over and above the value of its physical parts inheres in a railroad that can not earn a reasonable rate of return on the amount attributable in valuation to its bare-bones—as the mere tangible elements properly may be called. P. 82.
4. While the mileage used as an integral part of a railroad system may have elements of value that it otherwise would not possess and the State properly may have regard to the whole in order to ascertain the value of the part that is within its borders, it is not permissible to take into account any of the outside property unless it can be seen in some plain and fairly intelligible way that it adds to the value of the road and the rights exercised in the State. P. 82.

5. Facts examined and *held* that the additional values of intangible property on which taxes in question were based are arbitrarily excessive and include values of system property beyond the State. P. 85.
6. Record examined and cause *held* reviewable on writ of error. P. 86.

204 Ky. 388, reversed.

THESE were proceedings by the Commonwealth instituted in a county court, for the purpose of listing for taxation intangible property of the railway alleged to have been omitted. The first was against the railway alone, covering the years 1914–1916. The second sought like relief for the years 1917–1918, during which the Director General of Railroads operated the railway system. The proceedings, tried together throughout, were dismissed by the county court, and by the circuit court, on appeal. The judgment of the latter was reversed in 193 Ky. 474. Judgments recovered on resubmission to the circuit court were affirmed by the Court of Appeals, except that, in respect of the years 1914 and 1916, the judgment in the first case was reversed. 204 Ky. 388.

Mr. Edward P. Humphrey, with whom *Messrs. L. E. Jefferies, Alex P. Humphrey,* and *Charles W. Milner* were on the brief, for plaintiffs in error.

Mr. J. P. Hobson, with whom *Messrs. L. W. Morris, D. L. Hazelrigg,* and *Frank Daugherty,* Attorney General of Kentucky, were on the brief, for defendant in error.

MR. JUSTICE BUTLER delivered the opinion of the Court.

A judgment against plaintiffs in error for franchise taxes imposed under the laws of Kentucky in respect of

certain lines of railway was affirmed by the highest court of that State. 204 Ky. 388. And see 193 Ky. 474. Reversal is sought on the ground that as applied these laws contravene the due process clause of the Fourteenth Amendment.

The statutes* (§§4077–4081) provide that every foreign or domestic railway company, in addition to other taxes imposed by law, shall pay an annual tax on its franchise. The provisions apply whether the privilege is exercised by the corporation in its own name or in the name of another which it adopts. A company's railway system is deemed to include lines operated, leased or controlled whether technically owned or not. The tax is on intangible property. Where the railroad is partly within and partly without the State, the value of the intangible property so to be taxed may be determined substantially as follows: capitalize the net railway operating income of the entire system for the accounting year last ended; assign to Kentucky its mileage proportion of that amount; deduct the assessed value of the tangible property otherwise taxed; and the remainder is the value taken as the basis for the franchise taxes. When the railroad is wholly within the State, the capitalized net, less the assessed value of tangible property on which other taxes are paid, is taken to be the value of intangible property. *Greene* v. *Louis. & Interurban R. R. Co.*, 244 U. S. 499, 510, and cases cited; *Louis. & Nash. R. R. Co.* v. *Greene,* 244 U. S. 522, 539.

Plaintiff in error, the Southern Railway Company, is a Virginia corporation. The lines of its system of railroads, exclusive of the Kentucky mileage in question, exceed 9500 miles and extend from Washington, D. C., into Virginia, the Carolinas, Tennessee, Georgia, Florida, Alabama and Mississippi. The company also has a line from New Albany, Indiana, to East Saint Louis, Illinois. It does

* The provisions are printed in the margin of *Louis. & Nash. R. R. Co.* v. *Greene,* 244 U. S. 522, at page 533.

not own any railroad in Kentucky. The "Southern Railway Company in Kentucky" owns 127.63 miles, all of which are in that State. Its branches connect with the line of the Cincinnati, New Orleans and Texas Pacific Railway Company which extends from Cincinnati to Chattanooga and connects it with the system. Its stock is owned by the Virginia company. The same persons are officers of both. The lines of the Kentucky company are reported to public authorities and are advertised as a part of the system. The Mobile and Ohio Railroad Company, the Cumberland Railroad Company, and the Cumberland Railway Company own, in all, about 53.3 miles of railroad in Kentucky, but their lines are not connected with the lines of the Southern Railway Company in Kentucky. The Virginia company through stock ownership controls these companies; but they and the Southern Railway in Kentucky, in their own names and as owners, made reports and paid in full all taxes assessed under Kentucky laws on their tangible and intangible properties.

The Commonwealth brought this suit against the Virginia company and the Director General to recover additional franchise or intangible property taxes for 1918 and 1919 in respect of the Kentucky mileage of these companies. The Court of Appeals held that there was no such connection or unity of use between the system of the Virginia company and the lines of the Mobile and Ohio, the Cumberland Railroad, and the Cumberland Railway as would justify recovery of any franchise taxes in respect of their Kentucky mileage. Stipulated facts tended to show that the Virginia company controlled the Cincinnati, New Orleans and Texas Pacific; and the court held that by means of its lines the railroad of the Southern Railway in Kentucky was so connected with the lines of the Virginia company as to be a part of the system. The value of intangible property adjudged to have been omitted, and on which the additional franchise taxes were

calculated, for 1918 was $1,730,090.02 and for 1919 was $3,028,592.62. These amounts were arrived at as follows: the net railway operating income for the entire system was capitalized at seven per cent.; there was deducted an amount to cover the value of shops, terminals and double tracks outside Kentucky in excess of corresponding tangible property connected with the lines in that State; there was allocated to Kentucky such proportion of the remainder as 424.61 miles, which were attributed to Kentucky, bore to the total mileage of the system; that amount was equalized for taxation at 75 per cent. for 1918 and at 85 per cent. for 1919; and from the result there was deducted the values of tangible and intangible property (including the Kentucky mileage of the Cincinnati, New Orleans and Texas Pacific) on which taxes had been paid. But the average value per mile so deducted was less than the system average per mile. The amounts so arrived at were assigned to the 127.63 miles of the Southern Railway Company in Kentucky and the 197.5 miles in Kentucky of the lines of the Cincinnati, New Orleans and Texas Pacific. The increase per mile for 1918 was $5,334.55 and for 1919 was $9,338.34.

The Court of Appeals rightly declared that a State may tax property permanently within its jurisdiction belonging to one domiciled elsewhere and used to carry on commerce among the States; that, where property is a part of a system and has its actual use only in connection with other parts of the system, that fact may be considered even though other parts of the system are outside the State; that the State may not tax property outside its jurisdiction belonging to one domiciled elsewhere, and that the mileage basis of apportionment cannot be adopted in the taxation of railroad franchises where the result is shown to be arbitrarily excessive. These propositions are derived from the decisions of this Court.

Fargo v. *Hart,* 193 U. S. 490, 499; *Pittsburgh, &c. Railway Co.* v. *Backus,* 154 U. S. 421, 427–431; *Union Tank Line Co.* v. *Wright,* 249 U. S. 275, 282; *Wallace* v. *Hines,* 253 U. S. 66, 69.

The question is whether the State made valid application of the governing principles. The value of tangible property is not involved in this case. The demand of the Commonwealth against the plaintiffs in error was for taxes on intangible properties over and above the amounts that had been paid by the owning companies. And the entire amount added as a basis for additional taxes is attributable only to the lines of the Southern Railway Company in Kentucky. There was no claim for any taxes in respect of the lines of the Cincinnati, New Orleans and Texas Pacific. That company had also reported its earnings and paid taxes on its tangible and intangible properties in Kentucky. These taxes were based on values per mile in excess of the average values per mile for the system arrived at by capitalization of net railway operating income in accordance with the rule applied by the State. No part of the amounts adjudged to have been omitted could properly be assigned thereto. The Mobile and Ohio, the Cumberland Railroad, and the Cumberland Railway were held not to be a part of the system. Plaintiffs in error insist that the enforcement of the taxes on these amounts, as measuring the additional values of intangible properties inhering in the lines of the Southern Railway Company in Kentucky, operates to tax the property of the Virginia company located beyond the borders of Kentucky and that such amounts are arbitrarily excessive.

The value of the physical elements of a railroad—whether that value be deemed actual cost, cost of reproduction new, cost of reproduction less depreciation or some other figure—is not the sole measure of or guide to

its value in operation. *Smyth* v. *Ames,* 169 U. S. 466, 547. Much weight is to be given to present and prospective earning capacity at rates that are reasonable, having regard to traffic available and competitive and other conditions prevailing in the territory served. No intangible element of substantial amount over and above the value of its physical parts inheres in a railroad that cannot earn a reasonable rate of return on its bare-bones—as the mere tangible elements properly may be called. See *Omaha* v. *Omaha Water Co.,* 218 U. S. 180, 202.

The amount adjudged to have been omitted equals an increase on the lines of the Southern Railway Company in Kentucky of $13,555 per mile for 1918 and of $23,730 for 1919. The 1917 average net operating income per mile for the system was the basis for determining the Kentucky franchise taxes for 1918, and the average for 1918 controlled the amount of the 1919 taxes. The average for the system was $3,642 per mile for 1917 and was $3,623 for 1918. The corresponding net income per mile of the Southern Railway Company in Kentucky for 1917 was $878. There was a loss of $4,741 per mile in 1918. The record also shows a loss in each of the years 1914, 1915 and 1916. The average for the five years was a loss of $1,230 per mile per year.

If considered alone, the railroad of the Southern Railway Company in Kentucky would be a losing venture. Its operating loss was more than $157,000 per year for the average of the five years reported in the record. But, assuming it a part of the system, it is right to take into consideration the parts outside the State that are operated in connection with it. The mileage used as an integral part of a railroad system may have elements of value that it otherwise would not possess, and the State properly may have regard to the whole in order to ascertain the value of the part that is within its borders. *Fargo* v. *Hart, supra,* 499. But, if the method pursued in valuing prop-

erty within the State is arbitrary and the resulting valuation is grossly excessive, the tax must be condemned as in contravention of the due process clause of the Fourteenth Amendment. *Union Tank Line Co.* v. *Wright, supra,* 282, and cases cited. It is not permissible for the State to take into account any of the outside property " unless it can be seen in some plain and fairly intelligible way that it adds to the value of the road and the rights exercised in the State." *Wallace* v. *Hines, supra,* 69.

The operating results of the system compared with those of the Southern Railway Company in Kentucky show that, on the basis of valuation adopted by the State, the average value per mile of the lines of that company is very much less than the average value per mile of the system. If taken separately it is clear that, because of lack of net earnings, no substantial intangible elements of value could reasonably be attributed to the railroad of that company. In order to justify the increases made, there would have to be attributed to these lines large amounts from system earnings. To sustain the addition for 1919, it is necessary to take enough to overcome the deficit of $4,741 per mile plus a fair return on the value of the physical property and on the $23,730 per mile fixed as a basis for additional taxes. The draft on earnings from other parts of the system to sustain the increase for 1918 would not be so heavy. But it is equally obvious that there is no foundation for the finding that there existed in these lines intangible values of $1,730,090 or any other substantial amount in excess of the value fairly to be attributed to the physical elements of the railroad. If intangible elements were attributed to the system at the same rate per mile as results from the distribution of the added amount to the mileage of the Southern Railway in Kentucky, their value would be more than $200,000,000 for 1919 and more than $120,000,000 for 1918. Clearly there is no foundation for any such results. The mere

statement of the figures is sufficient to show that the amount added as a basis for franchise taxes is so excessive and unreasonable that it cannot be sustained; and such an application of the system earnings amounts to an attempt to tax property outside the State. And as the direct earnings per mile of the lines of that company are so much less than the average for the system, it is plain that the amount adjudged to have been omitted was arbitrarily excessive and included values of system property beyond the limits of Kentucky.

Moreover, the percentages used to make the apportionment to Kentucky were too high. Reference to the figures for 1919 will be sufficient. There was taken 4.273 per cent. of $432,326,444.12, the system value to be apportioned. The system mileage was 9939.1, and that used for the apportionment was 424.61. The Southern Railway Company in Kentucky had 127.63 miles, the Cincinnati, New Orleans and Texas Pacific, 197.5, the Mobile and Ohio, 38.693, the Cumberland Railroad, 12.9, and the Cumberland Railway, 1.74. As the court held that the lines of the three companies last mentioned were not so connected with the system that plaintiffs in error were liable in respect of them, their mileage was erroneously included in the factor used for apportionment to the lines taxed. And for the reasons stated the mileage of the Cincinnati, New Orleans and Texas Pacific should not have been included. The mileage used to make the apportionment was more than three times that of the Southern Railway in Kentucky, and was more than thirty per cent. in excess of the combined mileage of that company and the Cincinnati, New Orleans and Texas Pacific. Obviously deduction of the lesser values of the Kentucky mileage on which the owners had paid taxes did not eliminate the error.

The enforcement of the franchise taxes so assessed would violate the due process clause of the Fourteenth Amendment.

The Commonwealth asserts that in the Kentucky courts the company did not make "the objection which is made here that this was a tax on property outside the State." But the record shows the contrary. The petition alleged that a portion of the Kentucky franchise had been omitted from assessment and prayed that such portion be assessed and taxed. The answer of plaintiffs in error not only denied liability and alleged that to hold the company liable and to attempt to add to that assessment would be a violation of the Fourteenth Amendment, but it also stated: "Defendants say that the effort made herein is simply for the purpose of endeavoring to bring into the State of Kentucky for purposes of taxation, property not in Kentucky, and values appertaining to property not in Kentucky, and earnings derived from property not in Kentucky; that to do this would be in violation of . . . the Constitution of the United States, particularly the Fourteenth Amendment thereof." In its first decision (193 Ky. 474), the Court of Appeals said (p. 488): "It is our conclusion, therefore, that the court should have assessed against defendant [Southern Railway Company of Virginia] Kentucky's portion of the intangible property assessed by the proportion of the mileage that the lines nominally operated by the 'Southern Railway Company in Kentucky' bear to the entire mileage of defendant's system estimated according to the method provided by the statute. But it is insisted that this would result in taxing in Kentucky property having no situs here. . . ." Then follows the court's answer to that contention. This shows that the court distinctly recognized and passed upon the contention that the imposition of the additional franchise taxes would be to tax property outside Kentucky. That decision, according to the local rule, not only bound the lower court, but controlled the disposition of the case on the second appeal. *Hopkins* v. *Adam Roth Grocery Co.*, 105 Ky. 357, 358. The objec-

tions were reiterated in an amended answer filed after the first decision. And the Court of Appeals in its second decision declared that the additional assessments "were made in accordance with and are concluded by the former opinion herein." Clearly, the objections made in the state courts were sufficient. They went to the point that, as proposed to be applied and enforced, the state statutes would operate to tax property outside and beyond the jurisdiction of Kentucky in contravention of the Fourteenth Amendment. And, notwithstanding these objections, the Court of Appeals in its first decision directed the making of these additional assessments; and, in its second decision, declared that they had been made as directed and affirmed the judgment of the Circuit Court by which they were determined.

A petition for certiorari was filed, but, as the case is properly here on writ of error, the petition will be denied.

Judgment reversed on writ of error.
Petition for certiorari denied.

MR. JUSTICE BRANDEIS, dissenting.

I do not consider the merits of this case, because, in my opinion, it should be affirmed on a point of practice which was urged here by the Commonwealth. On writ of error to a state court, even where, as here, this Court has jurisdiction, no objection is reviewable which was not made there. The question on which the judgment of the Court of Appeals of Kentucky is reversed was not raised or passed upon below.

The claim made below was that the Southern could not be taxed at all in Kentucky under the unit rule and that, therefore, the statute as applied was void. *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282, 288–290. The Commonwealth admitted that the Southern, a Virginia corporation, did not own the Kentucky lines di-

rectly. The Southern admitted that it controlled them by stock ownership. In support of the claim that the unit rule could not be applied, the Southern made two contentions. The first was dealt with by the Court of Appeals in its first opinion, 193 Ky. 474; the second, in its second opinion, 204 Ky. 388. The first contention was that the unit rule could have no application, because the Southern was not doing business in Kentucky. That contention the Court of Appeals decided against the Southern for all the years; and this Court affirms the ruling. The second contention was that the unit rule did not apply, because there was not unity of use and operation of the Kentucky lines with its lines elsewhere. The question depended upon the amount of control exercised by the Southern Railway Company over the C., N. O. & T. P. Railway, which connected the Southern Railway in Kentucky with the rest of the Southern system. This contention the Court of Appeals decided in favor of the Southern for the years 1914, 1915 and 1916; but against it for the years 1917 and 1918. With this ruling also this Court agrees. The reversal by this Court is based on an entirely different claim. It is on the ground that the method of assessment used was such as to furnish, as a basis for the franchise tax, an amount so unreasonable and arbitrary as to involve taxation of property outside the State, in view (1) of the fact that the per mile earnings of the entire system were so much larger than the per mile earnings of the Southern in Kentucky, and (2) of the supposed use of too large a percentage intended to represent the proportion of the mileage in Kentucky to the total mileage of the system.

The Court of Appeals recognized clearly that it could not tax in Kentucky any property outside its limits. It upheld the tax as an increase of assessment upon property located confessedly in Kentucky, applying the rule of *Pullman Co.* v. *Richardson,* 261 U. S. 330, 338, that "if

the property be part of a system and have an augmented value by reason of a connected operation of the whole, it may be taxed according to its value as part of the system, although the other parts be outside the State;—in other words, the tax may be made to cover the enhanced value which comes to the property in the State through its organic relation to the system."

Applying the unit rule, however, there are two grounds on which a decision sustaining the claim that property outside the State has been taxed might have rested, if the appropriate claim had been made below. It might have been held that the statute, so far as it required the adoption of the mileage plan of valuation, was void as applied, because the different character of the lines outside Kentucky precluded the application of the per mile method as a basis of valuation. Compare *Fargo* v. *Hart,* 193 U. S. 490; *Wallace* v. *Hines,* 253 U. S. 66, 69. Or it might have been held that the tax was void, because the additional assessment based on mileage without the State was so arbitrary and unreasonable in amount as to violate due process. Compare *Union Tank Line Co.* v. *Wright,* 249 U. S. 275; *Wallace* v. *Hines,* 253 U. S. 66, 69–70. But neither of these claims was made in the court below. The only contentions made there were those which this Court and the lower court agree in holding unfounded—namely, that the Southern was not doing business in Kentucky and that there was no such unity of use and operation of the lines within and those without the State as to permit of the application of the unit rule.[1]

[1] The reason urged by the Southern in support of the second contention was, as the second opinion recites, that the Kentucky lines "had neither physical nor operative connection with lines outside of the state . . . and that to apply the notion of organic unity to all its lines under such circumstances is violative of the Fourteenth Amendment of the Constitution of the United States, in that it brings into Kentucky for taxation purposes values wholly outside of the

The second opinion of the Kentucky Court of Appeals recites that "it is admitted that the assessments for 1917 and 1918 were made in accordance with and are concluded by our former opinion." Hence it was necessary for the plaintiff in error to show that the objections insisted upon in this Court were raised upon the first trial or the appeal in the state court.[2] A consideration

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state. Whether or not this is true is the sole question presented for decision upon these appeals." The Court of Appeals decided the second contention in favor of the Southern for the years 1914, 1915 and 1916, because it concluded "that there was in fact no physical connection between the Northern branch and the Southern branch of the defendant's lines, and that despite the defendant's ownership and control of both of these separate branches, they cannot, under the many decisions of the Supreme Court of the United States, be considered as parts of a single system for the purpose of ascertaining the value of defendant's franchise employed in Kentucky without violating the Fourteenth Amendment of the federal Constitution." It held the Southern taxable for the years 1917 and 1918 because in 1917 the "defendant acquired the C. N. O. & T. P. Ry. Co., and thus unified all of its holdings into a single unit of use and management." In considering the situation for the earlier years it stated: "The question for decision then finally narrows to whether for the purpose of valuing defendant's franchise employed in Kentucky, the line from Danville, Kentucky, to St. Louis, Mo., is to be considered as a separate unit or as a part of a system including also defendant's eastern and southern lines."

[2] As showing that they were raised, this Court relies upon the allegation of the answer that "the effort made herein is simply for the purpose of endeavoring to bring into the State of Kentucky for purposes of taxation, property not in Kentucky; . . . that to do this would be in violation of . . . the Fourteenth Amendment," and upon a quotation from the first opinion of the Kentucky Court of Appeals to the effect that "it is insisted that this would result in taxing in Kentucky property having no situs here. . . ." The reliance of this Court appears to rest upon a misapprehension. On the first trial, the lower courts dismissed the State's petition. As no method of assessment was before the Court of Appeals, it could not, in its first opinion, have passed upon the arbitrariness of this or any other method of assessment. See 193 Ky. 474, 489.

of the entire answer and of the entire first opinion make it altogether clear that the contention, which was advanced by the answer and refuted by the opinion, consisted solely of the claim that any assessment against the Southern would be unconstitutional as taxing property outside the State because the Southern was not doing business within the State. Neither the record nor the opinion of the Court of Appeals discloses that there was an objection to the assessment as such. Nowhere in the opinion is there any reference to the figures urged here as showing the arbitrariness of the statute as applied.

It cannot be said "that the necessary effect in law of a judgment, which is silent upon the question, is the denial of a claim or right which might have been involved therein, but which in fact was never in any way set up or spoken of." *Dewey* v. *Des Moines,* 173 U. S. 193, 200. The rule that a claim or right which was not asserted in the state court cannot be deemed to have been denied, and hence cannot be insisted upon in this Court has been long established.[3] It is true also that the party defeated upon a federal question in a state court will not be limited in this Court to the same argument upon that question, *Dewey* v. *Des Moines, supra,* at p. 198; and that, if the federal question is properly raised, it is immaterial that the state court may have refused to discuss the point. *Erie R. R. Co.* v. *Purdy,* 185 U. S. 148, 154. But

[3] In 1836 Mr. Justice Story, because of the fact "that a different impression exists at the bar," reviewed all the cases that had reached this Court from the state courts, finding that they exhibited "an uniformity of interpretation . . . which has never been broken in upon," requiring that, in order to give the Court jurisdiction, the question sought to be reviewed had both to be raised in the court below and there decided. *Crowell* v. *Randell,* 10 Pet. 368, 392, 398. By 1894 Chief Justice Fuller regarded such principles as "axiomatic." *California Powder Works* v. *Davis,* 151 U. S. 389, 393. The rule is still inflexible. *New York* v. *Kleinert,* 268 U. S. 646.

if the contention made below differs from the contention made here to such a degree that the decision upon one would not necessarily conclude the other, the raising of one below will not permit the raising of the other here, even if the same provision of the Constitution be the basis of both claims. Compare *Dewey* v. *Des Moines, supra; Marvin* v. *Trout,* 199 U. S. 212, 223–224, 227.

The importance of the rule of practice is illustrated by the case at bar.[4] Because the reasonableness of the method of assessment was not questioned below, there is nothing in the record to show what figures and what method of calculation were used by the taxing officers. The figures adopted by this Court are presented only in the brief of the plaintiff in error. They are protested by counsel for the Commonwealth. Moreover, there is reason to believe that the inferences drawn from them are unsound.

McDONALD ET AL. *v.* MAXWELL ET AL., EXECUTORS.

CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 147. Argued January 20, 1927.—Decided April 11, 1927.

1. A decision of the Supreme Court of the District of Columbia, in Probate, allowing a commission to executors in the approval of their yearly account, is reviewable by appeal without bill of exceptions, where an issue of law only was involved, raised by exceptions of the beneficiaries to the account. P. 95.

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[4] Compare *Hamilton Co.* v. *Massachusetts,* 6 Wall. 632, 636; *National Bank* v. *Commonwealth,* 9 Wall. 353, 363; *Edwards* v. *Elliott,* 21 Wall. 532, 557; *Wilson* v. *McNamee,* 102 U. S. 572; *Keokuk & Hamilton Bridge Co.* v. *Illinois,* 175 U. S. 626, 633; *Bolln* v. *Nebraska,* 176 U. S. 83, 90; *Chapin* v. *Fye,* 179 U. S. 127; *Capital City Dairy Co.* v. *Ohio,* 183 U. S. 238, 248; *Cox* v. *Texas,* 202 U. S. 446, 452; *Montana* v. *Rice,* 204 U. S. 291, 301; *Hunter* v. *Pittsburgh,* 207 U. S. 161, 180; *Selover, Bates & Co.* v. *Walsh,* 226 U. S. 112; *Illinois Cen-*

2. Stock dividends on corporate shares in a decedent's estate in process of administration, do not in themselves represent an increase of value upon which the executor is entitled to have a commission. *Gibbons* v. *Mahon*, 136 U. S. 549. P. 96.
3. Judgment entered *nunc pro tunc*, as of the day on which the cause was argued and submitted, in view of the death of one of the respondents since occurring. P. 99.

6 F. (2d) 678, reversed.

CERTIORARI (269 U. S. 542) to a judgment of the Court of Appeals of the District of Columbia which affirmed a judgment allowing commissions to the respondent executors, over exceptions exhibited on behalf of the beneficiaries.

Mr. Charles V. Imlay, with whom *Mr. Charles E. Wainwright* was on the brief, for petitioners.

Mr. Frederic D. McKenney, with whom *Messrs. John S. Flannery, G. Bowdoin Craighill, Joseph S. Graydon*, and *Edward DeWitt* were on the brief, for respondents.

MR. JUSTICE SANFORD delivered the opinion of the Court.

In the course of a proceeding that had been pending for many years in the Supreme Court of the District of Columbia, sitting as a Probate Court, for the administration of the estate of James McDonald, deceased, under his last will and testament, the executors were allowed certain commissions for the one year period covered by their ninth account. On an appeal by the beneficiaries under the will, two of whom are minors represented by a guardian *ad litem*, the District Court of Appeals, being of opinion that there was "nothing on the face of the record to indicate error," affirmed the judgment allowing

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tral R. R. Co. v. *Mulberry Coal Co.*, 238 U. S 275, 281; *Bullen* v. *Wisconsin*, 240 U. S. 625, 632; *Hiawassee River P. Co.* v. *Power Co.*, 252 U. S. 341. Compare *Virginian Ry. Co.* v. *Mullens*, 271 U. S. 220.

these commissions. 6 F. (2d) 678. And this writ of certiorari was thereupon granted. 269 U. S. 542.

A motion by the executors to dismiss the writ and affirm the judgment, on the ground, in effect, that the record presents no substanial question for review, was postponed to the hearing; and the case has been heard on this motion and on the merits.

The record—aside from formal and undisputed matters—consists of the account filed by the executors, a report and exception by the guardian *ad litem,* an exception by the adult beneficiary, and the order of the court allowing the commissions. From these it appears that the executors, in August, 1923, filed their ninth account, covering the period from July 11, 1922 to July 12, 1923—hereinafter referred to as the accounting period. In this account they stated, under the heading of "Receipts Principal Account," that, in addition to the balance of principal in their hands on July 11, 1922, shown by their eighth account, they had charged themselves with the profits received during the accounting period from the sales of certain inventoried items, aggregating $1,604.32, and with certain shares of stock which they had received during the accounting period as stock dividends, "at the face or par value thereof," aggregating $1,570,325, making a total of $1,571,929.32; and that they "claim and hereby retain for their services a commission of five per cent. upon profits realized on proceeds of inventoried items, and the par or face value of stocks received as dividend, viz, $1,571,929.32 . . . . . 78,596.47."

They further stated, under the heading "Income Account," that, in addition to the balance of income shown by their eighth account, they had charged themselves with income received during the accounting period on the property owned by the estate, aggregating $247,814.39; and that they "also claim and hereby retain for their services a commission of five (5) per cent. upon the

annual income and profits on income investments received . . . . 12,390.72."

The guardian *ad litem,* pursuant to a former order of the court, filed a report concerning the matters involved in this account, in which—after pointing out that the executors on their previous accounts had been allowed commissions of more than $200,000 upon the principal of the estate and $50,000 upon the income—he insisted that the sum of $12,390.72, claimed as commission on the income received, was a sufficient compensation for their services during the accounting period; and that as to the additional commission of $78,596.47 claimed on an "increase in principal" of $1,571,929.32, the stock dividends of $1,570,325, of which this mainly consisted, were "not a proper basis upon which to charge a commission." And he specifically "except(ed) to the requested allowance of $78,596.47 for commission on principal."

The adult beneficiary also filed an exception to the account upon the ground that "the commissions claimed, in large part, are based upon an alleged increase in the capital assets of said estate . . . consisting in the issuance to said estate, as the holder of stock in a large number of corporations, of stock dividends, when as a matter of law and of fact, the issuance of said stock dividends added nothing to the interest of said estate as a share holder in said corporations, but merely changed the evidence of said interest, in the shape of stock certificates," and "the issuance of stock dividends to said estate cannot be considered as an increase of either capital or income."

Thereafter, the court, without handing down an opinion, entered an order reciting that the ninth account of the executors "being now presented for approval, the same is, after examination by the Court, approved and passed, the executors being allowed $12,390.72 commission on income, as claimed, but being hereby allowed

$50,000.00 commission on increase in principal instead of $78,596.47 claimed."

It thus is apparent that the court allowed the commission of $50,000 " upon profits realized on proceeds of inventoried items, and the par or face value of stocks received as dividend, viz, $1,571,929.32," for which the executors had claimed a commission of $78,596.47, on the ground that these profits and the par or face value of the stock dividends constituted an " increase in principal " upon which a commission could be allowed.

The beneficiaries do not challenge here so much of this allowance as was based on the $1,604.32 of profits realized from inventoried items, on which the executors claimed a commission of 5 per cent., or $80.22. And the sole question presented is whether the remainder of the $50,000 allowed as a " commission on increase in principal," that is, at least $49,019.78, which was based solely on the $1,570,325 of stock dividends, was properly allowed.

The Court of Appeals—after stating that the orders in a proceeding in the District Probate Court are reviewable only in accordance with the practice at common law by which the evidence must be brought up in a bill of exceptions, and that the record did not contain any bill of exceptions or purport to show the substance of the testimony—said: " The court below, evidently after a hearing in which all pertinent facts and circumstances were considered, reached the conclusion that the executors were entitled to $50,000 commission on increase in principal, and made that allowance. The facts and circumstances upon which this allowance was based are not before us, and, there being nothing on the face of the record to indicate error, it is apparent that the judgment must be affirmed. . . ." We think this was error.

This proceeding is not like one for the probate of a will involving an issue as to the competency of the testator, in

which the parties have a right to a trial by jury and to bills of exception covering the rulings of the court during the progress of the trial, and a review may be had upon writ of error, *Ormsby* v. *Webb,* 134 U. S. 47, 64, but one in which the District Supreme Court, sitting in probate, is clothed, as an orphans' court, with power to proceed with the settlement and distribution of the estate in accordance with equitable principles and procedure, and a controversy in matter of law raised by the exceptions of the beneficiaries to the executors' account, and apparent on the record, is reviewable on appeal. *Kenaday* v. *Sinnott,* 179 U. S. 606, 614.

Here the exceptions raised no issue as to the matters of fact stated in the executors' account, but a question of law merely. There is no recital in the record that the order was based upon any evidence submitted; no reference to the hearing of any evidence; and nothing, we think, from which any inference can be rightly drawn that the court made an investigation of any matters not shown by the executors' account, or allowed the commission on the stock dividends on any ground other than that as matter of law the receipt of the stock dividends constituted an "increase in principal" of the estate.

And as to this we think the ruling was erroneous. There was, it is to be noted, no statement in the executors' account that the aggregate value of the dividend shares received and the original shares on hand at the commencement of the accounting period, was any greater than the value of the original shares alone before the dividend shares were issued, or that the value of the principal of the estate had increased in any manner during the accounting period. They made no claim for the allowance of an additional commission on the ground that there had been such an increase; their sole claim being, as shown by their account, that they were entitled

to the additional commission by reason of the fact that they had received stock dividends of the par value stated. And, for aught that appeared from their account, the combined value of the original shares and the dividend shares was precisely the same at the end of the accounting period as the value of the original shares alone at its commencement.

Assuming, but not deciding, that if the executors' account had shown an increase in the value of the principal of the estate during the accounting period, this, if claimed, would have been a proper basis for the allowance of an additional commission, it is clear that the mere fact that the executors had received the stock dividends during the accounting period did not show any increase in the principal of the estate.

In *Gibbons* v. *Mahon,* 136 U. S. 549, 559, 565, in determining whether a stock dividend accrued to the tenant for life under a trust estate, this Court said: "A stock dividend really takes nothing from the property of the corporation, and adds nothing to the interests of the shareholders. Its property is not diminished, and their interests are not increased. After such a dividend, as before, the corporation has the title in all the corporate property; the aggregate interests therein of all the shareholders are represented by the whole number of shares; and the proportional interest of each shareholder remains the same. The only change is in the evidence which represents that interest, the new shares and the original shares together representing the same proportional interest that the original shares represented before the issue of new ones." And the Court quoted with approval the statement in *Williams* v. *Western Union Telegraph Co.,* 93 N. Y. 162, 189, that: "After such a dividend the aggregate of the stockholders own no more interest in the corporation than before. The whole number of shares

before the stock dividend represented the whole property of the corporation, and after the dividend they represent that and no more. A stock dividend does not distribute property, but simply dilutes the shares as they existed before." So in *Eisner* v. *Macomber,* 252 U. S. 189, 211, in which it was held that stock dividends were not taxable as income, the Court said: "The essential and controlling fact is that the stockholder has received nothing out of the company's assets for his separate use and benefit; on the contrary, every dollar of his original investment, together with whatever accretions and accumulations have resulted from employment of his money and that of the other stockholders in the business of the company, still remains the property of the company, and subject to business risks which may result in wiping out the entire investment. Having regard to the very truth of the matter, to substance and not to form, he has received nothing that answers the definition of income within the meaning of the Sixteenth Amendment."

It is apparent, in the light of these decisions, that the stock dividends received by the executors represented no real increase in the principal of the estate during the accounting period. They merely changed the form of the estate's investment in the corporate stocks by increasing the number of its shares, but left the aggregate value of all its shares the same as that before the dividend shares were issued. After their issuance, which necessarily "diluted" the value of the original shares, the dividend shares and the original shares together represented the same proportional interest in the corporate properties that had previously been represented by the original shares alone; no more, and no less. Clearly, therefore, the dividend shares themselves represented no increase in the value of the estate; and they could not properly be taken as the basis for the allowance of a commission to the

executors on the theory that their receipt, in and of itself, constituted an increase in its capital.

The executors' motion to dismiss and affirm must accordingly be denied; and the judgment reversed. But, the Court being advised that the respondent Maxwell, one of the executors, has died since January 20, 1927, the day on which this case was argued and submitted, the judgment here will be entered *nunc pro tunc* as of that day. *Quon Quon Poy* v. *Johnson*, 273 U. S. 352, and cases cited.

Judgment reversed, nunc pro tunc.

AMERICAN NATIONAL COMPANY, RECEIVER, *v.* UNITED STATES.

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

No. 167. Argued February 25, 1927.—Decided April 11, 1927.

A corporation, in the business of making and selling loans on five year notes and mortgages, derived its income from commissions in the form of two year notes made by the borrowers; and, in selling loan notes to investors, agreed, as an inducement, to pay them bonuses of a specified per cent. yearly of the loans sold, during the life thereof. *Held* that, under § 13(d) of the Revenue Act of 1916, and regulations of the Treasury pursuant thereto, a method of accounting which accrued the aggregate of the commission notes received during a tax year as income thereof, though not then due and payable, and which similarly accrued the aggregate of bonus contracts made during the year as expenses thereof, correctly reflected the income, and that such aggregate of bonus contracts was properly deducted from the gross of the commissions in ascertaining taxable income. *United States* v. *Anderson*, 269 U. S. 422. P. 103.

Reversed.

APPEAL from a judgment of the District Court in favor of the United States, in a suit under the Claims Act (Jud.

Code § 24, par. 20) to recover an amount paid under protest as an income and excess profits tax.

Mr. Charles H. Garnett, with whom *Mr. Streeter B. Flynn* was on the brief, for appellant.

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

Mr. Justice Sanford delivered the opinion of the Court.

The receiver of the F. B. Collins Investment Company—proceeding under § 24, par. 20, of the Judicial Code,[1]—brought this suit against the United States to recover an additional income and excess profits tax of $4,287.64 that had been assessed against the Company for the year 1917, under the Revenue Act of 1916,[2] and the War Revenue Act of 1917,[3] and paid by it under protest. The District Court, sitting as a Court of Claims, on its findings of fact, entered judgment in favor of the United States, before the effective date of the Jurisdictional Act of 1925. And this direct appeal was allowed. *J. Homer Fritch, Inc.* v. *United States,* 248 U. S. 458.

The question here presented is whether, under the provisions of the Revenue Act of 1916, the Company in computing its taxable net income for 1917, was entitled to deduct from its gross income the amount of certain obligations for the payment of money which it claimed were " expenses " incurred in the operation of its business within that year.

The Revenue Act of 1916 provided, in §§ 12(a) and 13(a), that the net income of a corporation should be ascertained by deducting from its gross income received

[1] U. S. C., Tit. 28, § 41(20).

[2] 39 Stat. 756, c. 463.

[3] 40 Stat. 300, c. 63.

within the year, first, the "ordinary and necessary expenses paid within the year in the maintenance and operation of its business"; and, in § 13(d), that a corporation "keeping accounts upon any basis other than that of actual receipts and disbursements, unless such other basis does not clearly reflect its income, may, subject to regulations made by the Commissioner of Internal Revenue, . . . make its return upon the basis upon which its accounts are kept, in which case the tax shall be computed upon its income as so returned." In Treasury Decision 2433,[4] issued in January, 1917, dealing with the latter provision, the Commissioner ruled that: "Under this provision it will be permissible for corporations which accrue on their books monthly or at other stated periods amounts sufficient to meet fixed annual or other charges to deduct from their gross income the amounts so accrued, provided such accruals approximate as nearly as possible the actual liabilities for which the accruals are made, and provided that in cases wherein deductions are made on the accrual basis as hereinbefore indicated income from fixed and determinable sources accruing to the corporations must be returned, for the purpose of the tax, on the same basis. . . . This ruling contemplates that the income and authorized deductions shall be computed and accounted for on the same basis and that the same practice shall be consistently followed year after year."

The findings of fact show that the Company, an Oklahoma corporation, had been engaged since 1908 in the business of making loans secured by mortgages upon real estate, which it negotiated and sold to investors. Under its usual course of business the borrower, upon the making of a loan, executed to the order of the Company his note for the amount loaned, due in five years, with interest at five per cent. per annum, payable semiannually; with the privilege of paying $100 or any multiple thereof on

[4] Treas. Dec., Int. Rev., 1917, p. 5.

the principal, on or after two years, at the maturity of any interest payment. At the same time the borrower executed to the Company another note due in two years, without interest, for ten per cent. of the total amount of the loan, as the Company's commission or compensation for making and negotiating the loan. From these commission notes the Company derived its income.

At first the Company negotiated and sold the loan notes to investors entirely through brokers or agents, to whom it paid fees or commissions. But from and after 1916 it sold many of these notes direct to investors; and being thus relieved from payment of these fees or commissions, and as an inducement to investors to purchase from it direct, agreed to pay them bonuses upon the notes as added consideration for the purchases; this being evidenced by a contract, styled a Guarantee, which the Company gave the investor, agreeing to pay him during the life of the loan, according to the terms of the note, one per cent. per annum of its amount, in addition to the five per cent. per annum that the borrower was to pay.

The Company consistently kept its books of account from year to year on an " accrual basis." Under the practice followed from the inception of its bonus method of doing business, whenever a loan note was sold it charged on its books, as an expense incurred in the sale, the aggregate amount of the payments called for in the bonus contract, computed at one per cent. per annum to the maturity of the note, and credited the investor on its books with a like amount, in a subsidiary bills payable ledger. The total amount of this liability on the bonus contracts was carried on its general ledger under a control account called the Guarantee Fund Account.

In the year 1917, in accordance with this practice, the Company accrued and set up on its books as a liability and charged to expense, the aggregate amount of the payments called for in the bonus contracts given investors during

that year. And it made its tax return for that year upon the basis upon which the accounts were kept, claiming as an expense the aggregate amount of these bonus contracts, as set up on its books. And, as admitted in argument, although not shown specifically by the findings of fact, it also entered on its books and returned as income received during the year, the aggregate amount of the commission notes given by the borrowers when it made the loans.

Furthermore, under the Company's practice, if any loan note was paid by the borrower before maturity, the difference between the amount of the bonus contract credited to the investor's account and the payments that had been made on the contract, was credited back to Profit and Loss, and treated as income of the Company for the year in which the note was paid.

The Commissioner of Internal Revenue disallowed the claim of the Company for the deduction of the total amount of the bonus contracts issued in 1917, and allowed the deduction only to the extent of the installments called for by such contracts which matured in 1917; and in accordance with this ruling made the additional assessment which is here involved. And the sole question here is whether the Company was entitled to deduct the entire amount of the bonus contracts, as it claimed, or merely such portion thereof as became due within the year, as ruled by the Commissioner.

The Government, although conceding that the bonus contracts "represented an expense" of the Company's business, contends that their total amount was not deductible as an expense "incurred" in 1917, on the grounds that only a part of the obligations "accrued" within that year, and that the method used by the Company in keeping its books did not clearly reflect its true income. We cannot sustain this contention.

In *United States* v. *Anderson,* 269 U. S. 422, 437, we held that where a corporation kept its books on an ac-

crual basis, the amount of a reserve entered thereon for taxes imposed by the United States on the profits of munitions made and sold during the taxable year, should be deducted from its gross income for that year, although they were not assessed and did not become due until the following year. The Court said: "While § 12(a) taken by itself would appear to require the income tax return to be made on the basis of actual receipts and disbursements, it is to be read with § 13(d) . . . providing in substance that a corporation keeping its books on a basis other than receipts and disbursements, may make its return on that basis provided it is one which reflects income. . . . Treasury Decision 2433 . . . recognized the right of the corporation to deduct all accruals . . . made on its books to meet liabilities, provided the return included income accrued and, as made, reflected true net income. . . . A consideration of the difficulties involved in the preparation of an income account on a strict basis of receipts and disbursements . . . indicates with no uncertainty the purpose of §§ 12(a) and 13(d) . . . to enable taxpayers to keep their books and make their returns according to scientific accounting principles, by charging against income earned during the taxable period, *the expenses incurred and properly attributable to the process of earning income during that period;* and indeed, to require the tax return to be made on that basis, if the taxpayer failed or was unable to make the return on a strict receipts and disbursements basis. . . . The [corporation's] true income could not have been determined without deducting from its gross income during the year the total costs and expenses attributable to the production of that income during the year. . . . In the economic and bookkeeping sense with which the statute and Treasury decision were concerned, the [munitions] taxes had accrued. It should be noted that § 13(d) makes no use of the words 'accrue' or 'accrual' but merely provides for

a return upon the basis upon which the taxpayer's accounts are kept, if it reflects income. . . . We do not think that the Treasury decision contemplated a return on any other basis when it used the terms 'accrued' and 'accrual' and provided for the deduction by the taxpayer of items 'accrued on their books.'"

So, in the present case, we think that the amount of the bonus contracts was "an expense incurred and properly attributable" to the Company's process of earning income during the year 1917. These contracts were not analogous to obligations to pay interest on money borrowed, but were expenses incurred in selling the loan notes in as real a sense as if under its original system of doing business the Company had paid these amounts to brokers as fees for selling the loans or given them notes for such fees. The Company's net income for the year could not have been rightly determined without deducting from the gross income represented by the commission notes, the obligations which it incurred under the bonus contracts, and would not have been accurately shown by keeping its books or making its return on the basis of actual receipts and disbursements. The method which it adopted clearly reflected the true income. And, just as the aggregate amount of the commission notes was properly included in its gross income for the year—although not due and payable until the expiration of two years—so, under the doctrine of the *Anderson* case, the total amount of the bonus contracts was deductible as an expense incurred within the year, although it did not "accrue" in that year, in the sense of becoming then due and payable.

We conclude that the assessment of the additional tax, having been based upon an erroneous disallowance of the deduction claimed by the Company, was invalid; and that the receiver was entitled to recover the amount paid, with interest.

The decree of the District Court is accordingly

Reversed.

UNITED STATES EX REL. NORWEGIAN NITROGEN PRODUCTS COMPANY, INC. *v.* UNITED STATES TARIFF COMMISSION.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 91. Argued March 3, 4, 1927.—Decided April 11, 1927.

1. Under Jud. Code § 250, before the Act of February 13, 1925, a judgment of the Court of Appeals of the District of Columbia, affirming dismissal of a petition for mandamus in which the construction of a federal law was drawn in question, was reviewable here by writ of error. P. 110.
2. No duty of the Tariff Commission to make an investigation of comparative costs of production here and abroad arises under the Revenue Act of September 8, 1916, or the Tariff Act of 1922, except when required by the President under § 315 of the latter. P. 110.
3. An action in mandamus to compel the Commission to reopen an investigation of differences in cost of production, which it conducted under an Executive Order as an aid to the President in adjusting tariff duties under § 315 of the Tariff Act of 1922, and to disclose to the petitioner information obtained at a prior hearing and allow him to cross-examine witnesses and introduce evidence, became moot when the President fixed the duties, on the Commission's report. P. 110.
4. In the absence of an injunction or restraining order, an administrative body, after judgment in its favor in an action to control its conduct by mandamus, may proceed to dispose of the matter before it notwithstanding the pendency of a writ of error to the judgment. P. 111.
5. A case becoming moot pending review should be remanded with directions to dismiss. P. 112.

6 F. (2d) 491, reversed.

ERROR to a judgment of the Court of Appeals of the District of Columbia which affirmed a judgment of the Supreme Court of the District dismissing on demurrer a petition for a mandamus to require the Tariff Commission to disclose information obtained by it in an investigation

of costs of production of sodium nitrite and to hold a public hearing, with leave to the plaintiff to cross-examine investigators and witnesses and offer opposing evidence.

Messrs. George R. Davis and *Marion DeVries* for plaintiff in error.

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

Mr. Justice Stone delivered the opinion of the Court.

The Tariff Act of September 21, 1922, c. 356, § 315, 42 Stat. 858, 941, vested in the President the power to adjust tariff duties so as to equalize differences in costs of production here and abroad of articles wholly or in part the growth or product of this country, whenever an investigation by the Tariff Commission should reveal disparate costs. Such investigation is made a prerequisite to action by the President in proclaiming changes of rates. By Executive Order of October 7, 1922, it was provided that all petitions or applications for action or relief under the so-called flexible sections of the Tariff Act of 1922 should be filed with the Tariff Commission.

In October, 1922, the American Nitrogen Products Company, a corporation of the State of Washington, filed with the United States Tariff Commission a petition praying for a fifty per cent. increase in the duty imposed by the Tariff Act of 1922 upon imported sodium nitrite. The following March, the Tariff Commission, for the purpose of assisting the President in the exercise of the powers delegated to him by the Act of 1922, ordered an investigation of the differences in cost of production of sodium nitrite at home and abroad, and of other pertinent facts and conditions. It was further ordered that all parties interested should be given an opportunity to be

present and produce evidence at a public hearing to be held at a date to be fixed later.

Plaintiff in error is engaged in the importation of nitrogen products into the United States which it sells on commission. It represents in the United States, as exclusive agent, the Norwegian Hydro-Electric Nitrogen Corporation, the only manufacturer of sodium nitrite in Norway. Representatives of the Commission, in the course of its investigation, proceeded to Norway and Germany and sought from the Norwegian company and from German manufacturers data showing the cost of production of sodium nitrite in those countries. This was refused. The Commission's experts were permitted to examine the books and records of American manufacturers, obtaining information of the domestic cost of production and other relevant data. This information was given under promise that it would be treated as confidential and upon the assurance that the rules of the Commission and § 708 of the Revenue Act of September 8, 1916, c. 463, 39 Stat. 756, 798, so required. Section 708 prohibits the Commission from revealing "the trade secrets or processes" of which it might learn in the course of its investigations.

After making its investigation, the Commission ordered a public hearing to be held on September 10, 1926. Its rules provided that: "Parties who have entered appearances shall prior to the filing of briefs, have opportunity to examine the report of the commissioner or investigator in charge of the investigation and also the record except such portions as relate to trade secrets and processes."

At the hearing, plaintiff appeared by counsel and demanded a complete copy of the application of the American Nitrogen Products Company, and attempted to cross examine its president as to its cost of production. In making these and other similar demands in the course of the hearings, plaintiff relied on the provisions of § 315(c) of the Act of 1922, reading in part: "The commission

shall give reasonable public notice of its hearings and shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard. The commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary." The Commission, holding that its action was controlled by § 708 of the Revenue Act of 1916, prohibiting it from divulging trade secrets or processes of which it acquired information in the course of investigation, excluded the questions asked and disclosed only a copy of the application of the American company, from which a statement of its costs of production had been deleted. On September 15, 1923, the Commission made a preliminary report stating the results of its inquiry. The report contained a review of the data in the possession of the Commission, including an estimate of the cost of production in Norway, based upon such public sources in Norway as were available to it, both the Norwegian company and the plaintiff having refused to give any information on the subject. But, following its settled policy, it withheld all material which would reveal the individual production costs of American manufacturers. Its practice is to publish the average domestic cost, but this was withheld here because the average cost was deemed informative of individual costs in view of the small number of American manufacturers. Hearings were resumed on September 26, at which plaintiff was given an opportunity to offer evidence, to make oral argument and to file briefs. Requests by plaintiff to cross examine the Commission's field examiners and experts and to inspect data gathered by them were refused.

Plaintiff then filed with the Supreme Court of the District of Columbia a petition for mandamus, directing the Tariff Commission to disclose the information which it had obtained concerning the cost of production of sodium nitrite by American and foreign manufacturers, and

directing the commissioners to hold a public hearing at which plaintiff should be given an opportunity to cross examine the investigators and experts of the Commission, and witnesses with respect to such data, to offer evidence in opposition, and to present arguments against the American company's petition. The Commission interposed an answer setting up that § 708 of the Revenue Act forbade the Tariff Commission from disclosing the information sought. To this answer the plaintiff demurred. The demurrer was overruled and final judgment was entered dismissing the petition.

Pending review by the Court of Appeals of the District of Columbia, the Commission completed and submitted its report to the President. On May 6, 1924, the President made proclamation reciting the investigation of the Commission and fixing the duty at a rate found necessary to equalize the cost of production of sodium nitrite at home and abroad. The Court of Appeals affirmed the judgment, holding that the case had become moot by the action of the President in fixing the new rate of duty. Notwithsanding this determination, it reviewed the case at length and announced its conclusion on the merits. 6 Fed. (2d) 491.

The case is properly here on writ of error under § 250 of the Judicial Code before the amendment of February 13, 1925, defendant in error having by its answer drawn in question the construction of § 708 of the Revenue Act. *Santa Fe Pac. R. R.* v. *Work,* 267 U. S. 511; *Brady* v. *Work,* 263 U. S. 435; *Goldsmith* v. *Board of Tax Appeals,* 270 U. S. 117.

We conclude that the case had become moot before the review below and that it is unnecessary for us to indulge in a discussion of the merits. Under § 315 (c) and (e) of the Tariff Act of 1922, the President is given authority to require an investigation by the Commission and it is its duty to make one when so required.

There is no other provision of the Act placing any duty on the Commission to make such an investigation. When not so requested by the President, action by the Commission is discretionary. Under its rules, it is optional with it whether it will employ its resources for investigations sought by an interested party. Section 703 of the Revenue Act of September 8, 1916, under which the Commission was created, requires it to make certain specified studies of the administration and operation of the tariff laws of the United States and tariff relations of the United States with foreign countries, on request of the President and certain Committees of the two houses of Congress. That Act has no relevancy here since, unlike the Act of 1922, it contains no provisions for hearings in conjunction with the investigations there authorized.

All relief sought here is incidental to the hearing before the Commission on the cost of production of sodium nitrite. The Commission conducted its inquiry and held these hearings to aid the President in determining whether the difference in cost of that product in this and in foreign countries should be equalized by revising the tariff under § 315(a) of the Act of 1922. The hearing pending when the plaintiff's petition was filed has been concluded, as it lawfully might, since there was no injunction or restraining order and the Commission's action was taken after the determination of the Supreme Court of the District in its favor. We need not consider here the effect upon judicial review of an attempt to evade or forestall a decision adverse to the Commission. The Commission has filed its report with the President and the President has made his decision and proclamation fixing the revised tariff. Either may revive the investigation but neither is under a duty to do so. Assuming that the plaintiff is entitled to a hearing of the character demanded whenever an investiga-

tion is had, which we do not decide, it would be an idle ceremony to require such a hearing upon an investigation which we may not command and which may never be made. In such circumstances there can be no effectual relief by mandamus and the Court of Appeals should have remanded the cause with directions to dismiss the petition as moot. *Brownlow* v. *Schwartz,* 261 U. S. 216; *Mills* v. *Green,* 159 U. S. 651, 653.

The argument is made that the President was without jurisdiction to proclaim the new tariff rate because of alleged irregularities in the conduct of the hearing before the Commission which was a prerequisite to such action by the President. But petitioner does not attack the validity of the tariff proclaimed by the President; nor is this an appropriate proceeding in which to do so. Even if the change in tariff rates were deemed to be ineffectual, it would not follow that it is mandatory upon the President or the Commission to institute a new hearing.

The judgments of the Court of Appeals and the Supreme Court of the District of Columbia are vacated and the cause remanded with directions to dismiss the petition as moot.

So ordered.

LOUIS PIZITZ DRY GOODS COMPANY, INC. v. YELDELL, ADMINISTRATOR.

ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

No. 171. Argued February 25, 28, 1927.—Decided April 11, 1927.

A state law allowing punitive damages to be assessed in actions against employers for deaths caused by negligence of their employees—the object of the statute being to prevent negligent destruction of human life—does not violate the due process clause of the Fourteenth Amendment. P. 114.

213 Ala. 222, affirmed.

ERROR to the Supreme Court of Alabama, to review a judgment sustaining a recovery in an action for death by negligence.

Mr. J. P. Mudd for plaintiff in error.

Mr. Benjamin F. Ray, with whom *Mr. Hugo L. Black* was on the brief, for defendant in error.

MR. JUSTICE STONE delivered the opinion of the Court.

Defendant in error, an administrator, brought suit in the circuit court of Jefferson County, Alabama, to recover for the wrongful death of his intestate, caused by the negligent operation of an elevator by an employee of plaintiff in error in its department store. The action was founded upon the so-called Homicide Act of Alabama, § 5696, Code of 1923, printed in the margin.* This statute authorizes the recovery of damages from either a principal or an agent, in such amount as the jury may assess, for wrongful act or negligence causing death. The jury returned a verdict of $9,500 and judgment for that amount was affirmed on

* "A personal representative may maintain an action, and recover such damages as the jury may assess in a court of competent jurisdiction within the State of Alabama and not elsewhere for the wrongful act, omission or negligence of any person or persons, or corporation, his or their servants, or agents, whereby the death of his testator or intestate was caused, if the testator or intestate could have maintained an action for such wrongful act, omission, or negligence, if it had not caused death. Such action shall not abate by the death of the defendant, but may be revived against his personal representative; and may be maintained, though there has not been prosecution, or conviction, or acquittal of the defendant for the wrongful act, or omission, or negligence; and the damages recovered are not subject to the payment of the debts or liabilities of the testator or intestate, but must be distributed according to the statute of distributions. Such action must be brought within two years from and after the death of the testator or intestate."

appeal. 213 Ala. 222. The case comes here on writ of error. Jud. Code, § 237, as amended.

Plaintiff in error does not deny its liability for the negligent act of its employee. But it calls attention to the fact that the Homicide Act imposing liability upon the employer for death resulting from the wrongful acts, omissions or negligence of its employees, as interpreted by the state courts, permits the jury, as in this case, to assess punitive damages against the employer for the mere negligence of its employee. *Richmond & Danville R. R.* v. *Freeman,* 97 Ala. 289. A statute which so authorizes the mulcting of the employer, it is argued, is "unreasonably oppressive, arbitrary, unjust, violative of the fundamental conceptions of fair play, and, therefore, repugnant to the Fourteenth Amendment."

The legislation now challenged has been on the statute books of Alabama in essentially its present form since 1872. The liability imposed is for tortious acts resulting in death, but the damages, which may be punitive even though the act complained of involved no element of recklessness, malice or wilfulness, may be assessed against the employer who, as here, is personally without fault. The Supreme Court of Alabama has repeatedly ruled that the statute is aimed at the prevention of death by wrongful act or omission. *Savannah & Memphis R. R.* v. *Shearer,* 58 Ala. 672, 680; *South and North Alabama R. R.* v. *Sullivan,* 59 Ala. 272, 279. "The statute is remedial, and not penal, and was designed as well to give a right of action where none existed before, as to 'prevent homicides,' and the action given is purely civil in its nature for the redress of private, and not public wrongs." *Southern Ry.* v. *Bush,* 122 Ala. 470, 489. In defining the scope of the act, the state court has pointed out that the extent of the culpability and the amount of the verdict are for the jury and that its finding is not to be disturbed unless the verdict

is "induced or reached on account of prejudice, passion, or other improper motive or cause." *Mobile Electric Co.* v. *Fritz,* 200 Ala. 692, 693. The case was argued here on the assumption that its scope was thus limited and we so interpret the statute. Its constitutionality has been upheld by both state and federal courts. *Richmond & Danville R. R.* v. *Freeman, supra; U. S. Cast Iron & Foundry Co.* v. *Sullivan,* 3 Fed. (2d) 794.

The objections now urged to a new form of vicarious liability were considered and rejected in the Workmen's Compensation cases, *New York Central R. R.* v. *White,* 243 U. S. 188; *Mountain Timber Co.* v. *Washington,* 243 U. S. 219, as they must be rejected here. The extension of the doctrine of liability without fault to new situations to attain a permissible legislative object is not so novel in the law or so shocking "to reason or to conscience" as to afford in itself any ground for the contention that it denies due process of law. The principle of *respondeat superior* itself and the rule of liability of corporations for the wilful torts of their employees, extended in some jurisdictions, without legislative sanction, to liability for punitive damages, *Boyer & Co.* v. *Coxen,* 92 Md. 366; *Hanson* v. *E. & N. A. R. R.,* 62 Me. 84; *Jeffersonville R. R.* v. *Rogers,* 38 Ind. 116; *Atlantic & Great West. Ry.* v. *Dunn,* 19 Ohio St. 162; see *Jefferson County Savings Bank* v. *Eborn,* 84 Ala. 529, 534; *contra, Lake Shore Ry.* v. *Prentice,* 147 U. S. 101, are recognitions by the common law that the imposition of liability without personal fault, having its foundation in a recognized public policy, is not repugnant to accepted notions of due process of law. No constitutional question was presented in *Lake Shore Ry.* v. *Prentice, supra,* and this Court thus was free to choose as between these conflicting common law rules the one which it thought most appropriate.

Lord Campbell's Act and its successors, establishing liability for wrongful death where none existed before,

the various Workmen's Compensation Acts, imposing new types of liability, are familiar examples of the legislative creation of new rights and duties for the prevention of wrong or for satisfying social and economic needs. Their constitutionality may not be successfully challenged merely because a change in the common law is effected. As interpreted by the state court, the aim of the present statute is to strike at the evil of the negligent destruction of human life by imposing liability, regardless of fault, upon those who are in some substantial measure in a position to prevent it. We cannot say that it is beyond the power of a legislature, in effecting such a change in common law rules, to attempt to preserve human life by making homicide expensive. It may impose an extraordinary liability such as the present, not only upon those at fault but upon those who, although not directly culpable, are able nevertheless, in the management of their affairs, to guard substantially against the evil to be prevented. See *St. Louis & Iron Mountain Ry.* v. *Taylor,* 210 U. S. 281; *Texas & Pacific Ry.* v. *Rigsby,* 241 U. S. 33, 43; *Wilmington Mining Co.* v. *Fulton,* 205 U. S. 60; cf. *Van Oster* v. *Kansas,* 272 U. S. 465. Or it may impose on the business or enterprise in which such loss of life occurs the economic burden of the protective measure adopted, *New York Central R. R.* v. *White, supra; Second Employers' Liability Cases,* 223 U. S. 1; or return to and substitute the common law method of permitting the jury to fix the amount of recovery, at least to the extent of an exercise of its reasonable judgment, for the present-day method of weighing and measuring the value of human life.

The distinction between punitive and compensatory damages is a modern refinement. The first use of the term "exemplary damages" is ascribed to Lord Camden in *Huckle* v. *Money,* 2 Wils. 205. See Sedgwick, Damages, § 348. Although sporadic instances of new trials being

ordered because the verdict was excessive may be found in the early common law, see *Wood* v. *Gunston,* Style 466; *Chambers* v. *Robinson,* 2 Stra. 691, it was not until much later that the formal practice developed, *Duberley* v. *Gunning,* 4 T. R. 654; *Wilford* v. *Berkeley,* 1 Burr. 610; Mayne, Damages, 691, and the fixed rules of damage evolved.

Judgment affirmed.

NEW YORK DOCK COMPANY *v.* STEAMSHIP POZNAN, ETC., ET AL.

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

No. 229. Argued March 15, 1927.—Decided April 11, 1927.

1. Wharfage service rendered to an arrested ship with the approval or permission of the admiralty court and inuring to the benefit of the fund arising from her sale is entitled to preference, in the distribution of the fund, over the claims of libeling cargo owners. P. 120.
2. Such preference is not based on a lien but is an incident of the equitable administration of the fund. P. 120.
3. A finding of a special commissioner, confirmed by the District Court, as to the reasonable value of wharfage should not be disturbed here when based on a fair trial and sustained by evidence. P. 123.
4. Objections respecting the amount so found, not raised or considered below, will be examined here only so far as necessary to make certain that no palpable error was committed. P. 123.

9 F. (2d) 838, reversed.
297 Fed. 345, affirmed.

CERTIORARI (269 U. S. 547) to a decree of the Circuit Court of Appeals which reversed a decree of the District Court, in admiralty, allowing preferential payment of wharfage out of a fund arising from the sale of a vessel.

Mr. Alexander J. Field, with whom *Messrs. Joseph S. Auerbach, Charles E. Hotchkiss,* and *Charles H. Tuttle* were on the brief, for petitioner.

Messrs. George W. Betts, Jr., and *Mark W. Maclay,* with whom *Edna F. Rapallo* was on the brief, for respondents.

Mr. Justice Stone delivered the opinion of the Court.

This case involves the right of a wharf owner to preferential payment from the proceeds of a vessel, for wharfage furnished the vessel while in the custody of a United States marshal under a warrant of arrest in admiralty. The owner of the S. S. Poznan entered into a contract with petitioner, the owner of a private pier in New York harbor, for the use of the pier for discharging cargo from December 1, 1920 until completion. The rate agreed upon was $250 per day, plus certain incidental charges not now material. On December 2, 1920, the Poznan was made fast to the pier. Later in the day, she was arrested by the United States marshal for the district upon libels, afterward consolidated into a single cause, for non-delivery of the vessel's cargo and for damages for breach of contracts of affreightment. The marshal allowed the vessel to remain at the pier. Later, on application of one of the libelling cargo owners, the district court ordered the delivery of a part of the cargo which that libellant had shipped, and made the order applicable to all other libellants who should make a like claim. The discharge of the cargo was then begun and deliveries were made to the several libellants in the consolidated cause, including respondent, the John B. Harris Co.

After the cargo had been about one-half discharged, the charterer applied to the district court for leave to move the vessel to another pier where the cargo could be removed more expeditiously. But, on request of some of the libellants and a committee representing the ship-

pers, the application was denied on January 5, 1921. The vessel was unloaded by February 18, 1921. Delivery of the cargo from the pier was completed March 1, 1921, but the vessel remained fast to the pier to and including March 11, 1921, when she was removed.

Meanwhile, the marshal having declined to pay the bill for wharfage without an order of the court, petitioner, in April, 1921, filed its libel against the vessel for the balance of wharfage charges unpaid, aggregating $17,462. By order of the district court, the libellants in the consolidated cause were permitted to intervene. Respondent, the John B. Harris Co., served notice of intervention, and filed its answer denying the allegations in the libel and praying that it be dismissed on the ground, among others, that the wharfage was furnished while the vessel was in the custody of the marshal, and hence no maritime lien could arise. Respondent has since prosecuted the defense in behalf of all the other libellants in the consolidated cause.

The vessel was later sold under an order in the consolidated cause and the proceeds, which were not enough to satisfy the libellants, paid into the registry of the court. The libellants in the consolidated suit have made common cause by stipulation that the recovery under the final decree should be paid to trustees and distributed in accordance with the instructions of a committee representing all of them. The committee found the total claims of the libellants to exceed the amount of the proceeds of the ship. A pro rata distribution has been made to the claimants and an adequate amount reserved to pay the demand of the petitioner, if allowed in this suit. The marshal, although refusing petitioner's request for payment of the wharfage charge, nevertheless included it in his bill of costs and expenses in the consolidated cause and charged his commission on this amount. The court disallowed these items but "without prejudice to any

rights of the New York Dock Company to have recourse against the proceeds of the vessel . . ."

The district court, in the present libel, allowed as a preferential payment from the proceeds of the ship, the reasonable value of the benefits resulting to the consolidated libellants from the wharfage and incidental service furnished by petitioner, to be determined by a special master. This was found by the master and held by the district court to be the reasonable value of the wharfage. A decree for this amount, less certain payments on account made by the owner of the ship, pursuant to the original contract of wharfage, 297 Fed. 345, was reversed by the circuit court of appeals for the second circuit. 9 F. (2d) 838. This Court granted certiorari. 269 U. S. 547.

The court below held that as the wharfage was furnished after the arrest of the ship, and while it was in the custody of the law, no maritime lien could attach, and that a preferential payment could not be supported upon any other theory applicable to the facts of this case.

A question much argued, both here and below, was whether the case could be considered an exception to the general rule that there can be no maritime lien for services furnished a vessel while *in custodia legis*. Cf. *The Young America*, 30 Fed. 789; *The Nisseqogue*, 280 Fed. 174; *Paxson* v. *Cunningham*, 63 Fed. 132; *The Willamette Valley*, 66 Fed. 565. But, in the view we take, the case does not turn upon possible exceptions to that rule, as we think petitioner's right of recovery depends, as the district court ruled, not upon the existence of a maritime lien, but upon principles of general application which should govern whenever a court undertakes the administration of property or a fund brought into its custody for the benefit of suitors.

The libellants in the consolidated cause were not only concerned as owners in securing delivery of the cargo, but as lienors they were interested in the ship and, as eventually appeared, in the whole of her proceeds. Serv-

ice rendered to the ship after arrest, in aid of the discharge of cargo, and afterward pending the sale, necessarily inured to their benefit, for it contributed to the creation of the fund now available to them. The most elementary notion of justice would seem to require that services or property furnished upon the authority of the court or its officer, acting within his authority, for the common benefit of those interested in a fund administered by the court, should be paid from the fund as an "expense of justice." *The Phebe,* 1 Ware 354, 359, Fed. Cases 11065. This is the familiar rule of courts of equity when administering a trust fund or property in the hands of receivers. The rule is extended, in making disposition of the earnings of the property in the hands of the receiver, to require payment of sums due for supplies furnished before the receivership, where their use by the debtor or receiver in the operation of the property has produced the earnings. See *Fosdick* v. *Schall,* 99 U. S. 235; *Thomas* v. *Western Car Co.,* 149 U. S. 95, 110; *Virginia & Alabama Coal Co.* v. *Central R. R.,* 170 U. S. 355; *St. Louis, &c. R. R.* v. *Cleveland, &c. Ry.,* 125 U. S. 658, 663, 673; *Southern Ry.* v. *Carnegie Steel Co.,* 176 U. S. 257; *Pennsylvania Steel Co.* v. *New York City Ry.,* 208 Fed. 168; *Pennsylvania Steel Co.* v. *New York City Ry.,* 216 Fed. 458, 470.

Such preferential payments are mere incidents to the judicial administration of a fund. They are not to be explained in terms of equitable liens in the technical sense, as is the case with agreements that particular property shall be applied as security for the satisfaction of particular obligations or vendors' liens and the like, which are enforced by plenary suits in equity. They result rather from the self-imposed duty of the court, in the exercise of its accustomed jurisdiction, to require that expenses which have contributed either to the preservation or creation of the fund in its custody shall be paid before a general distribution among those entitled to receive it.

We need not inquire here into the exact limits of the powers of courts of admiralty to administer equitable relief as distinguished from that peculiar to the courts of admiralty. This is not a suit, as the court below seemed to think, for the enforcement of an equitable lien. The court of admiralty is asked, in the exercise of its admiralty jurisdiction, to administer the fund within its custody in accordance with equitable principles as is its wont. Cf. *United States* v. *Cornell Steamboat Co.*, 202 U. S. 184, 194; *The Eclipse*, 135 U. S. 599, 608; Benedict, Admiralty, 5th ed., § 70. It is defraying from the proceeds of the ship in its registry an expense which it has permitted for the common benefit and which, in equity and good conscience, should be satisfied before the libellants may enjoy the fruits of their liens.

Such a preferential payment from the proceeds of the ship, for wharfage furnished to her while in custody, was allowed by the court below in *The St. Paul*, 271 Fed. 265. But in the present case, that court thought that *The St. Paul* case was to be distinguished on the ground that there the wharfage service was furnished and the obligation incurred in accordance with an order made by the court and with the consent of the libellants. But here the court denied a motion to remove the ship from petitioner's wharf with the consent of some of the libellants and with full knowledge of all concerned that the wharfage was then being furnished. The libellants in the consolidated cause, who are united in interest with respondent in the present case, thus appear to have acquiesced in this determination. We are unable to perceive any basis for a distinction between action of the court in authorizing the ship to proceed to the wharf to enable it to discharge its cargo in the one case, and authorizing it to remain there for a like purpose in the other. It is enough if the court approves the service rendered or per-

mits it to be rendered, and it inures to the benefit of the property or funds in its custody.

Objection is made that the amount found by the special master and confirmed by the district court as the reasonable value of the wharfage furnished is excessive, but this issue of fact was fairly tried. The finding of the special commissioner is supported by the evidence and should not be disturbed here. Respondent attempts to raise here questions with respect to the amount of recovery which were neither raised nor considered below. We have examined them only so far as is necessary to ascertain that no error was committed by the district court so plain or apparent as to warrant our consideration on such a state of the record. Cf. *Pierce* v. *United States*, 255 U. S. 398, 405; *Hiawassee Power Co.* v. *Carolina-Tenn. Co.*, 252 U. S. 341; *Ill. Cent. R. R.* v. *Mulberry Coal Co.*, 238 U. S. 275, 281; *Givens* v. *Zerbst*, 255 U. S. 11, 22; *Tilden* v. *Blair*, 21 Wall. 241, 249.

The decree below must be reversed and that of the District Court reinstated.

Reversed.

MR. JUSTICE HOLMES took no part in the consideration and decision of this case.

FIDELITY NATIONAL BANK & TRUST COMPANY OF KANSAS CITY ET AL. *v.* SWOPE ET AL.

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

No. 46. Argued April 29, 30, 1926.—Decided April 11, 1927.

1. Where jurisdiction of the District Court was based on diverse citizenship as well as the constitutional question raised by the bill, its decree was appealable to the Circuit Court of Appeals, (Jud. Code § 128), and the decree of that court appealable here, under Jud. Code § 241, before amendment. P. 125.

2. In a suit under § 28 of Art. VIII of the Kansas City Charter, to validate a special improvement ordinance and proposed assessments of the cost on the lands within the benefit district described in the ordinance, notice to the property owners by publication in a local newspaper is sufficient to constitute due process. Pp. 130, 134.
3. A proceeding under § 28 of Art. VIII of the Kansas City Charter, brought in a state court of plenary jurisdiction by the City against the owners of property in a benefit district for the purpose of determining the validity of an ordinance authorizing a special improvement and of proposed assessments and liens under the ordinance, is a judicial proceeding in which the sole duty of the court is to pass on questions of law and to inquire judicially into the facts only so far as necessary in applying the law—a "case" or "controversy," within the meaning of Const. Art. III, § 2; and a judgment validating the ordinance and proposed liens is *res judicata,* preventing further litigation of these matters by the property owner or his privies in the state or federal courts, otherwise than by appeal. P. 130.
4. A decision of the state supreme court determining the effect of judgments in such proceedings, as *res judicata,* must be accepted by this Court, though rendered after the litigation which raised the question in this Court was begun. P. 134.
5. In a suit of the kind above described, the contractor who subsequently does the improvement work, and those to whom he assigns the tax bills he receives in payment are represented by the City; so that the estoppel may be availed of by such assignees in a suit by a property owner to annul their tax bills. P. 135.
6. Award of process of execution is not an indispensable adjunct to exercise of the judicial function. P. 132.

2 F. (2d) 676, reversed.

APPEAL from a decree of the Circuit Court of Appeals which affirmed a decree of the District Court (274 Fed. 801) adjudging void and canceling certain tax bills, held by appellants, which had been issued to defray the cost of grading a boulevard in Kansas City.

Messrs. Frank P. Barker and *Justin D. Bowersock,* with whom *Messrs. Samuel J. McCulloch* and *Hunter M. Meriwether* were on the brief, for appellants.

Mr. Elliott H. Jones, with whom *Messrs. W. C. Scarritt, Edward S. North,* and *A. D. Scarritt* were on the brief, for appellees.

MR. JUSTICE STONE delivered the opinion of the Court.

Appellees brought suit in the District Court for western Missouri to have certain assessments of benefits on their lands for the alleged pro rata share of the cost of grading Meyer Boulevard in Kansas City declared null and void, and to have canceled certain tax bills issued to defray the cost of grading. Appellants are the holders of these bills which they acquired by purchase. The jurisdiction of the district court rested upon diversity of citizenship and the allegation in the bill that the assessments and the proceedings had in levying them violated the due process clause of the Fourteenth Amendment. The district court, after trial, gave judgment for the relief prayed, 274 Fed. 801, which was affirmed by the court of appeals for the eighth circuit. 2 F. (2d) 676.

Since the jurisdiction of the district court was based upon grounds in addition to the constitutional question raised by the bill, the appeal was rightly taken to the circuit court of appeals. Jud. Code, § 128. The case is properly here on appeal from that court. Jud. Code, § 241, before amended. *Risty* v. *Chicago, R. I. & Pac. Ry. Co.,* 270 U. S. 378; *Weiland* v. *Pioneer Irrigation Co.,* 259 U. S. 498.

The city council of Kansas City, by ordinance adopted in 1915, authorized the present grading improvement. Meyer Boulevard, as projected, is a broad highway extending westwardly from Swope Park, a large public park in Kansas City, connecting with numerous boulevards extending north into the business section of the city. The boulevard varies from two hundred to five hundred feet in width. Provision is made for parkways between the

driveways so that, of the total improved area of thirty-one acres, approximately twenty acres are made up of a grass parkway. The carrying out of the project involved extensive grading and relatively large expense.

Section 3, Art. VIII of the Kansas City charter imposes the cost of ordinary street grading upon the owners of abutting property extending a limited distance from the street. But in view of the extraordinary character of the projected improvement of Meyer Boulevard, proceedings were had under § 28 of Art. VIII of the city charter. This section, printed so far as relevant in the margin,[1] establishes a procedure which may be followed for levying a special tax on any lands benefited when the improvement involves an " unusual amount of filling in or cutting or grading away . . . necessitating an expense of

[1] " When in grading or regrading any street, avenue, highway, or part thereof, a very large or unusual amount of filling in or cutting or grading away of earth or rock be necessary, necessitating an expense of such magnitude as to impose too heavy a burden on the land situate in the benefit district as limited in Section three . . . , the cost of grading or regrading such street, . . . may be charged as a special tax on parcels of land (exclusive of improvements) benefited thereby, after deducting the portion of the whole cost, if any, which the city may pay, and in proportion to the benefits accruing to the said several parcels of land, exclusive of improvements thereon, and not exceeding the amount of said benefit, said benefits to be determined by the Board of Public Works as hereinafter provided, and the limits within which parcels of land are benefited shall in all such specified instances be prescribed and determined by ordinance. . . .

" The public work described above shall be provided for by ordinance, and the city may provide that after the passage of the ordinance and after an approximate estimate of the cost of the work shall have been made by the Board of Public Works, the city shall file a proceeding in the Circuit Court of Jackson County, Missouri, in the name of the city, against the respective owners of land chargeable under the provisions of this section with the cost of such work. In such proceeding the city shall allege the passage and approval of the ordinance providing for the work, and the approximate estimate of the cost of said work; and shall define and set forth the limits of the

such magnitude as to impose too heavy a burden on the land situate in the benefit district as limited in Section three . . ."

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benefit district, prescribed by the ordinance, within which it is proposed to assess property for the payment of said work. The prayer of the petition shall be that the court find and determine the validity of said ordinance, and the question of whether or not the respective tracts of land within said benefit district shall be charged with the lien of said work in the manner provided by said ordinance.

"Service of process in such proceeding shall be governed by the provisions of Section eleven (11) of Article thirteen (XIII) of this Charter, relating to service of notice and summons in proceedings for the ascertainment of benefits and damages for the condemnation of land for parks and boulevards. In such proceedings, the city shall have the right to offer evidence tending to prove the validity of said ordinance, and said proposed lien against the respective lots, tracts and parcels of land within said benefit district sought to be charged with such lien; and the respective owners of lots, tracts and parcels of land within said benefit district shall have the right to introduce evidence tending to show the invalidity or lack of legality of said ordinance, and said proposed lien against the respective lots, tracts, and parcels of land owned by each respective defendant; and the court shall have the right to determine the question of whether or not the said lots, tracts and parcels of land owned by each defendant should be charged with such lien.

"The trial of such proceeding shall be in accordance with the Constitution and Laws of the State, and the court shall render judgment either validating such ordinance, and proposed lien against the lots, tracts and parcels of land within said benefit district or against such lots, tracts or parcels of land within said benefit district or against such lots, tracts, or parcels of land as the court may find legally chargeable with the same, or the court may render judgment that such ordinance or proposed lien are, in whole or in part, invalid and illegal.

"Any appeal taken from such judgment must be taken within ten days after the rendition of such judgment, or if a motion for a new trial be filed therein, then within ten days after such motion may be overruled or otherwise disposed of; . . .

"If no appeal shall be taken, or after the determination of such appeal, the city may enter into a contract with the successful bidder

Following the prescribed procedure, the city council passed an ordinance authorizing the improvement now in question, fixing the boundaries of the benefit district, which embraced the lands of appellees, and directing that the lands within the district should be assessed for the cost of the improvement in proportion to their value as determined under the charter. The ordinance directed that suit be brought by the city in the circuit court of Jackson County against the property owners in the benefit district for the purpose of validating the ordinance and the liens for the cost of the improvements. The Board of Public Works having made its estimate of the approximate cost of the grading, suit was brought by the city in the Jackson County circuit court. Notice of the proceeding was given all owners of property within the benefit district by four weeks' publication in a designated local newspaper in accordance with the statute. Proof of service was approved by the court. The appellee Swope entered no appearance but the appellee Brown appeared and raised by answer numerous objections to the ordinance and assessment, including those pressed here. The material parts of the answer, set forth in the margin,[2] indicate the

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to whom such work may be let; and, after the work under such contract shall have been fully completed, the estimate of cost thereof, and the apportionment of the same against the various lots, tracts and parcels of land within the benefit district, shall be made by the Board of Public Works according to the assessed value thereof, exclusive of improvements, with the assistance of the City Assessor as provided in Section three of this article, and all of the provisions of Section three of this article relating to the apportionment of special assessments, and the levy, issue and collection of special tax bills as in grading proceedings as in said section specified, shall apply to special tax bills issued pursuant to this section, ..."

[2] "Said parties state that they are the defendants herein and the owners of said property, and that said property does not abut on Meyer Boulevard; that the South line thereof is a quarter of a mile from said boulevard, and the north line thereof is a half mile from

scope of this proceeding. After a hearing, the court entered its judgment declaring valid the ordinance and the proposed assessments and liens, when effectuated in accordance with the ordinance. The motion of the appellee Brown for a new trial was denied. No appeal was taken from the decree of the court, which thus became final. The city then let the contracts for the improvements, which have been completed. The costs have been apportioned according to the valuation of the lands made by the city assessor, and tax bills, including those held by appellants, issued against the several tracts for the proportionate part of the special benefit tax assessed.

In this suit to cancel the tax bills so issued, appellees alleged that § 28 of Art. VIII of the charter and the

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said Meyer Boulevard. Said defendants state that their property is not directly benefited by the opening of said boulevard, and is only remotely benefited, as all other property in Kansas City is. That the property of defendants, above described, lines on one boulevard, to-wit: Swope Parkway, upon which is operated a street car line, and it can derive no particular and special benefit from the grading of said Meyer Boulevard. That the grading of said boulevard will greatly enhance the value of the property abutting on said boulevard, and yet, in the apportionment of the cost of said grading, the property of said defendants, fronting on said Swope Parkway, may be assessed at as great a sum as the property on said Meyer Boulevard, and the effect would be that the special tax levied thereunder against the property of defendants may equal, acre for acre, the special tax assessed against the property immediately benefited, to-wit: the property abutting on said Meyer Boulevard.

"Defendants further state, that for the reasons, aforesaid, it would be illegal and improper for the court to declare this ordinance valid, and it would also be illegal for the reason that on its face thereof, the charter provision authorizing this proceeding is void, for the reason that it violates the Constitution of Missouri, and the Constitution of the United States. It would be just as legal to provide that because the paving of said Meyer Boulevard was of an unusual width, and the cost of paving thereof excessive, that the land within half a mile of said boulevard should pay in proportion to its value for the paving of same."

city ordinance and all proceedings under them violated the Constitution of the United States; that the levying of the tax was an arbitrary and abusive exercise of legislative authority, in that (1) the improvement was general rather than local; (2) that the method of fixing the benefit district was arbitrary, discriminatory and unreasonable, and (3) that the assessment according to the value of the lands benefited, regardless of their remoteness from the improvement, resulted in an assessment greatly exceeding the benefits.

Appellants at the outset argue that all the objections made to the assessments here were open and hence decided against appellees in the proceeding in the Jackson County circuit court, and that its judgment is not open to collateral attack in this or in any other suit, since the issues which might have been litigated there are *res adjudicata* here.

The proceedings in the circuit court were had upon sufficient notice to constitute due process in proceedings of this character. *Lent* v. *Tillson,* 140 U. S. 316; cf. *North Laramie Land Co.* v. *Hoffman,* 268 U. S. 276. The parties to it are concluded by the judgment if the proceeding was judicial rather than legislative or administrative in character. Both courts below held that the questions here in controversy at the time of the hearing in the state court were "moot"; and, even if their adjudication was authorized by the legislature and was specifically made by the circuit court, it would not be binding upon the parties in the federal courts.

But if the determination of the state court was *res adjudicata* according to its laws and procedure, no reason is suggested, nor are we able to perceive any, why it is not to be deemed *res adjudicata* here, if the proceeding in the state court was a "case" or "controversy" within the appellate jurisdiction of this Court, Fed. Const. Art. III, § 2, so that constitutional rights asserted, or which

might have been asserted in that proceeding, could eventually have been reviewed here.

That this proceeding authorized by § 28 of the Kansas City charter was judicial in character appears from an inspection of the statute and the record in the circuit court. The proposed improvement having been authorized, the benefit district established, the estimated cost ascertained, all by action of the city council or the board of public works essentially legislative in character, the jurisdiction of the state court was invoked in an adversary proceeding to determine the validity of the liens imposed or to be imposed under the ordinance. That court is a court of general jurisdiction, having plenary power to determine all questions arising under the state law or the laws and Constitution of the United States. Section 2436 Mo. Rev. Stat. 1919; *Schmelzer* v. *Kansas City,* 295 Mo. 322. These questions are required to be determined in a trial in accordance with the laws and constitution of the State. The sole duty and power of the court is to pass upon questions of law and to inquire judicially into the facts so far as necessary to ascertain the applicable rules of law. See *Keller* v. *Potomac Elec. Co.,* 261 U. S. 428, 440. Under this procedure, the judgment to be awarded finally determines, subject to appeal, the validity of the ordinance authorizing the improvement, the limits of the benefit district, the method of apportioning benefits, and the validity of the proposed liens. That the issues thus raised and judicially determined would constitute a case or controversy if raised and determined in a suit brought by the taxpayer to enjoin further proceedings under the ordinance could not fairly be questioned. Compare *Risty* v. *Chicago, R. I. & Pac. Ry. Co., supra.* They cannot be deemed any the less so because through a modified procedure the parties are reversed and the same issues are raised and finally determined at the behest of the city. We do not think sig-

nificant the fact that under § 28 the city might pay, though it did not, a part of the cost of the improvement and that the council, in authorizing the special tax, is required to deduct from the estimated cost the amount which may be paid by the city. These provisions could not restrict the authority or capacity of the court to pass upon the validity of the benefit district and the special tax actually authorized by the ordinance.

While ordinarily a case or judicial controversy results in a judgment requiring award of process of execution to carry it into effect, such relief is not an indispensable adjunct to the exercise of the judicial function. Naturalization proceedings, *Tutun* v. *United States,* 270 U. S. 568; suits to determine a matrimonial or other status; suits for instructions to a trustee or for the construction of a will, *Traphagen* v. *Levy,* 45 N. J. Eq. 448; bills of interpleader, so far as the stakeholder is concerned, *Wakeman* v. *Kingsland,* 46 N. J. Eq. 113; bills to quiet title where the plaintiff rests his claim on adverse possession, *Sharon* v. *Tucker,* 144 U. S. 533; are familiar examples of judicial proceedings which result in an adjudication of the rights of litigants, although execution is not necessary to carry the judgment into effect, in the sense that no damages are required to be paid or acts to be performed by the parties. Cf. *Kennedy* v. *Babcock,* 19 Misc. (N. Y.) 87; *Cohen* v. *N. Y. Mutual Life Ins. Co.,* 50 N. Y. 610, 625. Nor is it essential that only established and generally recognized forms of remedy should be invoked. "Whenever the law provides a remedy enforceable in the courts according to the regular course of legal procedure, and that remedy is pursued, there arises a case within the meaning of the Constitution, whether the subject of the litigation be property or status." *Tutun* v. *United States, supra,* 577. Thus, naturalization proceedings, *Tutun* v. *United States, supra,* or a special statutory proceeding to determine judicially whether the claim made by a domestic corporation

against a foreign country upon which an award had been made by a United States commissioner pursuant to treaty, had been furthered by fraud, the statute authorizing distribution of the fund in accordance with the judgment, *La Abra Silver Mining Co.* v. *United States,* 175 U. S. 423, are cases or controversies within the meaning of the Constitution.

Tregea v. *Modesto Irrigation District,* 164 U. S. 179, is cited as authority for the proposition that the proceeding had in the Missouri court is not judicial in character. But this Court in that case rested its decision on its interpretation of the California statute in question. It held in effect that the proceeding authorized was not adversary, being a proceeding by the trustee of an irrigation district against the district itself, and that it was essentially *ex parte,* its purpose being to secure evidence on the basis of which the court could render an advisory opinion as to the validity of a pending bond issue. These were considerations which could only lead to the conclusion reached that the proceeding was not a case or controversy of which this Court could take cognizance in the exercise of its appellate jurisdiction.

The present statute admits of no such construction. The proceeding is in terms directed to be " against the respective owners of land chargeable under the provisions of this section with the cost of such work," and the specific issue to be determined by the judgment of the court is whether or not the respective tracts in the benefit district shall be charged with the lien as provided by the ordinance. The court is directed to render judgment " either validating such ordinance, and proposed lien against the lots, . . . within said benefit district or against such lots, . . . as the court may find legally chargeable, . . . or the court may render judgment that such ordinance or proposed lien are, in whole or in part, invalid and illegal." The plain effect of these provisions is to

authorize the court to examine and determine the validity and effect of the legislative action in establishing the benefit district. The result of the proceeding is to establish judicially as against the property owners in the district the validity of such action and of the liens established or to be established conformably to the statute on the specific property described.

The issues presented and the subject matter are such that the judicial power is capable of acting upon them. There is no want of adverse parties necessary to the creation of a controversy as in *Muskrat* v. *United States,* 219 U. S. 346. The judgment is not merely advisory as in *Liberty Warehouse Co.* v. *Grannis,* 273 U. S. 70; *New Jersey* v. *Sargent,* 269 U. S. 328; *Fairchild* v. *Hughes,* 258 U. S. 126; *Massachusetts* v. *Mellon,* 262 U. S. 447; *Texas* v. *Interstate Commerce Commission,* 258 U. S. 158, 162. It operates to determine judicially the legal limits of the benefit district and to define rights of the parties in lands specifically described in the pleadings. So far as it affects owners of land in the benefit district who are citizens of other states, the controversy is a " suit " which may be removed to the federal courts. Jud. Code, § 28; *Road District* v. *St. Louis Southwestern Ry.*, 257 U. S. 547.

That the judgment is binding on the parties and their privies and hence not open to collateral attack would seem to be the only reasonable construction of the statute if that question were for us to decide. But the Supreme Court of Missouri, since the pendency of the present suit, has held that the judgment rendered by the Jackson County Circuit Court in a similar proceeding is not open to collateral attack by the property owners within the benefit district, and that such property owners may not litigate, in another suit, questions, including the constitutionality under the Fourteenth Amendment of the assessments levied, which might have been raised in the circuit court proceeding. *Schmelzer* v. *Kansas City, supra.* This decision, although subsequent to the insti-

tution of the present suit, effected no change in the local law, upon which appellees had relied. It must be accepted as establishing the effect as *res adjudicata* of the proceeding had under the Missouri statute. Compare *Edward Hines Trustees* v. *Martin,* 268 U. S. 458.

Whether the proceeding be regarded as an action *in rem, Christianson* v. *King County,* 239 U. S. 356, 373, or an action *in personam,* there is in the two litigations a sufficient identity of issues and of parties to conclude the parties to the present suit. *United States* v. *California Bridge Co.,* 245 U. S. 337, 341. Viewed as an action *in personam,* appellants acquired their title to the tax bills by purchase from the contractor, whose right to them was derived through the exercise by the city of powers adjudicated in the circuit court proceedings to be in it and properly exercised by it. As to those powers, and hence their rights originating in the exercise of them, appellants were represented by the city and may take the benefit of the judgment in its favor. *United States* v. *California Bridge Co., supra,* 341.

Judgment reversed.

MORRIS ET AL. *v.* DUBY ET AL., COMMISSIONERS.

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

No. 372. Argued October 29, 1926.*—Decided April 18, 1927.

1. The power of the States to make reasonable regulations to protect highways from damage by vehicles is not affected by the Acts of Congress providing for national and state coöperation in the construction of rural post roads. P. 143.

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* On the above date the Court entered an order remanding the case and vacating the judgment of the District Court upon the ground that the case had become moot. On January 10, 1927, the previous order was vacated on joint motion of counsel and the case was restored for reargument on February 28, 1927. On that day the case was submitted.

2. A state order limiting the maximum weight of motor trucks and loads on highways in the State is valid, if reasonable and non-discriminatory, and is applicable to vehicles moving in interstate commerce, in the absence of legislation by Congress. P. 143.
3. The fact that a truck company, in interstate commerce, may not make a profit if loads are limited as prescribed by a state highway regulation, does not prove the regulation unreasonable or discriminatory, and the fact that its competition with parallel steam roads may be prevented is outweighed by the fact that greater loads damage the highways. P. 144.
4. In the absence of a showing of fraud or abuse of discretion, a finding of the proper state administrative body as to the damage caused to highways by loads exceeding a specified weight must be accepted by this Court. P. 144.
5. The Acts of Congress and of Oregon for state and federal coöperation respecting construction and maintenance of highways do not impose a contractual obligation on the State to continue permitting the weights of trucks and loads that were permitted on the highways when the agreement was made. P. 144.
6. Under the convention effected between the State and the United States by the State's acceptance of the conditions prescribed in the Acts of Congress providing for state and federal coöperation, and use of federal funds, in improvement of highway systems and in facilitating carriage of the mail over them, maintenance of a highway is primarily imposed on the State, and regulation of its use is therefore a state function in which it is not to be interfered with unless regulations adopted are so arbitrary or unreasonable as to defeat the purposes of the federal acts. P. 145.

Affirmed.

APPEAL from a decree of the District Court refusing an interlocutory injunction and dismissing the bill, in a suit to enjoin the members of the Oregon Highway Commission from enforcing an order limiting the weight of trucks and loads that may operate on a highway in the State.

Messrs. W. R. Crawford and *Edwin C. Ewing* for appellants, submitted.

Sections 35 and 36 of the Oregon law enacted in 1921, as amended in 1923, and the acts of the highway commission thereunder, in reducing the capacity of certain

motor trucks, are unconstitutional and void, being in violation of the federal Constitution and the federal Highway Act, which was adopted by the State in 1917.

The federal Highway Act provided that the entire jurisdiction over federal-aided highways was to be vested in the federal government and gave the power and authority to the Secretary of Agriculture to carry out its provisions. The Secretary of Agriculture has the only power to take steps to conserve and preserve such highways and insure the safety of traffic thereon, and the enactment of the 1921 law and the 1923 amendments, and the acts of the highway commission in issuing and enforcing the order, were directly in violation of the agreement made by the State in the adoption of the provisions of the federal law in 1917. *Neilson* v. *Oregon,* 212 U. S. 315; *New Jersey* v. *Wilson,* 7 Cr. 165; *Buck* v. *Kuykendall,* 267 U. S. 307.

This order directly effects the just and reasonable charges on the interstate business.

If the State had directly fixed the present tariff and reduced the same 50% on said interstate business, the appellants would be entitled to an injunction and a decree after final hearing on the ground that such exaction would have been contrary to and in violation of the Constitution of the United States as being arbitrary, unreasonable and confiscatory. We consider that such order has the same effect. *Railroad Commission Cases,* 116 U. S. 307; *Chicago R. Co.* v. *Minnesota,* 134 U. S. 418; *Reagan* v. *Loan Co.,* 154 U. S. 362; *St. Louis R. Co.* v. *Gill,* 156 U. S. 649; *Buck* v. *Kuykendall,* 267 U. S. 307. The order is arbitrary and unreasonable and created a monopoly in favor of other common carriers in competition with the trucks of appellants.

Mr. J. M. Devers, Assistant Attorney General of Oregon, with whom *Mr. I. H. Van Winkle,* Attorney General, was on the brief, for appellees.

The paramount control of the public highways of the State is vested in the legislature. Control is sometimes delegated, but is never surrendered. 13 R. C. L., § 143; *Atkin* v. *Kansas,* 191 U. S. 207; *Cicero Lbr. Co.* v. *Cicero,* 176 Ill. 9; *Salem* v. *Anson,* 40 Ore. 339; Elliott, Roads and Streets, 2d ed. p. 8; *Brand* v. *Multnomah County,* 38 Ore. 79; *Yocum* v. *Sheridan,* 68 Ore. 237.

The right to regulate the public highways can not be abridged, alienated or contracted away by the legislature. *Mugler* v. *Kansas,* 123 U. S. 623; *Prigg* v. *Pennsylvania,* 16 Pet. 539; *Leisy* v. *Hardin,* 135 U. S. 100; *Boyd* v. *Allen,* 94 U. S. 645; *Stone* v. *Mississippi,* 101 U. S. 814.

The matter of regulating the amount of loads to be hauled over the highways is within the discretion of the authorities charged with their care and maintenance; and when any such regulation within the scope of the authority of the law-making power has been passed, the prima facie presumption is that the regulation is reasonable and proper, and in order to warrant the court in coming to a definite conclusion there must be evidence introduced showing that in the particular case the discretion granted to the legislative body has been abused and the rights of the individuals taken from them. Cooley, Const. L. 542; *Transportation Co.* v. *Chicago,* 99 U. S. 635; *Slaughter House Cases,* 16 Wall. 36; *Fertilizing Co.* v. *Hyde Park,* 97 U. S. 659; *Phelan* v. *Virginia,* 8 How. 163; *Stone* v. *Mississippi,* 101 U. S. 814; *Patterson* v. *Kentucky,* 97 U. S. 501; *Gibbons* v. *Ogden,* 9 Wheat. 31.

The organic provision securing private rights does not preclude reasonable regulation of the use of private property to preserve the highways and to preserve the public safety and welfare, even if such regulation renders less valuable or curtails the use of the property already acquired, the public safety and necessity being superior to private property rights. *Bonsteel* v. *Allen,* 83 Fla. 214; *Pittsburgh & R. Co.* v. *Hartford,* 170 Ind. 674; *Chicago*

& Alton R. Co. v. *Tranbarger,* 238 U. S. 67; *Fertilizing Co.* v. *Hyde Park,* 97 U. S. 659. The order of the highway commission is not a regulation of interstate commerce, but a regulation of the highways under the police power. *Buck* v. *Kuykendall,* 267 U. S. 307, distinguished.

Congress having made no regulation in regard to the use of the highways, the power is vested in the legislature of the State, being a local and concurrent power. *Welton* v. *Missouri,* 91 U. S. 275; *Henderson* v. *Mayor,* 92 Ind. 259; *Mobile* v. *Kimball,* 102 Ind. 691; *Escanaba Co.* v. *Chicago,* 107 U. S. 678.

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

The plaintiffs below, the appellants here, owned and operated for hire, under proper license, motor trucks on the Columbia River Highway in Oregon, from the east boundary of Multnomah County to the west limits of the city of Hood River, a distance of 22.11 miles. This Highway extends from Portland to The Dalles, Oregon, and is a rural post road. The plaintiffs have complied with all the state rules and regulations respecting the operation of motor trucks upon the Highway, and under previous regulations carried a combined maximum load of not exceeding 22,000 pounds. The Highway Commission, under a law of Oregon, has reduced the maximum to 16,500 pounds, by an order in which the Commission recites that the road is being damaged by heavier loads. The plaintiffs filed this bill to enjoin the enforcement of the order, on the ground that it invades their federal constitutional rights.

The case was heard under § 266 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 926, before a court of three judges, on an order to show cause why a preliminary injunction should not issue restraining the Commission from enforcing the order. A

motion to dismiss was interposed to the complaint by the defendant and submitted at the same time. The District Court denied the application for a preliminary injunction, and granted the motion to dismiss the plaintiff's amended bill, on the ground that it did not state facts sufficient to constitute a cause of action or to entitle the plaintiffs to the relief demanded. As the plaintiffs refused to plead further, the cause was dismissed, and the case comes here directly from the District Court by virtue of paragraph 3 of § 238 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936.

The Secretary of Agriculture, by virtue of three Acts of Congress, one of July 11, 1916, c. 241, 39 Stat. 355, an amendment thereto of February 28, 1919, c. 69, 40 Stat. 1189, 1200, and the Federal Highway Act of November 9, 1921, c. 119, 42 Stat. 212, is authorized to coöperate with the States, through their respective highway departments, in the construction of rural post roads. These require that no money appropriated under their provisions shall be expended in any State until it shall by its legislature have assented to the provisions of the Acts. They provide that the Secretary of Agriculture and the state highway department of each State shall agree upon the roads to be constructed therein and the character and method of their construction. The construction work in each State is to be done in accordance with its laws, and under the supervision of the state highway department, subject to the inspection and approval of the Secretary and in accord with his rules and regulations made pursuant to the federal acts. The States are required to maintain the roads so constructed according to their laws. In case of failure of a State to maintain any highway within its boundaries after construction or reconstruction, the Secretary is authorized to proceed on notice to have the highway placed in proper condition of maintenance, at the charge and cost of the federal funds allotted to the State,

and henceforth to refuse any further project in such State until the State shall reimburse the Government for such maintenance and shall pay into the Federal Highway Fund for reapportionment among all the States the sum thus expended.

By § 5, c. 237, of the General Laws of Oregon for 1917, the Oregon Highway Law was passed. That creates a highway commission with authority to carry out the provisions of the Act and to exercise general supervision over all matters pertaining to the construction of state highways and to determine the general policy of the highway department. By § 5, the Oregon Legislature assents to the provisions of the Act of Congress of 1916, furnishing aid in the construction of rural post roads, and the Department is authorized to enter into all contracts and agreements with the National Government relating to the survey, construction, improvement and maintenance of the roads under the Act of Congress, and to submit any scheme of construction as may be required by the Secretary of Agriculture, and to do all things necessary to carry out the coöperation contemplated by the Act. The good faith of the State is pledged to make the available funds sufficient to equal the funds apportioned to the State by the Government, and to maintain the roads constructed or improved with the aid of funds so appropriated, and to make adequate provision for carrying out such maintenance. By the General Laws of Oregon, 1917, § 28, c. 194, p. 256, 268, in force when the first federal act was passed, it was provided that no motor truck of over five tons capacity should be driven or operated on any road or highway of the State except with the consent and upon a permit issued by the county court of the county wherein such truck was sought to be driven or operated; and this was the provision of law in force when the law was passed accepting the federal acts for Oregon. By the General Laws of Oregon of 1921, c. 371, § 35,

it was provided that the Highway Commission and the county court might grant special permits to permit any vehicle having with its load a combined weight in excess of 22,000 pounds, to move on the highways, the permission to be written and to include such terms, rules and stipulations as the commission or court might deem proper. By § 36 of the same act, whenever in the judgment of the State Highway Commission or any county court or board of county commissioners of any county it would be for the best interests of the State or county and for the protection from undue damage of any highway or highways or any sections thereof, to reduce the maximum weights and speeds in the Act provided, for vehicles moving over or upon the highways of the State, and to fix the reduced weights and speeds and prohibit the use of such highways for any other weights, authority is given such commission or board to do so and to post a notice of the limitation.

The order complained of, set forth as an exhibit to the amended bill of complaint, recites that the Commission, as a result of due investigation, finds that the road is being damaged and injured on account of the kind and character of traffic now being hauled over it, and that the loads of maximum weight moved at the maximum speed are breaking up, damaging and deteriorating the road, and that it will therefore be for the best interests of the state highway that the maximum weight be reduced from 20,000 to 16,500, and that changes be made with respect to tires and their width.

The amended bill gives a history of the highway and its continued use for a weight of 22,000 pounds for four years, which has been availed of by the appellants as common carriers and as members of an Auto Freight Transportation Association of Oregon and Washington, with costly terminals in Portland established by requirement of that city; it alleges that the twenty-two miles

of the Columbia River Highway here involved is a part of the interstate highway from Astoria, Oregon, into the State of Washington, and all subject to the Federal Highway Acts, and that this order will interfere with interstate commerce thereon. The amended bill denies the damage to the road as found by the Highway Commission, and says that the reduction of the limit will be unreasonable, arbitrary and discriminatory. It avers that the plaintiffs have been engaged in active competition with steam railroads paralleling the Columbia River Highway and charging rates of traffic which, unless the appellants can use trucks combined with loads of 22,000 pounds, will prevent their doing business except at a loss. It alleges that the acts of Congress and of Oregon constitute a contract by which the permission for the use of a truck of five tons capacity without regard to weight of the truck itself, is a term which can not be departed from by the State Highway Commission, and constitutes a protection to the plaintiffs of which they may avail themselves in this action.

An examination of the acts of Congress discloses no provision, express or implied, by which there is withheld from the State its ordinary police power to conserve the highways in the interest of the public and to prescribe such reasonable regulations for their use as may be wise to prevent injury and damage to them. In the absence of national legislation especially covering the subject of interstate commerce, the State may rightly prescribe uniform regulations adapted to promote safety upon its highways and the conservation of their use, applicable alike to vehicles moving in interstate commerce and those of its own citizens. *Hendrick* v. *Maryland,* 235 U. S. 610, 622, *et seq.; Kane* v. *New Jersey,* 242 U. S. 160, 167. Of course the State may not discriminate against interstate commerce. *Buck* v. *Kuykendall,* 267 U. S. 307. But there is no sufficient averment of such discrimination in the bill. In the *Kuykendall* case this Court said, p. 315:

"With the increase in number and size of the vehicles used upon a highway, both the danger and the wear and tear grow. To exclude unnecessary vehicles—particularly the large ones commonly used by carriers for hire—promotes both safety and economy. State regulation of that character is valid even as applied to interstate commerce, in the absence of legislation by Congress which deals specifically with the subject. *Vandalia R. R. Co.* v. *Public Service Commission,* 242 U. S. 255; *Missouri Pacific Ry. Co.* v. *Larabee Flour Mills Co.*, 211 U. S. 612. Neither the recent federal highway acts, nor the earlier post road acts, Rev. Stat., § 3964; Act of March 1st, 1884, c. 9, 23 Stat. 3, do that."

The mere fact that a truck company may not make a profit unless it can use a truck with load weighing 22,000 or more pounds does not show that a regulation forbidding it is either discriminatory or unreasonable. That it prevents competition with freight traffic on parallel steam railroads may possibly be a circumstance to be considered in determining the reasonableness of such a limitation, though that is doubtful, but it is necessarily outweighed when it appears by decision of competent authority that such weight is injurious to the highway for the use of the general public and unduly increases the cost of maintenance and repair. In the absence of any averments of specific facts to show fraud or abuse of discretion, we must accept the judgment of the Highway Commission upon this question, which is committed to their decision, as against merely general averments denying their official finding.

Nor is there anything either in the federal or state legislation to support the argument that the agreement between the national and state governments requires that the weight of truck and load which was permitted by the State when the agreement was made binds the State contractually to continue such permission. Conserving

limitation is something that must rest with the road supervising authorities of the State, not only on the general constitutional distinction between national and state powers, but also for the additional reason, having regard to the argument based on a contract, that under the convention between the United States and the State, in respect of these jointly aided roads, the maintenance after construction is primarily imposed on the State. Regulation as to the method of use, therefore, necessarily remains with the State and can not be interfered with unless the regulation is so arbitrary and unreasonable as to defeat the useful purposes for which Congress has made its large contribution to bettering the highway systems of the Union and to facilitating the carrying of the mails over them. There is no averment of the bill or any showing by affidavit making out such a case.

The temporary injunction was rightly refused and the motion to dismiss the bill was properly granted.

Affirmed.

FEDERAL TRADE COMMISSION *v.* KLESNER.

CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 211. Argued March 10, 1927.—Decided April 18, 1927.

The provision of the Federal Trade Commission Act, § 5, conferring jurisdiction on the Circuit Courts of Appeals to enforce, set aside, or modify orders of the Commission, should be construed as conferring like jurisdiction upon the Court of Appeals of the District of Columbia respecting orders to be enforced in that District. P. 154.

So *held* in view of the parallelism between the Supreme Court of the District and the Court of Appeals, as federal courts, on the one hand, and the District Courts and Circuit Courts of Appeals on the other; the fact that the jurisdiction to assist the Commission in compelling evidence which the Act confers on the District

Courts is conferred also on the District Supreme Court, through § 61 of the Code, D. C.; and the additional consideration that enforcement of the Act in the District, as intended, is dependent on the construction of § 5 above indicated.

6 F. (2d) 701, reversed.

CERTIORARI (269 U. S. 545) to a judgment of the Court of Appeals of the District of Columbia which dismissed, for want of jurisdiction, an application of the Federal Trade Commission based on § 5 of the Federal Trade Commission Act, for a decree to enforce an order of the Commission commanding Klesner to desist from a method of doing business in the District of Columbia which the Commission found to be an unfair method of competition.

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

In order to carry out the plain provisions of the statute, it is necessary that the words " circuits courts of appeals " should be construed to include the Court of Appeals of the District of Columbia. To read them otherwise is to attribute to Congress an intention to make an order of the Commission directed at unfair competition in commerce in the District of Columbia enforceable if the offending person resides outside of the District and within the jurisdiction of some Circuit Court of Appeals, but unenforceable if he resides in the District. The statute should not be construed to produce absurd results, if it may reasonably be avoided.

If the Court of Appeals of the District was right in the decision in this case, it will follow that neither the Interstate Commerce Commission, the Federal Reserve Board, nor the Federal Trade Commission may enforce the provisions of the Clayton Act with respect to commerce in the District unless the offending person or corporation resides outside of it.

Appellate jurisdiction has been upheld where the language of the statute did not exactly describe the courts which were ultimately held to have jurisdiction or did not definitely include the class of cases in which jurisdiction was held to have been conferred. *S. S. Coquitlam* v. *United States,* 163 U. S. 346; *Hoskins* v. *Funk,* 239 Fed. 278; *Craig* v. *Hecht,* 263 U. S. 255; *Webb* v. *York,* 74 Fed. 753.

The Supreme Court and the Court of Appeals of the District of Columbia, and the courts of the Territories perform those judicial functions that are elsewhere performed by both state and federal courts. For the purpose of enforcing federal statutes of general application, these courts are a part of the federal judicial system. But when they are enforcing statutes of local application only, they have such powers and jurisdiction " as a State may confer on her courts." *Keller* v. *Pot. Elec. Co.,* 261 U. S. 428; *Benson* v. *Henkel,* 198 U. S. 1; *Hyattsville Bldg. Assn.* v. *Bouick,* 44 App. D. C. 408; *United States* v. *B. & O. R. R.,* 26 App. D. C. 581.

It is not out of accord with the laws establishing its jurisdiction to hold that the Court of Appeals of the District of Columbia is a " Circuit Court of Appeals " within the meaning of the Federal Trade Commission Act. Since, so far as the general federal laws are concerned, the jurisdiction of the Supreme Court of the District of Columbia is the same as that of the United States District Courts, the appellate jurisdiction of the Court of Appeals of the District of Columbia, sitting as a federal appellate court, is the same in character and functions as that of the Circuit Courts of Appeals of the United States.

Mr. Harry S. Barger, with whom *Mr. Clarence R. Ahalt* was on the brief, for respondent.

The Court of Appeals of the District of Columbia is a court of the United States; but it is not a constitutional

court of the United States in the same sense that the Circuit Courts of Appeals of the United States and the United States District Courts are constitutional courts, and, in respects too numerous to mention, it does not possess the same jurisdiction possessed by the Circuit Courts of Appeals of the United States. To say that the Court of Appeals of the District of Columbia is a " Circuit Court of Appeals of the United States," without more authority than is found in the Federal Trade Commission Act, would be the same as saying that, because Congress has expressly and in apt language conferred concurrent jurisdiction upon the United States District Courts and the Court of Claims in sums not exceeding ten thousand dollars, the District Courts are Courts of Claims, or that the Court of Claims is a District Court of the United States. Even if Congress had used apt language to confer special jurisdiction on the Court of Appeals of the District of Columbia to review decisions of the Federal Trade Commission, that court would in no sense be a " Circuit Court of Appeals of the United States." *Chapman* v. *United States,* 164 U. S. 436; *In re Heath,* 144 U. S. 92; *Cross* v. *United States,* 145 U. S. 572; *Farnsworth* v. *Montana,* 129 U. S. 104; *United States* v. *Sanges,* 144 U. S. 310; *United States* v. *Moore,* 3 Cr. 159.

To demonstrate conclusively that Congress does not regard the Court of Appeals of the District of Columbia as a " Circuit Court of Appeals," reference is made to § 238 of the Judicial Code as well as to § 250 thereof, wherein radically different provisions obtain for appeals from the courts of the United States outside the District of Columbia and those from the courts of the District.

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

The question presented in this case is whether the Court of Appeals of the District of Columbia has, under

the Federal Trade Commission Act, 38 Stat. 717, jurisdiction to enforce, set aside or modify orders of the Federal Trade Commission, entered against persons engaged in commerce within the District of Columbia, requiring them to cease and desist from the use of unfair methods of competition within the District.

The case, as made before the Commission, was as follows: Klesner, a resident of the District, was engaged, among other things, in the manufacture and sale of window shades in the District, doing business under the name and style of "Shade Shop." For some years prior to respondent's entry into this business, another establishment had been engaged exclusively in the window shade business under the same name and style, and had become well and favorably known to the purchasing public by that name. The charge heard before the Commission was that the respondent, by the use of the name "Shade Shop," was deceiving the purchasing public into the belief that his establishment was that of a prior long-established competitor, and by this means was causing people to deal with the respondent, in the belief that they were dealing with his competitor. Klesner answered, denying the charge. Evidence was received upon the issues joined, and after argument the Commission made its report upon the facts and issued an order requiring the respondent to cease and desist from doing business in the District of Columbia under the name of "Shade Shop." Klesner failed and refused to obey the order, and the Commission applied to the Court of Appeals of the District of Columbia for a decree of enforcement. That court, without considering the merits of the case, held that it was without jurisdiction in the premises, and dismissed the Commission's petition, June 1, 1925, in an opinion reported in 6 F. (2d) 701. A petition for certiorari was granted by this Court October 26, 1925, (269 U. S. 545) pursuant to § 240 (a) of the Judi-

cial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938.

The ground for the dismissal of this case by the Court of Appeals was that Congress, in the Trade Commission Act, had not given jurisdiction to the Court of Appeals of the District of Columbia over suits brought to enforce the order of the Commission as it had done in respect of such suits in the proper circuit courts of appeals. The pertinent part of the Federal Trade Commission Act bearing on this question we have set out in the margin.*

* "Sec. 4. That the words defined in this section shall have the following meaning when found in this Act, to wit:

"'Commerce' means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation. . . .

"Sec. 5. That unfair methods of competition in commerce are hereby declared unlawful.

"The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.

"Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. . . . The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission. If upon such hearing the commission shall be of the opinion that the method of competition in question is

The Trade Commission Act was passed by Congress to prevent persons, partnerships or corporations from using unfair methods of competition in the commerce which Congress had the constitutional right to regulate. By § 4 of the Act, the commerce to be reached is defined as including not only commerce between the States, and with foreign nations and between the District of Columbia and any State or Territory or foreign nation, but also commerce within the District of Columbia. The statute is clear in its direction that the Commission shall

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prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist fom using such method of competition. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

"If such person, partnership, or corporation fails or neglects to obey such order of the commission while the same is in effect, the commission may apply to the circuit court of appeals of the United States, within any circuit where the method of competition in question was used or where such person, partnership, or corporation resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, partnership, or corporation and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission. The findings of the commission as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the

make orders preventing persons engaged in the District from using the forbidden methods. Therefore the Commission was authorized to make the order which was made in this case. In § 9 of the Trade Commission Act, the Commission is given power to require by subpoena the attendance and testimony of witnesses and the production of documentary evidence relating to any matter under investigation. And this may be required from any place in the United States at any designated place of hearing, and in case of disobedience to a subpoena, the Commission may invoke the aid of any court of the United States in requiring such attendance and testimony. Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on, may in case of contumacy or refusal to obey a

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commission, the court may order such additional evidence to be taken before the commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendations, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code. . . .

"The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission shall be exclusive.

"Such proceeding in the circuit court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. . . .

"Sec. 9. That for the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all

subpoena issue an order requiring the presence of the person summoned, and a failure to obey the order may be punished by the district court as a contempt thereof. Upon application of the Attorney General, at the request of the Commission, the district courts shall have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this Act or any order of the Commission made in pursuance thereof.

By § 61 of the Code of Laws for the District of Columbia, 31 Stat. 1199, the Supreme Court of the District is given the same powers and the same jurisdiction as district courts of the United States and is to be deemed a court of the United States, and shall exercise all the jurisdiction of one, and a special term of the court shall be a district court of the United States. The justices of the court are vested with the power and jurisdiction of judges

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such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.

"Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

"Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

"Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this Act or any order of the commission made in pursuance thereof."

of the district courts of the United States. Sections 62 and 84, Code of the District of Columbia, 1924. It follows that the Trade Commission could use the Supreme Court of the District to enforce the procedure needed on its part to take evidence and thus enable it to reach its conclusions, and in this could avail itself of the power of contempt of that court.

It has been the evident intention of Congress that laws generally applicable to enforcement of what may be called federal law in the United States generally should have the same effect within the District of Columbia as elsewhere. For this purpose the courts of the District of Columbia are federal courts of the United States. *Keller* v. *Potomac Electric Company,* 261 U. S. 428, 442. They are part of the federal judicial system. In *Benson* v. *Henkel,* 198 U. S. 1, this Court held that the Supreme Court of the District of Columbia was a Court of the United States and that the District of Columbia was a district within the meaning of Revised Statutes, § 1014, providing for the apprehension and holding persons for trial before such court of the United States. Where the Judicial Code provides that no writ of injunction shall be granted by any court of the United States to stay proceedings of any court of a State, with certain exceptions, the District Court of Appeals has held that the statute applied to the Supreme Court of the District of Columbia. *Hyattsville Building Assn.* v. *Bouick,* 44 D. C. App. 408. See also, *United States* v. *B. & O. R. R.,* 26 D. C. App. 581; *Arnstein* v. *United States,* 296 Fed. 946, 948.

The question, therefore, which we have to answer is whether, when Congress gave the Commission power to make orders in the District of Columbia with the aid of the Supreme Court of the District in compelling the production of evidence by contempt or mandamus, it intended to leave the orders thus made, if defied, without any review or sanction by a reviewing court, though such

review and sanction are expressly provided everywhere throughout the United States except in the District. We think this most unlikely, and, therefore, it is our duty, if possible in reason, to find in the Trade Commission Act ground for inference that Congress intended to refer to and treat the Court of Appeals of the District as one of the circuit courts of appeals referred to in the Act, to review and enforce such orders.

It is to be noted that the same question arises in the construction of the Clayton Act of October 15, 1914, c. 323, 38 Stat. 730. That Act applies, as this one does, to commerce in the District, as well as between States, and with foreign nations. By its second section it forbids difference in prices to purchasers in order to lessen competition. In the third section it makes it unlawful to lease or make and sell goods patented or unpatented or fix a price thereon with the condition that the lessee or purchaser shall not use the goods or wares of competitors, where such a provision shall lessen competition. By § 7, corporations are forbidden to acquire stock of another to lessen competition, and by § 8 there is a restriction upon interlocking directorates in two or more competing corporations applicable to banking associations and other corporations. Section 11 provides that authority to enforce compliance with the sections just referred to is vested in the Interstate Commerce Commission where applicable to common carriers, in the Federal Reserve Board where applicable to banks, and in the Federal Trade Commission where applicable to all the other characters of commerce. The orders of these bodies are to be made upon hearings similar to those provided for in the Federal Trade Commission Act, and the circuit courts of appeals are to review and enforce the orders. The existence of two such Acts itself enforces the inference that Congress thought that the term "Circuit Court of Appeals" was sufficient to include the appellate court of the District of Columbia.

The Court of Appeals of the District of Columbia was created by an Act of Congress approved February 9, 1893, 27 Stat. 434, which conferred upon it appellate jurisdiction over the Supreme Court of the District of Columbia. Section 7 of the Act provides that any party aggrieved by any final order, judgment or decree of the Supreme Court of the District, or of any justice thereof, may appeal therefrom to the Court of Appeals thereby created, which upon such appeal shall review such order, judgment or decree and affirm, reverse or modify the same as shall be just. This was a substitution of the Court of Appeals for the general term of the Supreme Court, which latter court was abolished by the Act. The parallelism between the Supreme Court of the District and the Court of Appeals of the District, on the one hand, and the district courts of the United States and the circuit courts of appeals, on the other, in the consideration and disposition of cases involving what among the States would be regarded as within federal jurisdiction, is complete.

A question similar to the one we have here was presented in the case of the *Steamer Coquitlam* v. *United States,* 163 U. S. 346. The United States in that case brought a suit in admiralty for the forfeiture of the steamer Coquitlam, because of an alleged violation of the revenue laws of the United States, in the District Court of Alaska, and, a decree having been rendered for the United States, an appeal was prosecuted to the Circuit Court of Appeals for the Ninth Circuit. Under the 15th section of the Act creating the circuit courts of appeals, 26 Stat. 826, 830, the circuit courts of appeals in cases in which their judgments were made final by the Act, were given the same appellate jurisdiction by writ of error or appeals to review the judgments, orders and decrees of the Supreme Courts of the several territories as by the Act they might have to review the judgments, orders, and

decrees of the district courts and circuit courts, and for that purpose the several territories were, by orders of the Supreme Court, to be made from time to time, to be assigned to particular circuits. 26 Stat. 826, 830. Now, in Alaska there was only one court, and it was called the District Court of Alaska, and it was contended that it was not a supreme court of the territory and, therefore, was not a court from which an appeal could be prosecuted to the Circuit Court of Appeals for the Ninth Circuit. By the Act of May 17, 1884, 23 Stat. 24, a civil government was provided for Alaska, to constitute a civil and judicial district, with the civil and judicial and criminal jurisdiction of district courts of the United States, and such other jurisdiction not inconsistent with the Act as might be established by law, and the general laws of Oregon, so far as the laws were applicable, were adopted. This Court held that, under the statutes, the Circuit Court of Appeals of the Ninth Circuit could not review the final judgments or decrees of the Alaska court in virtue of its appellate jurisdiction over the district and circuit courts mentioned in the Act of March 3, 1891, 26 Stat. 826, 830, but that, as Alaska was one of the territories of the United States and as the District Court established in Alaska was the court of last resort within the limits of the territory, it was in a very substantial sense the supreme court of that territory; that no reason could be suggested why a territory of the United States in which the court of last resort was called a supreme court should be assigned to some circuit established by Congress that did not apply with full force to the Territory of Alaska in which the court of last resort was designated as the District Court of Alaska. The Court, speaking by Mr. Justice Harlan, said (p. 352):

"Looking at the whole scope of the act of 1891, we do not doubt that Congress contemplated that the final

orders and decrees of the courts of last resort in the organized Territories of the United States—by whatever name those courts were designated in legislative enactments—should be reviewed by the proper Circuit Court of Appeals, leaving to this court the assignment of the respective Territories among the existing circuits."

We think we may use the same liberality of construction in this case. We find here a court which by acts of Congress is to be treated as a district court of the United States, and we find here a court of appeals which by the terms of its creation is exercising reviewing power over all federal cases proceeding from that district court of the United States by appeal or writ of error, so that it is exercising exactly the same function as the circuit courts of appeals do with respect to the district courts within their respective territorial jurisdictions in the other parts of the United States. The services of this district court of the United States in the District of Columbia are to be availed of under the Trade Commission Act when necessary in compelling evidence by the express words of the Act. We must conclude that Congress, in making its provision for the use of the circuit courts of appeals, in reviewing the Commission's orders, intended to include within that description the Court of Appeals of the District of Columbia as the appellate tribunal to be charged with the same duty in the District. The law was to be enforced, and presumably with the same effectiveness, in the District of Columbia as elsewhere in the United States.

We do not think that the cases of *Swift* v. *Hoover,* 242 U. S. 107, and of *Tefft, Weller & Company* v. *Munsuri,* 222 U. S. 114, should lead us in this case to a different conclusion. They related to appeals direct to this Court in bankruptcy from a court in Porto Rico, and from the Supreme Court of the District respectively. With the

heavy burden upon this Court, every direct review imposed on it was naturally viewed with critical care, and when it was sought to enlarge the jurisdiction of this Court by strained construction to include review of the numerous and small claims from courts of bankruptcy in such jurisdictions, it is not strange that the attempt failed. More than that, in those cases the bankruptcy proceedings were judicial proceedings with judicial judgments which could be enforced even if not reviewed. They were not left in the air without any sanction against a defiant litigant, as would be the result in the present case, were the view we have taken not to prevail.

The judgment of dismissal of the Court of Appeals of the District of Columbia is reversed and the cause remanded for further proceedings.

Reversed.

The separate opinion of MR. JUSTICE McREYNOLDS.

I think the judgment of the court below should be affirmed.

If the cause involved no more than interpretation of a doubtful provision in the statute, it hardly would be worth while to record personal views. But judicial legislation is a hateful thing and I am unwilling by acquiescence to give apparent assent to the practice.

Possibly—probably, perhaps—if attention had been seasonably called to the matter Congress would have authorized the Court of Appeals for the District of Columbia to enforce orders of the Trade Commission. But the words of the enactment, which we must accept as deliberately chosen, give no such power; and I think this court ought not to interject what it can only suppose the lawmakers would have inserted if they had thought long enough.

FEDERAL TRADE COMMISSION ET AL. *v.* CLAIRE FURNACE COMPANY ET AL.

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

No. 1. Argued December 6, 1923; reargued November 24, 1925.—Decided April 18, 1927.

1. An order of the Federal Trade Commission requiring a corporation to submit reports concerning its business, under § 6 of the Federal Trade Commission Act, is enforcible by the Commission only by requesting the Attorney General to institute mandamus proceedings under § 9, or by supplying him with the facts necessary to enforce the forfeiture of $100 per day, prescribed by § 10 for continued failure to file such reports after notice. P. 170.
2. As the validity of such orders may be fully contested in such mandamus or forfeiture proceedings, if instituted in the exercise of his discretion by the Attorney General, these offer an adequate legal remedy to corporations resisting the orders as unconstitutional, and therefore a bill in equity to enjoin the Commission from taking steps to enforce such orders will not lie. P. 174.
3. In view of the purpose of the statute that questions of constitutionality involved in such orders of the Commission should be passed upon by the Attorney General before undertaking their enforcement by judicial proceedings instituted by him, a suit brought by corporations affected, against the Commission, to determine such questions should not be entertained even with consent of the parties. P. 174.

52 App. D. C. 202; 285 Fed. 936, reversed.

APPEAL from a decree of the Court of Appeals of the District of Columbia which affirmed a decree of the Supreme Court of the District, enjoining the Federal Trade Commission and its members from attempting to enforce orders made on the complainant corporations, commanding them to furnish monthly reports showing in detail the output, costs, prices, etc., in their business.

Solicitor General Beck, with whom *Messrs. W. H. Fuller* and *Adrien F. Busick* were on the brief, for appellants on the first argument.

Congress has power to compel the giving of information and production of documents in any inquiry concerning a subject matter over which it has jurisdiction to legislate. The Constitution conferred all powers proper for the exercise of each power expressly granted. Among the powers so granted is that to acquire information, and it is not necessary to establish in each instance that the information required is indispensable to legislative action. The specific character of the action contemplated by Congress need not be shown in order that information may be required. Information respecting prices may be required though no power to fix reasonable prices exists. Information required should be had at least as to articles of prime necessity.

Congress can constitutionally authorize an administrative body to collect information respecting any subject over which it has legislative jurisdiction.

Jurisdiction of Congress over interstate commerce and the extent of the power to require information: Commerce among the States includes the purchase and sale of commodities between citizens in different States. The power to regulate extends to all matters which may burden or restrain interstate commerce, even though not actually a part thereof. The power of Congress to require information respecting interstate commerce is broader than the power to regulate, and extends to ascertaining what, if any, burdens or restraints upon such commerce are threatened.

The information called for by the questionnaires concerns interstate commerce itself, or matters so closely related thereto as to be necessary to an intelligent report upon conditions existing in such commerce, and may be lawfully required. The information is necessary to show whether the law of supply and demand operates. Each item required relates to subject matter upon which Congress may legislate.

Congress has the power to provide for the investigation of corporations and the compulsory making of reports by them, and for the publication of the facts for the purpose of applying the corrective force of public opinion to the practices of corporations. It has power to compel the giving of information and production of documents to show whether the laws which the Commission is charged with enforcing are being violated, and demand therefor falls within the visitorial power of Congress over corporations engaged in interstate commerce.

The Federal Trade Commission Act authorized the Commission to require the information and reports specified in the questionnaires. The Commission's action was within the text of the law; it was in harmony with the long interpretation of this and other Acts by the Government, and with the Congressional interpretation of the Trade Commission Act. The call for monthly reports was lawful.

The demand for the information contained in the questionnaires in the manner and form made, does not violate the Fourth or Fifth Amendments to the Federal Constitution.

Solicitor General Mitchell, with whom *Messrs. W. H. Fuller* and *Adrien F. Busick* were on a supplemental brief, for appellants on reargument.

Obtaining information about their interstate business from corporations engaged in interstate commerce is an appropriate means of enabling Congress to regulate interstate commerce.

The power to require such corporations to furnish information concerning their affairs can not be denied unless there be some specific provision of the Constitution restraining its exercise.

The ultimate question in this case is whether the power is restrained by the Fourth Amendment, prohibiting unreasonable searches and seizures. It is not an unreason-

able invasion of privacy to require from these corporations reports of their interstate business, although the information is not for use in any pending proceeding or in connection with pending legislation.

Having power to require information respecting their interstate commerce business, Congress has power to require information respecting the business of these corporations not interstate commerce, where (1) the accounts are commingled or (2) their other operations have a direct bearing on their activities in interstate commerce.

The Commission is given power by the terms of the Federal Trade Commission Act to require reports in the form demanded.

Mr. Paul D. Cravath, with whom *Mr. Hoyt A. Moore* was on the brief, for appellees on the first argument.

Congress has not conferred upon the Commission any such power as it seeks to exercise in requiring the information called for. The sole source of authority of the Commission is the Federal Trade Commission Act, which does not purpose to authorize the Commission to make a general investigation of an industry or intrastate business in any case. The construction by the Commission calls for unprecedented and unauthorized power.

The orders of the Commission to the appellees exceed the power granted to it. The Act applies only to the interstate commerce of corporations. The Commission can not regulate prices. Investigations authorized must relate to the purposes of the Act. The Act does not authorize investigations of economic conditions.

Congress could not grant to the Commission power to investigate the manufacturing activities of corporations which sell their output in interstate commerce. The power of Congress over interstate commerce does not extend to manufacturing or mining. Although the Commission may have investigatory power over such business

of the appellees as is interstate commerce, this does not give it such power over their other business. Neither Congress nor the Commission has any power to require information on any matter over which it has no regulatory power. The inquiry of the Commission does not relate to interstate commerce.

Enforcement of the demands of the Commission would violate rights secured to the appellees by the Fourth Amendment to the Constitution.

Mr. Paul D. Cravath, with whom *Messrs. Hoyt A. Moore* and *A. Arthur Jenkins* were on a supplemental brief, for appellees on reargument.

This case presents squarely the question whether the Commission has power to require corporations engaged in the manufacture of steel and iron products or in the production of coke to file with the Commission monthly reports giving the costs and sales prices of products manufactured by them and a vast amount of other information regarding their manufacturing operations and purely intrastate activities, simply because a part of their manufactured products is sold, and a part of the raw materials utilized at their plants is purchased, in States other than those in which those plants are located. Two or three of the appellees apparently do not purchase any of their raw materials or sell any of their manufactured products in interstate commerce. All the others sell some portion of their manufactured products, and most of them purchase or produce some portion of their raw materials, in States other than the States where their respective manufacturing plants are located.

Whatever authority the Commission had for requiring the information must be found in the Act.

The law laid down by this Court in *Federal Trade Commission* v. *American Tobacco Co.,* 264 U. S. 298, and *Federal Trade Commission* v. *Baltimore Grain Co.,* 267

U. S. 586, applies to the present case. The only periodical reports authorized are annual reports. The order is invalid because not limited to interstate commerce. The power of Congress under the Commerce Clause is limited to preserving freedom of commerce.

Congress can not fix or regulate prices to be charged by manufacturers.

The Fifth Amendment is involved. It appears to be the view of the Commission that the information, the power to secure which can be delegated by Congress, includes any information that in any manner may involve any subject over which Congress can legislate.

The intermingling of intrastate and interstate transactions does not justify the demand of the Commission. Commingling of accounts does not expose them to Congressional investigation. The intrastate activities of the appellees have no bearing on interstate commerce. The examination of books to check the reports must be also properly limited.

Profits or prices are not the concern of the Commission; nor is productive capacity and production. Manufacturing is not a public or common calling.

The doctrine of *Harriman* v. *Interstate Commerce Commission,* 211 U. S. 407, applies here.

On the appellant's own argument as to the Fourth Amendment, its order violates that Amendment.

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

This was a bill in equity brought in the Supreme Court of the District of Columbia on behalf of twenty-two companies of Ohio, Pennsylvania, West Virginia, New York, Delaware, New Jersey and Maryland, in the coal, steel and related industries, to enjoin the Federal Trade Commission from enforcing or attempting to enforce orders issued by that Commission against the complainant com-

panies, requiring them to furnish monthly reports of the cost of production, balance sheets, and other voluminous information in detail, upon a large variety of subjects relating to the business in which complainant corporations are engaged. The authority under which the Commission professed to act was expressed in the following resolution adopted by the Commission, December 15, 1919:

"Whereas at a hearing held by the Committee on Appropriations of the House of Representatives on August 25th, 1919, the Federal Trade Commission was requested to suggest what it might undertake to do to reduce the high cost of living; and

"Whereas the commission recommended to the said committee that it would be desirable to obtain and publish from time to time current information with respect to 'the production, ownership, manufacture, storage, and distribution of foodstuffs, or other necessaries, and the products or by-products arising from or in connection with the preparation and manufacture thereof, together with figures of cost and wholesale and retail prices,' and particularly with respect to various basic industries, including coal and steel; and

"Whereas the said committee recommended an appropriation of $150,000 for the current fiscal year for the said commission in consequence of this recommendation and the same was duly made by authority of Congress, and made available on November 4, 1919: Now, therefore, be it

"*Resolved,* That the Federal Trade Commission by virtue of section 6, paragraphs (a) and (b), of the Federal Trade Commission act, proceed to the collection and publication of such information with respect to such basic industries as the said appropriation and other funds at its command will permit: And be it further

"*Resolved,* That such action be started as soon as possible with respect to the coal industry and the steel industry, including in the latter closely related industries such as the iron ore, coke, and pig iron industries."

Purporting to proceed under this resolution, the Commission served separate notices upon the twenty-two appellees and many other corporations, engaged in mining, manufacturing, buying and selling coal, coke, ore, iron and steel products, etc., which directed them to furnish monthly reports in the form prescribed showing output of every kind, itemized cost of production, sale prices, contract prices, capacity, buying orders, depreciation, general administration and selling expenses, income, general balance sheet, etc., etc. Elaborate questionnaires, accompanying these orders, asked for answers revealing the intimate details of every department of the business, both intrastate and interstate. A summary of these, printed in the margin, sufficiently indicates their contents.* The concluding paragraph of the notice de-

* Summary of interrogatories submitted by Federal Trade Commission to sundry corporations with direction to report monthly.

(1) Quantities of 44 specified products produced.

(2) Costs of 25 products from each battery of ovens, furnace, mill or other unit of operation.

(3) Sales prices ("actual realization f. o. b. mill after deduction of freight allowance") of 19 products, separately as to domestic and export shipments.

(4) Contract prices ("base price less freight allowance") named in orders for future delivery of 19 products, separately as to domestic and export shipments.

(5) Capacity of ovens, furnaces, works and mills in respect of 18 products.

(6) Orders booked during each month and orders unfilled at the end of each month respecting 19 products.

(7) Depreciation and general administrative and selling expenses allocated to 17 products, details of income from other sources, balance of net income transferred to surplus, with details of interest,

clared—"The purpose of this report is to compile in combined or consolidated form the data received from individual companies and to issue currently in such form accurate and comprehensive information regarding changes in the conditions of the industry both for the benefit of the industry and of the public."

Appellees did not comply with the inquiries in the notices but filed in the Supreme Court, District of Columbia, their joint bill against the Commission and its members, wherein they set out its action, alleged that it had exceeded its powers, and asked that all defendants be restrained "from the enforcement of said orders, and from requiring answers to said questionnaires, and from taking any proceedings whatever with reference to the enforcement of compliance with said orders and answers to said questionnaires;" also for general relief.

Without questioning the appellees' right to seek relief by injunction, the appellants answered, admitted issuing of the orders, claimed authority therefor under §§ 6, and 9, Federal Trade Commission Act, September 26, 1914, c. 311, 38 Stat. 717, 721, 722, and further alleged and said—

That the reports were required "for all the purposes and under all the authority granted to them by law, including the purpose of gathering and compiling said information for publication and the consequent regulation of the interstate commerce of said complainants resulting from such publication of the true trade facts as to all of the business of complainants and of others en-

rentals, cash discounts on purchases, royalties, dividends from affiliated or subsidiary companies, income from outside investments, and details of deductions from net income, including federal income and excess profit taxes, interest on bonds and notes, sinking fund provisions, discount on bonds and notes, losses on investments, amortization, losses on contracts, reorganization expenses, fire losses, donations, adjustment of property value and bonuses to officials.

gaged in commerce in those commodities, and including the purpose of making reports to Congress and of recommending additional legislation to Congress.

"Defendants allege that all of the information to be acquired through the answers to said questionnaires is necessary and has direct relation to regulation and control of the interstate and foreign commerce of complainants and others answering said questionnaires, and is sought by the Federal Trade Commission for the purpose and in necessary aid of the regulation of said commerce.

"Defendants admit that no complaint has been filed or is now pending before the commission against any of complainants for a violation of § 5 of the trade commission act, but aver that the activities sought to be enjoined were instituted and are sought to be carried on under the provisions of said trade commission act.

"That one purpose of the requirements made in this case is the gathering of complete information, which is necessary in the proper regulation through publicity of the true facts as to the interstate business of the industry. That such purpose can not be properly performed without the acquisition of the complete facts. That the acquisition of the complete information and facts required will effectuate such purpose, in that the dissemination of such complete trade information will tend to prevent undue fluctuations and panic markets based on ignorance of the true facts, or based on incomplete and partial or self-interested information published only whenever and in so far as it may serve those self-interested who may publish it. That regulation by publicity is, and for a long time has been, recognized as one form of regulation which has been generally conceded to be fair and equitable to all concerned. That unless such regulation through public dissemination of the full and complete facts is carried out, other more drastic forms of attempted regulations without proper information may follow.

"That in addition to the regulatory effect, in and of itself, of such public dissemination of the complete facts, it is one of the purposes of these activities to gather and convey to Congress, for its information in the performance of its duties, the full and complete facts, in order that instead of legislating on incomplete or partial or prejudiced information, it may have the full facts before it. That if any regulatory effect upon intrastate commerce flows from such publicity, it is merely incidental to the general regulation of interstate commerce, as to which the power of Congress is complete."

The cause was heard upon motion to strike the answer from the files because it contained no adequate defense. The trial court concluded that, as the propounded questions were not limited to interstate commerce, but asked also for detailed information concerning mining, manufacture and intrastate commerce, they were beyond the Commission's authority. "The power claimed by the Commission is vast and unprecedented. The mere fact that a corporation engaged in mining ships a portion of its product to other States does not subject its business of production or its intrastate commerce to the powers of Congress." It accordingly held the answer insufficient and, as defendants declined to amend, granted the injunction as prayed. The Court of Appeals affirmed this action. 285 Fed. 936; 52 App. D. C. 202. The cause, here by appeal, has been twice argued.

Appellees were not charged with practicing unfair methods of competition (§ 5, Act of September 26, 1914) or violating the Clayton Act (c. 323, §§ 2, 3, 7, 8, 38 Stat. 730, 731, 732). Orders under such charges can be enforced only through a Circuit Court of Appeals (§ 11, Clayton Act; § 5, Federal Trade Commission Act).

The action of the commission here challenged must be justified, if at all, under the paragraphs of §§ 6 and 9, Act of September 26, 1914, copied below, and the only

methods prescribed for enforcing orders permitted by any of these paragraphs are specified in §§ 9 and 10. They are applications to the Attorney General to institute an action for mandamus, and proceedings by him to recover the prescribed penalties.

"Sec. 6. That the commission shall also have power—

"(a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships.

"(b) To require, by general or special orders, corporations engaged in commerce, excepting banks, and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission.

. . . . . .

"(f) To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recom-

mendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use.

"(g) From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this Act.

"(h) To investigate, from time to time, trade conditions in and with foreign countries where associations, combinations, or practices of manufacturers, merchants, or traders, or other conditions, may affect the foreign trade of the United States, and to report to Congress thereon, with such recommendations as it deems advisable. . . .

"Sec. 9. That for the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.

"Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence. . . .

"Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this Act or any order of the commission made in pursuance thereof. . . .

"Sec. 10. That any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce documentary evidence, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine or not less than $1,000 nor more than $5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment. . . .

"If any corporation required by this Act to file any annual or special report shall fail to do so within the time fixed by the commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United States the sum of $100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the corporation has its principal office or in any district in which it shall do business. It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States."

There was nothing which the Commission could have done to secure enforcement of the challenged orders except

to request the Attorney General to institute proceedings for a mandamus or supply him with the necessary facts for an action to enforce the incurred forfeitures. If, exercising his discretion, he had instituted either proceeding the defendant therein would have been fully heard and could have adequately and effectively presented every ground of objection sought to be presented now. Consequently, the trial court should have refused to entertain the bill in equity for an injunction.

We think that the consent of the parties was not enough to justify the court in considering the fundamental question that has been twice argued before us. It was intended by Congress in providing this method of enforcing the orders of the Trade Commission to impose upon the Attorney General the duty of examining the scope and propriety of the orders, and of sifting out of the mass of inquiries issued what in his judgment was pertinent and lawful before asking the Court to adjudge forfeitures for failure to give the great amount of information required or to issue a mandamus against those whom the orders affected and who refused to comply. The wide scope and variety of the questions, answers to which are asked in these orders, show the wisdom of requiring the chief law officer of the Government to exercise a sound discretion in designating the inquiries to enforce which he shall feel justified in invoking the action of the court. In a case like this, the exercise of this discretion will greatly relieve the court and may save it much unnecessary labor and discussion. The purpose of Congress in this requirement is plain, and we do not think that the court below should have dispensed with such assistance. Until the Attorney General acts, the defendants can not suffer, and when he does act, they can promptly answer and have full opportunity to contest the legality of any prejudicial proceeding against them. That right being adequate, they were not in a position to ask relief by injunction. The bill should have been dismissed for want of equity.

This conclusion leads to a reversal of the decree of the District Court of Appeals and a remanding of the case to the Supreme Court of the District with direction to dismiss the bill.

Reversed.

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

The separate opinion of MR. JUSTICE MCREYNOLDS.

I think the decree below should be affirmed—the Commission went beyond any power granted by Congress.

This appeal was taken four years ago. Nearly seven years have passed since the cause began—June 12, 1920. Able counsel have argued it twice before us, but none suggested that the trial court erred in failing to dismiss the bill because there was an adequate remedy at law. Under well-settled doctrine such a defense may be waived by failure promptly to advance it. *Reynes* v. *Dumont,* 130 U. S. 354, 395; *Singer Sewing Machine Co.* v. *Benedict,* 229 U. S. 481, 484; *American Mills Co.* v. *American Surety Co.,* 260 U. S. 360, 363.

In my view it is now much too late for this court first to set up and then maintain the defense of lack of jurisdiction in the trial court, and I cannot acquiesce in the disposition of the cause upon that instable ground. The real issue should be met and determined.

KADOW ET AL. *v.* PAUL ET AL. COMMISSIONERS.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

No. 241. Argued March 16, 1927.—Decided April 18, 1927.

1. Section 4439–6 of the Laws of Washington, 1923, which provides a supplemental assessment on the lands within drainage districts to make up any deficiency resulting from the elimination or avoidance of any original assessment, does not intend that the assess-

ment of any land owner may thus be increased beyond the benefits derived by him from the improvement. P. 180.

2. Where part of the land in a special improvement district fails to pay its assessment and is appropriated and sold, any deficit thus arising may constitutionally be met by additional assessments on the lands of the district, provided the law operates uniformly as against all parts of it and the assessments of the respective land owners are not made to exceed the benefits they receive from the improvement. P. 181.

134 Wash. 539, affirmed.

ERROR to a decree of the Supreme Court of Washington which affirmed a decree dismissing the petition in a suit brought by a number of the owners of land within a drainage district to restrain the making of the improvement and the issuance of bonds to pay for it.

Mr. Homer D. Angell, with whom *Mr. Henry Crass* was on the brief, for plaintiffs in error.

Mr. A. L. Miller, with whom *Mr. Charles P. Swindler* was on the brief, for defendants in error.

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

This is a writ of error to a decree of the Supreme Court of Washington. The original action was brought in the Superior Court of Clarke County, of that State, to have the proceedings in the organization of Diking Improvement District No. 3 of that county declared void, because certain portions of the statute under which the district was formed were unconstitutional, and to restrain the defendants from taking any steps looking to the construction of the proposed improvement or the sale by the county of bonds to finance it. After a trial on the merits, the trial court dismissed the petition, and an appeal was taken to the Supreme Court of the State, where the

decree of the trial court was affirmed. The proposed improvement was sought to be made under Chapter VI, Title XXVII, Rem. Comp. Stat., as amended by c. 46 of the Laws of 1923. This law, by §§ 4407, 4408, 4410, 4411, 4412, 4414, 4415, 4416, 4422, 4435–1, makes provision for the establishment of a diking district initiated by a petition addressed to the Board of County Commissioners of the county in which the improvement is located, signed by certain owners of property to be benefited, the petition to set forth with reasonable certainty the location, route and terminal of the dike. Thereafter, the usual provisions are made for the giving of notice, the hearing upon the question of the wisdom and public benefit of the improvement, an estimate of the damage to each landowner which may be done by the improvement, and also of the benefits it will effect for each, and the total number of acres that will be benefited. The county commissioners are to have the aid of the county engineer. The proposed improvement is to be approved by the state Reclamation Board. Full provision is made for hearings at which the damages and the benefits shall be determined and apportioned to the various landowners and for appeals to a court in such determinations. A board of supervisors of the district are elected, who attend to the construction of the improvement. The cost of the improvement is to be paid by assessment upon the property benefited, and all the lands included within the boundaries of the district, and assessed for the improvement, are to remain liable for the costs of the improvement until the same are fully paid. One permitted method of meeting the cost is by bonds. These are not to be obligations of the county, though they are issued by it.

The object of this particular improvement was to reclaim lands on the east bank of the Columbia River,

which were swampy and subject to overflow at times of high water. It also had for its purpose the draining of Lake Shillapoo. The first petition covered 6,500 acres. After the organization of the district had proceeded to the point where bonds were ready to be sold, it was permitted to remain dormant for three years, when a second petition was filed with the County Commissioners, and thereafter the district was regularly established, comprising 5,100 acres of land. It was determined that the project should be financed by the issuing of bonds to run for fifteen years. The commissioners advertised for the letting of the contract for the improvement and for the sale of the bonds. On the day before the date set, the plaintiffs in error began the present action. In the state court there were may objections to the validity of the proceedings, and all of them were decided against the plaintiffs.

The counsel for plaintiffs in error in this Court concede that the only point which they can press here grows out of an amendment to the Diking Law, § 4439–6 of Session Laws of Washington for 1923, pages 128, 129, with reference to reassessments. It reads as follows:

"If upon the foreclosure of the assessment upon any property the same shall not sell for enough to pay the assessment against it, or if any property assessed was not subject to assessment, or if any assessment made shall have been eliminated by foreclosure of a tax lien or made void in any other manner, the board of county commissioners shall cause a supplemental assessment to be made on the property benefited by the improvement, *including property upon which any assessment shall have been so eliminated or made void,* and against the county, cities and towns chargeable therewith in the manner provided for the original assessment, to cover the deficiency so caused in the original assessment." The italicized words were put in by the amendment in 1923.

It is argued for plaintiffs in error that by this statute it is attempted to give power to the county officers, upon

the foreclosure of the assessment upon any property, to reassess the deficit upon the remaining lands in the district, and that this permits them to ignore the original apportionment and to reassess lands within the district for the remainder of the cost of the improvement, the benefit of which inures to other lands in the district; that this violates the principle that assessments must be apportioned in accordance with the benefits received, and is not due process of law. It is said that this complaint is particularly pertinent to the case at bar, because a large area of the diking district involved comprises the bottom of Shillapoo Lake and contiguous low lands bordering it, the value of which is nothing at the present time, and the value of which may continue to be nothing after the system of improvement is established, for the reason that it has not been ascertained that the bed of the lake and the low lands surrounding it are of such composition as to permit their use for agricultural purposes even after they are drained; that, if such lands prove valueless, the assessment charges against the same will not be paid; and by the reassessment provision the cost thereof will be reassessed against the remaining land in the district, which will increase the cost to such lands far in excess of the benefits received. In answering the objection that the condition feared has not yet arisen, is premature and may never arise and that such owners can apply for relief when conditions arise making it necessary, it is said that the bonds in question, the issuing of which the plaintiffs in error are seeking to have enjoined, are to be sold under the provisions of this law with the reassessment feature as a part thereof, and that they become at once a cloud upon the title of plaintiffs, make it unmarketable, and to that extent tend to confiscate their property and work a taking without due process of law. It is said that if the reassessment feature violates the Federal Constitution, a court of equity should afford relief at the outset to the land owners within the district.

The Diking Act specifically provides, § 4421, Session Laws of Washington for 1923, page 114, that the cost of the improvement shall be paid by assessment upon the property benefited, said assessment to be levied and apportioned as thereinafter prescribed. In *Foster* v. *Commissioners of Cowlitz County,* 100 Wash. 502, the Supreme Court of the State, in discussing a similar objection under this act though it has since been amended in one respect, used this language:

" In so far as the question of due process in the charging of the cost of the improvement to the property benefited thereby is concerned, counsel's contention is also untenable. Owners of property within the district are given notice and opportunity to be heard upon the question of the creation of the district and the construction of the improvement. When it comes to charging the cost of the improvement against the several tracts of land within the district, such charge must be 'in proportion to the benefits accruing thereto,' and we think the statute also means that no tract of land can be charged in excess of the benefits accruing thereto. Owners of the land within the district to be charged with any portion of the cost of the improvement are given notice and opportunity to be heard upon the question of benefits and the apportionment of the charge to be made therefor against the several tracts. Not until all this is done is the assessment finally levied."

It is said that this language of the Washington court can not now be regarded as a limitation to benefits of assessments against any particular lot of land because of the amendment of 1923, already referred to, by which the supplemental assessments may include deficits in the total assessments occasioned by elimination or voiding of previous assessments on the other lands in the district.

It seems clear to us that there is nothing in this amendment which changes the rule of construction of the statute as laid down by the Supreme Court in the *Foster* case,

imposing a limitation in favor of the assessment payers against any supplemental assessment that should exceed the benefits conferred on each one by the improvement. Supplemental assessments, in providing for the payment for such improvements, are recognized as a legitimate part of the proceeding necessary to raise the money and to pay bonds issued to meet the cost; and if, in the process of collection, it shall appear that some of the assessed land fails to pay the assessment and is appropriated and sold, the distribution of the deficit thus arising, to be included in another assessment, is only meeting the to be expected cost of the improvement. When the operation of the law works uniformly as against all parts of the assessment district, and results in a higher cost of the improvement, and an increased assessment on all the owners of land who have paid, it violates no constitutional right of theirs as long as their benefits continue respectively to exceed their individual assessments. *Orr* v. *Allen,* 248 U. S. 35; *Orr* v. *Allen,* 245 Fed. 486, 498; *Norris* v. *Montezuma Valley Irrigation District,* 248 Fed. 369, 373; *Hagar* v. *Reclamation District,* 111 U. S. 701; *Fallbrook Irrigation District* v. *Bradley,* 164 U. S. 112.

Affirmed.

TIMKEN ROLLER BEARING COMPANY *v.* PENNSYLVANIA RAILROAD COMPANY.

GOODBODY, RECEIVER, *v.* PENNSYLVANIA RAILROAD COMPANY.

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

Nos. 168, 178. Argued February 25, 1927.—Decided April 18, 1927.

1. An action against a railroad for the value of switching service performed by a shipper who did so at the railroad's request during a railroad strike and also paid the railroad tariff charges covering the same service, is within the jurisdiction of the District Court

where diversity of citizenship and jurisdictional amount are present; and the question whether an administrative decision by the Interstate Commerce Commission is prerequisite to the plaintiff's cause of action, is a question of the merits. P. 185.

2. Under Jud. Code § 238, a judgment of the District Court dismissing a case within its power to decide, upon a decision of the merits, was not reviewable directly by this Court though erroneously styled a dismissal "for want of jurisdiction." P. 185.
3. By the Act of September 14, 1922 (repealed by Act of February 13, 1925) a writ of error from this Court to the District Court was transferrable to the Circuit Court of Appeals when erroneously allowed under Jud. Code § 238 to a judgment of dismissal on the merits properly reviewable in the latter court. P. 186.
4. The provision of the Act of February 13, 1925, § 14, that it shall not affect cases "pending in the Supreme Court" on its effective date (three months from its approval) applies to a case erroneously lodged in this Court under Jud. Code § 238, which should have gone to the Circuit Court of Appeals, and imposes the duty of transferring it to that court under the Act of September 14, 1922. P. 187.
5. A writ of error from this Court, issued in due form by a judge having authority to issue such writs, followed by due execution of the writ and lodgment of the record here, is to be regarded as a case "pending" in this Court from the allowance and issuance of the writ, even though the writ was allowed and issued erroneously. P. 188.

ACTIONS to recover the value of switching service, brought in an Ohio state court and removed, on the ground of diversity of citizenship, to the District Court, where they were dismissed for supposed want of jurisdiction. Orders made at this term dismissing the writs of error are now set aside and the causes are transferred to the Circuit Court of Appeals.

Messrs. Luther Day, Rufus S. Day, and *Donald W. Kling* for plaintiffs in error, submitted.

Mr. Andrew P. Martin, with whom *Messrs. Andrew Squire* and *Thomas M. Kirby* were on the briefs, for defendant in error.

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

These two cases are exactly alike, and the same disposition will be made of them. They were dismissed at this term for lack of jurisdiction, as follows:

" Dismissed for lack of jurisdiction in this Court on the authority of *Transportes Maritimes Do Estado* v. *Almeida,* 265 U. S. 104, 105, and *Oliver American Trading Company* v. *Government of the United States of Mexico,* 264 U. S. 440, 442."

This is a motion to set aside the dismissals and to substitute therefor orders transferring them to the Circuit Court of Appeals for the Sixth Circuit.

The Timken Roller Bearing Company is a corporation of Ohio engaged in the business of making roller bearings and other steel products, with its principal place of business in Canton, Stark County, Ohio. The Pennsylvania Railroad is a corporation of Pennsylvania and a common carrier engaged in Ohio, and carried freight for the Timken Company. The Timken Company sued the Pennsylvania Company, averring the following facts:

On April 10, 1920, the yard employees of the Pennsylvania Company struck. That Company notified the Timken Company that it would be unable to switch freight cars for it from the Pennsylvania's interchange tracks to the customary delivery of the Timken plant at Canton, Ohio. The Pennsylvania Company then provided the Timken Company with a yard locomotive, and from April 13, 1920, to about September 30, 1920, the Timken Company, with the knowledge and consent, and at the request of the Pennsylvania Company, did the switching service itself. The Pennsylvania Company made to the Timken Company its customary charges for such switching service at its regular freight rates, which the Timken Company paid. During that period the Timken Company switched 1640 freight cars for the Pennsylvania Company, the

reasonable value of which service was $6,534.61. This amount was included in the line haul freight charges paid by the Timken Company to the Pennsylvania Company. The Pennsylvania Company was thus unjustly enriched in the amount above stated, and the Pennsylvania Company owed to the Timken Company the reasonable value of the service as stated.

The suit of the Timken Company was brought in the Common Pleas Court of Cuyahoga County, Ohio, and removed by the Pennsylvania Company, on the ground of diverse citizenship, to the United States District Court for the Northern District of Ohio. In that court the Pennsylvania Company filed a motion to dismiss for lack of jurisdiction, on the grounds:

(a) That the matters complained of in the plaintiff's petition essentially involved the making of a rate, as to which the District Court had no power;

(b) The subject affected the reasonableness of rates and the reasonableness of a practice in interstate commerce, which were administrative questions, confided primarily to the Interstate Commerce Commission, and there was no allegation in the plaintiff's petition that the Interstate Commerce Commission had prescribed any rule, rate or practice which would regulate, control or govern the rights or obligations of the plaintiff and defendant in the matter complained of;

(c) That to compensate the plaintiff for the expense of the switching service set forth in plaintiff's petition would be tantamount to giving it a rebate, contrary to law.

The motion to dismiss was sustained by the District Court on the ground that the question presented by the plaintiff's petition was an administrative and not a judicial question and that exclusive jurisdiction to hear and determine the matters complained of was vested in the Interstate Commerce Commission. The District Court

therefore dismissed the petition solely for want of jurisdiction, and, under the provisions of § 238 of the Judicial Code of the United States as it stood at the time, January 30, 1925: "Appeals and writs of error may be taken from the District Courts, including the United States District Court for Hawaii, direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the Court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision. . . . ," it made the following certificate:

" This Court by its final order dismissed the suit solely for want of jurisdiction.

" This certificate is made conformably to Judicial Code, Section 238, and the opinion filed herein is made a part of the record and will be certified and sent up as a part of the proceedings, together with this certificate."

Thereupon a writ of error from this Court to the District Court was allowed by the District Judge.

When the case was argued here in open court, this Court ordered the dismissal of the writ of error as above, for the reason that the question of jurisdiction passed on by the District Court in this case was not such a question as was covered by § 238. As interpreted by repeated decisions of the Court, such a question is in issue only when the District Court's power to hear and determine the cause as defined and limited by the Constitution or statutes of the United States is in controversy, and, where a District Court is vested with jurisdiction of a cause, as where diversity of citizenship exists, and the matter in controversy is of the requisite value, the question whether it has the power to afford the plaintiff a particular remedy does not present a jurisdictional issue. *Smith* v. *Apple,* 264 U. S. 274, 278; *Oliver Trading Company* v. *Mexico,* 264 U. S. 440, 442; *Transportes Maritimes Do Estado*

v. *Almeida*, 265 U. S. 104, 105. In this case there was no question about the jurisdiction of the Court, for there was diverse citizenship and the value of the matter in controversy was of requisite amount. The real question was whether, in the absence of an administrative decision by the Interstate Commerce Commission, the plaintiff had a cause of action. See *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285. It went to the merits and not to the jurisdiction, and therefore this Court had no jurisdiction by writ of error under § 238 to consider the case.

The issue now made is whether this Court made the proper disposition of the cause by dismissing it, in view of the amendment by Act of Congress of September 14, 1922, to § 238 of the Judicial Code, called § 238 (a), c. 305, 42 Stat. 837, as follows:

"If an appeal or writ of error has been or shall be taken to, or issued out of, any circuit court of appeals in a case wherein such appeal or writ of error should have been taken to or issued out of the Supreme Court; or if an appeal or writ of error has been or shall be taken to, or issued out of, the Supreme Court in a case wherein such appeal or writ of error should have been taken to, or issued out of a circuit court of appeals, such appeal or writ of error shall not for such reason be dismissed, but shall be transferred to the proper court, which shall thereupon be possessed of the same and shall proceed to the determination thereof, with the same force and effect as if such appeal or writ of error had been duly taken to, or issued out of, the court to which it is so transferred."

There is no doubt that under this section, if it applies to the present case, the motion to dismiss should not have been granted as it was, but the case should have been transferred to the Circuit Court of Appeals for a review of the issue on the merits as to the cause of action set up by the Timken Company in its petition.

The motion now made to set aside the dismissal and enter an order of transfer is resisted by the attorneys for the Pennsylvania Company, on the ground that § 238 (a) does not now apply to the present case. This suit was filed in the Common Pleas Court of Cuyahoga County on May 31, 1924, and was removed to the United States District Court for the Northern District of Ohio June 30, 1924, and upon the defendant's motion was dismissed by the District Court for lack of jurisdiction, the judge's certificate to that effect being filed January 30, 1925. The writ of error was allowed by the District Court on April 6, 1925, was issued on that date and served upon the defendant in error April 18, 1925—all before the taking effect of the Act of February, 1925, on May 13, 1925. The return on the writ of error was transmitted by the Clerk of the District Court on July 3, 1925, the transcript of record being filed on July 13, 1925.

The Act of September 14, 1922, § 238 (a) was expressly repealed by the Act of February 13, 1925, § 13, 43 Stat. 942. Section 14 provides that the Act "shall take effect three months after its approval, but shall not affect cases then pending in the Supreme Court, nor shall it affect the right to a review or the mode or time for exercising the same as respects any judgment or decree entered prior to the date when it takes effect." The defendant contends that § 14 can not be construed to continue the effect of § 238 (a) of the Act of September 22, 1922, because § 14 only saves cases then pending in the Supreme Court; that, as this Court has now found it had no jurisdiction of the writ of error issued by this Court to the District Court, it can not be said that it was a case pending in this Court, and therefore it did not come within the saving clause and the order dismissing the case for lack of jurisdiction must stand. We think that this is much too narrow a construction of the saving provision of § 14. A writ of error duly issued by a judge having authority to issue writs of error from this Court to the District

Court of the United States, in a case there pending, even though the writ of error is erroneously issued, is, when the writ is executed and the record brought here, to be regarded as having been a case pending in this Court from the allowance and issuing of the writ of error, and as then removed from the control and jurisdiction of the District Court—and to continue as such for the purposes of § 14 until the writ of error is dismissed. The effect of § 14, therefore, is to impose on this Court the duty of granting the transfer to the Circuit Court of Appeals if that is the court, as it is, to which this case should have been taken on error. The previous dismissal of the case is set aside and the transfer of the case to the Circuit Court of Appeals for the Sixth Circuit is ordered.

A similar order will be made in the case of *Goodbody* v. *Pennsylvania Company*, No. 178.

Dismissals set aside, and cases transferred.

ROAD IMPROVEMENT DISTRICT NO. 1 OF FRANKLIN COUNTY, ARKANSAS, ET AL. *v.* MISSOURI PACIFIC RAILROAD COMPANY.

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

No. 38. Argued April 19, 1926.—Decided April 18, 1927.

1. A legislative confirmation of a special assessment cures irregularities but not constitutional infirmities. P. 191.
2. Concurrent findings of two courts below of facts showing a road improvement assessment to be arbitrary and unreasonably discriminatory should be accepted by this Court unless clearly erroneous. P. 191.
3. An assessment against a railroad based on real property and also its rolling stock and other personal property is unreasonably discriminatory when other assessments for the same improvement are based on real property alone. P. 192.

4. Testimony that the assessors fixed the benefits to the railroad on a mileage basis regardless of area, and as to other property proceeded solely with regard to area, is of no avail after a legislative adoption of the assessments, where the modes in which the assessors arrived at the amounts assessed were not shown on the assessment roll or communicated to the legislature. P. 192.
5. That loss of local traffic to a railroad usually results when a hard-surface road adapted to use by motor-driven vehicles is constructed practically parallel to its line, is of common knowledge. P. 194.
6. The evidence shows that an increase in traffic and revenue of the railroad, as respects freight moving in car-load lots and passengers travelling considerable distances, may reasonably be expected from the proposed road improvement, greater than the loss in local traffic, but that the assessment far exceeds such anticipated benefit and is arbitrary and violative of the Due Process Clause. P. 194.
7. Where an excessive special assessment was enjoined absolutely, but the evidence showed that some benefit would accrue, the court modified the decree so that a new assessment not exceeding an amount stated, might be imposed by the board of assessors empowered by the state law to revise such assessments. P. 194.

2 F. (2d) 340, modified and affirmed.

APPEAL from a decree of the Circuit Court of Appeals which affirmed a decree of the District Court setting aside, as arbitrary and discriminatory, a special assessment of benefits against the Railroad, made to help defray the cost of a road improvement in Arkansas.

Mr. Dave Partain, with whom *Messrs. G. C. Carter* and *Heartsil Ragon* were on the brief, for appellants.

Mr. Thomas B. Pryor, with whom *Mr. Edward J. White* was on the brief, for appellee.

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

This is a suit to annul an assessment of benefits accruing to a railroad from the improvement of a public road in Franklin County, Arkansas.

The improvement was undertaken by a road district created for the purpose by an act of the state legislature directing that the cost be distributed over the lands, railroads and other real property within the district, in the form of special taxes measured by benefits received. Act 588, Special Road Acts 1919. The benefits were to be assessed by the district's assessors; and any owner aggrieved by their action was to have a right for twenty days to sue in a court of competent jurisdiction to set aside the assessment against his property. Otherwise it was to be "incontestable either at law or in equity."

The assessors originally assessed the benefits to the railroad at $54,062.00; and the railroad company in due time brought this suit to annul that assessment—on the grounds, among others, that it was plainly arbitrary and unreasonably discriminatory and therefore in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

While the suit was pending the state legislature confirmed the assessments, specifically including that against the railroad, and authorized additional assessments, to be made conformably to the first act, to meet the cost of proposed changes in the width of the road-bed and in other features of the improvement. Act 626, Special Acts 1921. The proposed changes in the plans were made and additional assessments ensued. In this way the total assessment against the railroad came to be $75,686.00. The legislation passed an act confirming and approving the additional assessments, again specifically including that against the railroad. Act 109, Special Acts 1923. In supplementary bills, filed by the court's leave, the plaintiff set forth the additional assessment and the legislative confirmations, and challenged their validity on the same grounds that were advanced against the original assessment.

On the hearing much evidence was produced; and the District Court found that the assessment against the railroad was plainly arbitrary and unreasonably discriminatory, and on that ground entered a decree setting it aside and enjoining the defendants from attempting to collect any tax based thereon. The Circuit Court of Appeals concurred in the finding and affirmed the decree. 2 F. (2d) 340.

The defendants bring the case here, their contentions being, (a) that the legislative confirmation of the assessment is controlling; (b) that the court below erred in finding that the assessment was plainly arbitrary and unreasonably discriminatory; and (c) that if the assessment was excessive, either in itself or when compared with the assessments against other property, it should be not wholly set aside but reduced to the extent of the excess.

There can be no doubt that the legislative confirmation placed the assessment on the same plane as if it were made by the legislature, and thereby cured any mere irregularities on the part of the assessors; but, as the legislature could not put aside or override constitutional limitations, the confirmation did not prevent inquiry into the alleged violation of such limitations.

If, as found by the courts below, the assessment was plainly arbitrary and unreasonably discriminatory, it was in violation of both the due process and the equal protection clauses of the Fourteenth Amendment; so we turn to the complaint of that finding. As the courts below concurred in the finding on successive examinations of the evidence it should be accepted by us unless shown to be clearly erroneous. *Washington Securities Co.* v. *United States,* 234 U. S. 76, 78; *Baker* v. *Schofield,* 243 U. S. 114, 118; *United States* v. *State Investment Co.,* 264 U. S. 206, 211; *Norton* v. *Larney,* 266 U. S. 511, 518.

The road district extends across Franklin County from east to west along the Arkansas River and is five or six

miles wide. The public road which is being improved traverses the district from east to west, is 24 miles long, practically parallels the railroad and touches the same towns. The improvement consists in reducing curves and grades, widening the road-bed and giving it a rock base and hard surface adapted to use at all seasons by all kinds of vehicles, whether drawn by animals or propelled by motors. The road is intended to be part of a projected hard-surface highway extending from Little Rock to Fort Smith, as the railroad does. The area of the road district is 67,000 acres and that of the railroad right of way therein is 565 acres, or eight-tenths of one per cent. of the whole. The benefits assessed to property in the district aggregate $575,421.35, of which $75,686.00, or 13.2 per cent., is assessed to the railroad.

The assessment to the railroad is not based on real property alone, but also on rolling stock and other personalty valued at $52,465.00, while all other assessments are confined to real property. In this there is an obvious and unreasonable discrimination. Further discrimination is said to be shown by testimony indicating that the assessors fixed the benefits to the railroad on a mileage basis regardless of area, and as to other property proceeded solely with regard to area. But this testimony must be put aside by reason of the legislative adoption of the assessments. The modes in which the assessors arrived at the amounts assessed were not shown on the assessment roll or communicated to the legislature; so the question of discrimination must be determined independently of the theories and processes of the assessors, as if the assessments were made directly by the legislature.

Most of the testimony is addressed to the questions whether and how far the railroad will be benefited by the intended improvement of the parallel public road. Some witnesses are of opinion there will be no benefit, and a

few that there will be great benefit. These are extreme views and are weakened, rather than supported, by further statements of the same witnesses. Other testimony in substantial volume, coming from witnesses informed by observation and experience, is to the effect that, while an increase in particular traffic with accompanying revenue reasonably may be expected, it will be less than would be realized if the highway extended away from the railroad and reached localities theretofore without such a road; that, unlike such a lateral feeder, the parallel road reaching the same towns as the railroad will through its ready use by motor-driven vehicles withdraw from the railroad much of the less-than-car-load freight between these towns, and much of the passenger traffic between them; that such has been the actual result in similar situations along this and other railroads in Arkansas and other States, specific instances being described; and that the loss to this railroad in the instances described has ranged from 50 to 90 per cent. of such local traffic and compelled a cessation of part of the service to which it was incident. The successful competition of motor trucks in these situations is explained on the grounds that they do not bear the cost of constructing and maintaining the roadway, and are able to receive and deliver freight at the street door and to relieve their patrons from drayage charges. The view that the improved road will be of mixed benefit and detriment to the railroad is not confined to the plaintiff's witnesses but shared by informed witnesses called by the defendants. One of these, a member of the State Highway Commission and familiar with the particular situation and the development in the locality, testifies: "Q. What in your opinion is the effect of building this highway upon the revenue of the Missouri Pacific Railway? Will it be a detriment to it, or will it not be a benefit? A. Well from some standpoints a bene-

fit, and from others perhaps a detriment, but as a whole perhaps a benefit."

From all the testimony we think there is ample ground for believing that the improved road will lead to an increase in the traffic and revenue of the railroad, as respects freight moving in car-load lots and passengers travelling considerable distances, but that the benefit from this will be cut down by a substantial loss in local freight and passenger traffic attracted to motor-driven vehicles moving over the improved road. That such a loss in local traffic usually ensues when hard-surface roads adapted to use by motor-driven vehicles are constructed practically parallel to railroads is not only shown by the testimony but is common knowledge. It received distinct recognition in the President's message of December 8, 1922, to Congress.

We think it also appears from the testimony that the increase in revenue reasonably to be expected will be greater than the loss, but that the excess will not be such as to justify an assessment of benefits of $75,686.00 or more than a small fraction of that sum. Indeed, on the present showing, we should regard an assessment in excess of $15,000.00 as passing the outside limit of reasonable judgment and plainly arbitrary.

Our conclusion is that the assessment against the railroad is unreasonably discriminatory in so far as it is based on personal property, and in this respect violates the equal protection clause of the Fourteenth Amendment, and that it is otherwise so excessive as to be a manifestly arbitrary exaction and in violation of the due process of law clause of the same amendment. In these respects the finding and holding below are well grounded.

It follows that the present assessment is invalid and an injunction should be granted against its enforcement. The District Court so decreed. But as, on the present showing, it appears that an assessment of some benefits—

in an amount certainly below $15,000.00—would be justified, the way should be left open for making a new or revised assessment. The defendants ask, if the present assessment be held excessive, that it be reduced in this suit to a proper sum. But to this we do not assent. The state statute commits the assessing of benefits to a special non-judicial board of assessors, and authorizes that board, when requested by the commissioners of the district, to revise their assessments by "increasing or diminishing the assessment against particular pieces of property as justice requires." Act 588, § 10, Special Road Acts 1919. The better course is to leave the making of a substituted or revised assessment to that board. The decree will be modified by including a provision that is without prejudice to the lawful revision of the assessment conformably to the state statute and not exceeding $15,000 in amount.

Decree modified and affirmed as modified.

DUIGNAN *v.* UNITED STATES ET AL.

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

No. 101. Argued February 21, 1927.—Decided April 25, 1927.

1. Case held properly reviewable by appeal under Jud. Code § 241, before amendment, and certiorari denied. P. 197.
2. In a suit by the United States against a lessor and a lessee to abate a liquor nuisance, under § 22 of Title II of the Prohibition Act, issues raised by a cross bill of the lessor asserting his federal right under § 23 to a forfeiture of the lease as against the lessee, are within the jurisdiction of the District Court regardless of the citizenship of the parties. P. 197.
3. A suit by the United States to abate a liquor nuisance under § 22 of Title II of the Prohibition Act, is a suit in equity and triable without a jury. P. 197.

4. The constitutional right to a jury trial may be waived by proceeding to trial without demanding a jury and is not saved by an application to the discretionary power of the court, sitting in equity, to frame issues for a jury. P. 198.
5. To support a demand for a jury trial of matters raised by a cross bill, the demandant must first put them in issue by answering the cross bill. P. 199.
6. Objections to the equity jurisdiction to adjudge a forfeiture of a lease under § 23 of Title II of the Prohibition Act, and to the assertion of this right through a cross bill filed by the lessor against the lessee in a suit brought against them both by the United States under § 22, are waived if not seasonably taken. P. 199.

4 F. (2d) 983, affirmed.

APPEAL from a decree of the Circuit Court of Appeals which affirmed a decree of the District Court abating a nuisance and adjudging forfeiture of a lease, under §§ 22 and 23 of the Prohibition Act.

Mr. Alfred J. Talley for appellant.

Mr. John W. Davis for appellee Pall Mall Realty Corporation.

Solicitor General Mitchell was on the brief for the United States.

MR. JUSTICE STONE delivered the opinion of the Court.

The United States filed a bill in equity in the district court for southern New York, under § 22 of the National Prohibition Act, to abate a liquor nuisance alleged to be maintained by Duignan, the appellant, upon premises occupied by him under a lease. By amended bill, the appellee, the Pall Mall Realty Corporation, the owner of the leased premises, was made a party defendant. In its answer, it admitted the allegations of the bill. By cross bill it set up its ownership of the premises, its lease to Duignan, the maintenance of a liquor nuisance by him on the premises in violation of § 21 of the National Pro-

hibition Act, and asked that the lease be forfeited under § 23 of the Act. Appellant neither answered the cross bill nor directed any motion to it, but made application for a jury trial which was denied.

On the trial without a jury, appellant drew in question the constitutionality of the forfeiture of his leasehold as a denial of due process of law. After the trial, in which the existence of the nuisance was litigated, the district court decreed the forfeiture of the lease. This was affirmed by the court of appeals for the second circuit. 4 F. (2d) 983. The case is properly here on appeal, Jud. Code, § 241, before amended, and the petition for certiorari, filed as a jurisdictional precaution, is denied.

At the outset, appellant denies the jurisdiction of the district court to try the issues raised by the cross bill, in the absence of diversity of citizenship. Section 23 provides: "Any violation of this title upon any leased premises by the lessee or occupant thereof shall, at the option of the lessor, work a forfeiture of the lease." The right thus given to the lessor to forfeit the lease is one arising under a law of the United States, and the district court had jurisdiction to determine a suit founded upon it, regardless of the citizenship of the parties. Jud. Code, § 24 (a).

Numerous other questions are raised by appellant's brief and argument, but so far as they are of substance, they are involved in or incidental to the two principal grounds urged for reversal: (1) that appellant was denied the right to a jury trial, in violation of the Seventh Amendment of the Constitution, and (2) that the forfeiture of appellant's lease is a denial of due process of law.

So far as appellant's motion for a jury trial was directed to the issues raised by the bill and answer, it was properly denied, as § 22 of the National Prohibition Act

authorizes the abatement of a liquor nuisance by a bill in equity filed by the United States. Cf. *Murphy* v. *United States,* 272 U. S. 630. But it is urged that § 23, assuming its constitutionality, at most gives a right at law to a possessory action for the recovery of the leased premises, which is not cognizable in a court of equity; and in any case, appellant was entitled to have the issues raised by the cross bill tried by a jury.

Appellant's application for a jury was in terms a motion for an order "framing for trial by jury the issues in this action as to the occurrences of the alleged violations of the National Prohibition Act." It clearly appears from the notice of motion and the supporting affidavits that the motion was not a challenge to the equity jurisdiction of the court nor a demand for a jury trial in an action at law, such as is guaranteed by the Constitution. It was rather an application addressed to the discretion of the court sitting in equity to frame issues for a jury to aid, as stated, "in advising the court as to the credibility of the witnesses," and was made on the ground that this was "not the usual equity case, which ordinarily involves only matters of law."

The right to a jury trial may be waived where there is an appearance and participation in the trial without demanding a jury. *Kearney* v. *Case,* 12 Wall. 275; *Perego* v. *Dodge,* 163 U. S. 160, 166. Section 649 of the Revised Statutes provides that issues of fact may be tried by the court without a jury, upon written stipulation of the parties, and that the finding of the court upon the facts shall have the same effect as the verdict of the jury. But this section does not preclude other kinds of waiver. *Kearney* v. *Case, supra.* Its purpose and effect, when read together with §§ 648 and 700, is to define the scope of appellate review in actions at law without a jury. Unless there is a written stipulation waiving a jury, there can be no review of the rulings on questions of law in

the course of the trial or of the sufficiency of a special finding to support the judgment. See *Law* v. *United States,* 266 U. S. 494, 496; cf. *Fleischmann Co.* v. *United States,* 270 U. S. 349, 355, 356. Appellant's failure to demand a trial by a common law jury amounted, we think, to a waiver of the constitutional right, if any, now claimed.

But even if his application for a jury trial be regarded as an assertion of his constitutional right, there were no issues to be tried by a jury, as he had failed to answer the cross bill. *The Confiscation Cases,* 20 Wall. 92, 110. Hence, there was no error in the court's finding the facts supporting its judgment, without a jury. Whether issues raised by the pleadings in proceedings under § 23 must be tried by jury if seasonably demanded is a question which does not arise on this record.

Appellant on appeal for the first time challenged the equity jurisdiction of the court, urging that the remedy at law was adequate. The cancellation of appellant's lease, which was the relief sought, was a remedy competent for equity to give. The repeated holdings of the lower courts that a suit brought under § 23 is one cognizable in equity,[1] at least suggest that the suit is not so plainly at law that the court should, of its own motion, have dismissed it. Under such circumstances, objection to the equity jurisdiction not seasonably taken is waived, *Kilbourn* v. *Sunderland,* 130 U. S. 505, 514; *Brown* v. *Lake Superior Iron Co.,* 134 U. S. 530, 534–536; *Perego* v. *Dodge, supra,* 164, especially where, as here, appellant did not answer the cross bill. For the same reason it is unnecessary for us to determine whether appellee adopted the proper procedure in seeking the forfeiture of the lease by cross bill.

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[1] *Grossman* v. *United States,* 280 Fed. 683; *United States* v. *Boynton,* 297 Fed. 261; *United States* v. *Archibald,* 4 F. (2d) 587; *United States* v. *Gaffney,* 10 F. (2d) 694; *cf. United States* v. *Schwartz,* 1 F. (2d) 718.

We do not consider the constitutionality of the forfeiture under § 23. The court below in enumerating the questions raised and presented made no mention of the constitutional question. The assignment of errors below did not refer specifically to it as required by the rules of that court, and so far as the record discloses, it was not presented there. See *United States* v. *Gaffney*, 10 F. (2d) 694, 696. This Court sits as a court of review. It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed. See *Montana Ry. Co.* v. *Warren*, 137 U. S. 348, 351; *Old Jordan Mining Co.* v. *Société Anonyme Des Mines*, 164 U. S. 261, 264, 265; *Magruder* v. *Drury*, 235 U. S. 106, 113; *Gila Valley Ry.* v. *Hall*, 232 U. S. 94, 98; *Grant Bros* v. *United States*, 232 U. S. 647, 660; *Ana Maria Sugar Co.* v. *Quinones*, 254 U. S. 245, 251; cf. *West* v. *Rutledge Timber Co.*, 244 U. S. 90, 99, 100; *United States* v. *Tennessee & Coosa R. R.*, 176 U. S. 242, 256.

Decree affirmed.

BUCK *v.* BELL, SUPERINTENDENT.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

No. 292. Argued April 22, 1927.—Decided May 2, 1927.

1. The Virginia statute providing for the sexual sterilization of inmates of institutions supported by the State who shall be found to be afflicted with an hereditary form of insanity or imbecility, is within the power of the State under the Fourteenth Amendment. P. 207.
2. Failure to extend the provision to persons outside the institutions named does not render it obnoxious to the Equal Protection Clause. P. 208.

143 Va. 310, affirmed.

ERROR to a judgment of the Supreme Court of Appeals of the State of Virginia which affirmed a judgment order-

ing the Superintendent of the State Colony of Epileptics and Feeble Minded to perform the operation of salpingectomy on Carrie Buck, the plaintiff in error.

Mr. I. P. Whitehead for plaintiff in error.

The plaintiff in error contends that the operation of salpingectomy, as provided for in the Act of Assembly, is illegal in that it violates her constitutional right of bodily integrity and is therefore repugnant to the due process of law clause of the Fourteenth Amendment. In *Munn* v. *Illinois,* 94 U. S. 143, this Court, in defining the meaning of "deprivation of life," said: "The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The deprivation not only of life but whatever God has given to everyone with life . . . is protected by the provision in question." The operation of salpingectomy clearly comes within the definition. It is a surgical operation consisting of the opening of the abdominal cavity and the cutting of the Fallopian tubes with the result that sterility is produced. It is true the Act of Assembly does provide for a hearing before the sterilization operation can be performed, and that that hearing may be in a court of law in case of appeal, but this fact standing alone does not meet the constitutional requirement of due process of law.

In determining whether the constitutional requirement has been observed we must look to the substance rather than the form of the law. *Chicago R. Co.* v. *Chicago,* 166 U. S. 226; *Simmons* v. *Craft,* 182 U. S. 427; for form of the procedure cannot convert the process used into due process of law, if the result is to illegally deprive a citizen of some constitutional right. *Chicago R. Co.* v. *Chicago, supra.* Neither can the State make a proceeding due process of law by declaring it to be such. If this were not so, there could be no restraint on the power of the legislature. *Murry* v. *Hoboken L. & I. Co.,* 18 How. 272;

Hurtado v. *California,* 110 U. S. 516. The test of due process of law is that the proceedings shall be legal, preserving the liberty of the citizen. The inherent right of mankind to go through life without mutilation of organs of generation needs no constitutional declaration.

The Act denies to the plaintiff and other inmates of the state colony for epileptics and feeble minded the equal protection of the laws guaranteed by the Fourteenth Amendment. "The mere fact of classification is not sufficient to relieve a statute of the reach of the equality clause." *Gulf, Colo. R. R. Co.* v. *Ellis,* 165 U. S. 150; and the classification must be based upon some reasonable grounds in the light of the purpose sought to be attained by the legislature and must not be an arbitrary selection.

The object of the Act is to prevent the reproduction of mentally defective people. "The legislature cannot take what might be termed a natural class of persons, split this class in two and then arbitrarily designate the dissevered factions of the original unit as two classes and thereupon enact different rules for the government of each." *State* v. *Julow,* 129 Mo. 163; *State* v. *Walsh,* 136 Mo. 400; *Alexander* v. *Elizabeth,* 56 N. J. L. 71; *Haynes* v. *Lapeer,* 201 Mich. 138; *Smith* v. *Command,* 231 Mich. 409; *Smith* v. *Bd. of Examiners,* 85 N. J. L. 46.

If this Act be a valid enactment, then the limits of the power of the State (which in the end is nothing more than the faction in control of the government) to rid itself of those citizens deemed undesirable according to its standards, by means of surgical sterilization, have not been set. We will have "established in the State the science of medicine and a corresponding system of judicature." A reign of doctors will be inaugurated and in the name of science new classes will be added, even races may be brought within the scope of such regulation, and the worst forms of tyranny practiced. In the place of the constitu-

tional government of the fathers we shall have set up Plato's Republic.

Mr. Aubrey E. Strode for defendant in error.

The act does not impose cruel and unusual punishment. A constitutional provision prohibiting the infliction of cruel and unusual punishment is directed against punishment of a barbarous character, involving torture, such as drawing and quartering the culprit, burning at the stake, cutting off the nose, ears or limbs, and the like, and such punishments as were regarded as cruel and unusual at the time the Constitution was adopted. *Hart* v. *Commonwealth,* 131 Va. 741; *In re Kemmler,* 136 U. S. 436; *Collins* v. *Johnson,* 237 U. S. 509; *Weems* v. *United States,* 217 U. S. 349. In *State* v. *Felin,* 70 Wash. 65, which was a criminal case, it was expressly held that an asexualization operation, vasectomy in that case, was not a cruel punishment. This Court held in the *Weems Case, supra,* that the provision of the federal Constitution (Amendment VIII) does not apply to state legislatures.

The Act affords due process of law. *Commission* v. *Hampton Co.,* 109 Va. 565; *Mallory* v. *Va. Colony for Feeble Minded,* 123 Va. 205; *Anthony* v. *Commonwealth,* 142 Va. 577. The Act is a valid exercise of the police power. The courts generally are indisposed to suffer the police power to be impaired or defeated by constitutional limitations. *Barbier* v. *Connolly,* 113 U. S. 27; *Shenandoah Lime Co.* v. *Governor,* 115 Va. 875. Section 159 of the Constitution of Virginia provides that " the exercise of the police power of the State shall never be abridged." An exercise of the police power analogous to that of the statute here in question may be found in the compulsory vaccination statutes; for there, as here, a surgical operation is required for the protection of the individual and of society; and that requirement has been upheld when imposed upon school children only, those at-

tending public institutions of learning, though not imposed upon the public as a whole. *Jacobson* v. *Massachusetts,* 197 U. S. 11; *Viemester* v. *White,* 179 N. Y. 235. The State may and does confine the feeble minded, thus depriving them of their liberty. When so confined they are by segregation prohibited from procreation—a further deprivation of liberty that goes unquestioned. The appellant is under the Virginia statutes already by law prohibited from procreation. The precise question therefore is whether the State, in its judgment of what is best for appellant and for society, may through the medium of the operation provided for by the sterilization statute restore her to the liberty, freedom and happiness which thereafter she might safely be allowed to find outside of institutional walls. No legal reason appears why a person of full age and sound mind, and even though free from any disease making such operation advisable or necessary, may not by consent have the operation performed for the sole purpose of becoming sterile, thus voluntarily giving up the capacity to procreate. The operation therefore is not legally *malum in se.* It can only be illegal when performed against the will or contrary to the interest of the patient. Who then is to consent or decide for this appellant whether it be best for her to have this operation? She cannot determine the matter for herself both because being not of full age her judgment is not to be accepted nor would it acquit the surgeon, and because she is further incapacitated by congenital mental defect.

The statute is part of a general plan applicable to all feeble-minded. It may be sustained as based upon a reasonable classification. In Virginia, marriage with the very class here involved, viz., feeble-minded inmates of state institutions, is prohibited, and its consummation visited with heavy penalties of the law. In Wisconsin, a statute requiring male applicants for marriage to file a physician's certificate of freedom from disease

was sustained in *Peterson* v. *Widule,* 157 Wis. 641. See also *Maynard* v. *Hill,* 125 U. S. 190. The validity of a statute prohibiting the marriage of epileptics was sustained in *Gould* v. *Gould,* 78 Conn. 242. See *Kinney* v. *Conn,* 30 Grat. 858; *Smith* v. *Board,* 85 N. J. L. 46, distinguished and criticized.

Mr. Justice Holmes delivered the opinion of the Court.

This is a writ of error to review a judgment of the Supreme Court of Appeals of the State of Virginia, affirming a judgment of the Circuit Court of Amherst County, by which the defendant in error, the superintendent of the State Colony for Epileptics and Feeble Minded, was ordered to perform the operation of salpingectomy upon Carrie Buck, the plaintiff in error, for the purpose of making her sterile. 143 Va. 310. The case comes here upon the contention that the statute authorizing the judgment is void under the Fourteenth Amendment as denying to the plaintiff in error due process of law and the equal protection of the laws.

Carrie Buck is a feeble minded white woman who was committed to the State Colony above mentioned in due form. She is the daughter of a feeble minded mother in the same institution, and the mother of an illegitimate feeble minded child. She was eighteen years old at the time of the trial of her case in the Circuit Court, in the latter part of 1924. An Act of Virginia, approved March 20, 1924, recites that the health of the patient and the welfare of society may be promoted in certain cases by the sterilization of mental defectives, under careful safeguard, &c.; that the sterilization may be effected in males by vasectomy and in females by salpingectomy, without serious pain or substantial danger to life; that the Commonwealth is supporting in various institutions many defective persons who if now discharged would become

a menace but if incapable of procreating might be discharged with safety and become self-supporting with benefit to themselves and to society; and that experience has shown that heredity plays an important part in the transmission of insanity, imbecility, &c. The statute then enacts that whenever the superintendent of certain institutions including the above named State Colony shall be of opinion that it is for the best interests of the patients and of society that an inmate under his care should be sexually sterilized, he may have the operation performed upon any patient afflicted with hereditary forms of insanity, imbecility, &c., on complying with the very careful provisions by which the act protects the patients from possible abuse.

The superintendent first presents a petition to the special board of directors of his hospital or colony, stating the facts and the grounds for his opinion, verified by affidavit. Notice of the petition and of the time and place of the hearing in the institution is to be served upon the inmate, and also upon his guardian, and if there is no guardian the superintendent is to apply to the Circuit Court of the County to appoint one. If the inmate is a minor notice also is to be given to his parents if any with a copy of the petition. The board is to see to it that the inmate may attend the hearings if desired by him or his guardian. The evidence is all to be reduced to writing, and after the board has made its order for or against the operation, the superintendent, or the inmate, or his guardian, may appeal to the Circuit Court of the County. The Circuit Court may consider the record of the board and the evidence before it and such other admissible evidence as may be offered, and may affirm, revise, or reverse the order of the board and enter such order as it deems just. Finally any party may apply to the Supreme Court of Appeals, which, if it grants the appeal, is to hear the case upon the record of the trial

in the Circuit Court and may enter such order as it thinks the Circuit Court should have entered. There can be no doubt that so far as procedure is concerned the rights of the patient are most carefully considered, and as every step in this case was taken in scrupulous compliance with the statute and after months of observation, there is no doubt that in that respect the plaintiff in error has had due process of law.

The attack is not upon the procedure but upon the substantive law. It seems to be contended that in no circumstances could such an order be justified. It certainly is contended that the order cannot be justified upon the existing grounds. The judgment finds the facts that have been recited and that Carrie Buck "is the probable potential parent of socially inadequate offspring, likewise afflicted, that she may be sexually sterilized without detriment to her general health and that her welfare and that of society will be promoted by her sterilization," and thereupon makes the order. In view of the general declarations of the legislature and the specific findings of the Court, obviously we cannot say as matter of law that the grounds do not exist, and if they exist they justify the result. We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. *Jacobson* v. *Massachusetts,* 197 U. S. 11. Three generations of imbeciles are enough.

But, it is said, however it might be if this reasoning were applied generally, it fails when it is confined to the small number who are in the institutions named and is not applied to the multitudes outside. It is the usual last resort of constitutional arguments to point out shortcomings of this sort. But the answer is that the law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated so far and so fast as its means allow. Of course so far as the operations enable those who otherwise must be kept confined to be returned to the world, and thus open the asylum to others, the equality aimed at will be more nearly reached.

Judgment affirmed.

MR. JUSTICE BUTLER dissents.

BURNRITE COAL BRIQUETTE COMPANY *v.* RIGGS ET AL.

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

No. 227. Argued March 11, 14, 1927.—Decided May 2, 1927.

1. The objection to the bringing of a suit, dependent on diversity of citizenship, in the District Court in a State of which neither party is a citizen, goes to the venue, and may be waived by general appearance and other action. P. 211.
2. A federal District Court may, under its general equity powers independently of any state statute, entertain a bill of a stockholder against the corporation for the appointment of at least a temporary receiver in order to prevent threatened diversion or loss of assets through gross fraud and mismanagement of its officers. P. 212.
3. The fact that a bill seeking appointment of a receiver of a corporation is brought in a State other than that of the incorporation may lead the court to decline to interfere as a matter of comity or for want of equity; or it may require the court to limit the scope of the relief granted. But the fact of incorporation under the laws of another State does not preclude jurisdiction. P. 212.

4. Where a receiver is appointed in a stockholder's suit by a federal court having jurisdiction, and the appointment is held on review to have been wrongly made, the court may, in the exercise of its judicial discretion, require that the receivers' charges be paid either by the corporation or by the unsuccessful plaintiff. P. 214.
5. And where a court, in the exercise of jurisdiction, has erroneously appointed a receiver, the acquiescence of the defendant may influence the court, in its discretion, to make the receivership expenses a charge upon the fund. P. 214.
6. A decree of the Circuit Court of Appeals reviewing a decree of the District Court which appointed receivers, and directing a dismissal of the bill "for want of jurisdiction," does not become the law of the case so as to require this Court, upon review of a second appeal from a decree allowing the receivers' expenses, to assume that the dismissal of the bill directed was properly for want of jurisdiction. P. 215.

6 F. (2d) 226, affirmed.

CERTIORARI (269 U. S. 547) to a decree of the Circuit Court of Appeals which affirmed one of the District Court allowing receivers' expenses against a corporation in a stockholder's suit. See also 291 Fed. 754.

Messrs. James J. Lynch and *George W. C. McCarter* with whom *Mr. Robert H. McCarter* was on the brief, for petitioner.

Mr. Merritt Lane, with whom *Mr. Joseph L. Smith* was on the brief, for respondents.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This suit was brought in the federal court for New Jersey against the Burnrite Coal Briquette Company, a Delaware corporation, by Riggs, a stockholder. The bill charged gross mismanagement; prayed for the appointment of a receiver to conserve the assets; and asked, that "if deemed advisable" the court "proceed under the statutes of the State of New Jersey . . . and that the

receiver be given all the powers and be charged with all the duties imposed upon such a receiver by the statutes." Upon the filing of the bill, receivers were appointed, action by the corporation was enjoined, and an issue of receivers' certificates was authorized, all *ex parte*. After an elaborate hearing upon an order to show cause, the receivers were continued until final hearing. Upon final hearing, the charges of mismanagement were sustained and the receivership was again ordered continued,

" with all the powers vested in them by previous orders by this court made, and with all of the powers conferred upon receivers by an act of the State of New Jersey, entitled, 'An act concerning corporations,' revision of 1896, its amendments and supplements thereto, and that the receivers continue to operate the business of said defendant corporation upon a re-organization or re-adjustment of the affairs of said corporation or such disposition as may be hereafter directed to be made of the affairs of said corporation by this court."

The Court of Appeals reversed the decree entered upon the final hearing and directed that the bill be dismissed for want of jurisdiction. The decision was not rested upon the ground that a State cannot enlarge the remedial right to proceed in a federal court sitting in equity, see *Pusey & Jones* v. *Hanssen,* 261 U. S. 491; nor upon the ground that a State cannot modify the substantive rights of a stockholder as against a foreign corporation merely because it happens to have property within the State. Compare *Maguire* v. *Mortgage Co.,* 203 Fed. 858. The reversal was placed solely upon the ground that the corporation had been found by the District Court solvent at the time of the filing of the bill; that the statute of New Jersey, as interpreted by its courts, conferred no power upon its own courts to appoint receivers of foreign corporations unless they were insolvent; and that the juris-

diction of the federal court was determined by that of the state courts. 291 Fed. 754.

After the coming down of the mandate, directing dismissal for want of jurisdiction, the District Court allowed the account of the receivers who had been active during a period of nearly two years; directed payment by the corporation of the receivers' obligations then outstanding, their expenses, the costs, and compensation for their own services and those of their counsel, amounting in all to nearly $80,000; declared these amounts a lien upon the corporation's property; and ordered that, in default of payment, the property be sold to satisfy the charges. Upon a second appeal, that decree was affirmed by the Court of Appeals. 6 F. (2d) 226. The corporation contended that since the District Court was held to be without jurisdiction, it had no power to allow the account and order the payment out of the fund. *Lion Bonding and Surety Co.* v. *Karatz,* 262 U. S. 640, 642. This Court granted a writ of certiorari. 269 U. S. 547.

The main question for decision is whether, in view of the Court of Appeals' direction to dismiss the bill for want of jurisdiction, it was error to allow thereafter the receivers' account and direct the payment. There was an objection to the jurisdiction, which, if it had been seasonably taken, must have prevailed. *Camp* v. *Gress,* 250 U. S. 308. The plaintiff was a citizen of New York; the defendant a Delaware corporation; the federal jurisdiction rested wholly on diversity of citizenship; and neither party was a citizen of New Jersey. Thus, there was a sound objection to the venue. If that objection had been duly made, and had been insisted upon, an error of the lower court in overruling it could not justify charging the corporation now with payment of any charge on account of the receivership. But that objection to the jurisdiction, being to the venue, could be waived.

Central Trust Co. v. *McGeorge,* 151 U. S. 129; *Kreigh* v. *Westinghouse & Co.,* 214 U. S. 249, 252–253. And, before it was taken by the answer, it had been waived by a general appearance and other action. This was conceded.

The reversal with direction to dismiss for want of jurisdiction, ordered on the first appeal, was put upon an entirely different ground. The Court of Appeals held that there was lack of jurisdiction of the subject matter. It assumed that the jurisdiction of the federal court was dependent upon the state statute. This was error. A federal district court may, under its general equity powers independently of any state statute, entertain a bill of a stockholder against the corporation for the appointment of at least a temporary receiver in order to prevent threatened diversion or loss of assets through gross fraud and mismanagement of its officers.[1] There were allegations in the bill adequate to support a suit of that character; and there was nothing in the bill inconsistent with its being entertained as such. The only reference in the bill to the state statute was in one of its eleven prayers. After the waiver of the objection to the venue, there was federal jurisdiction over the parties and of the subject matter; and there was equity jurisdiction.

The fact that a bill seeking appointment of a receiver of a corporation is brought in a State other than that of the incorporation may lead the court to decline to interfere as a matter of comity or for want of equity; or it may require the court to limit the scope of the relief

[1] See *Dodge* v. *Woolsey,* 18 How. 331, 341–344; *Zeckendorf* v. *Steinfeld,* 225 U. S. 445, 459; *Citizens' Savings & Trust Co.* v. *Ill. Cent. R. R. Co.,* 205 U. S. 46; *Clark* v. *National Linseed Oil* Co., 105 Fed. 787; *New Albany Waterworks Co.* v. *Louisville Banking Co.,* 122 Fed. 776; *Callins* v. *Williamson,* 229 Fed. 59.

granted.[2] But the fact of incorporation under the laws of another State does not preclude jurisdiction.[3] If the dismissal directed by the Court of Appeals on the first appeal was proper (as to which we have no occasion to express an opinion), it must be justified on the ground that, in view of the facts, the District Court erred in its judgment in appointing and continuing the receivers. Compare *Chicago Title & Trust Co.* v. *Newman,* 187 Fed. 573, 576. In other words, the dismissal must rest on the ground that there was want of equity, not on lack of jurisdiction.

The District Court, assuming erroneously that it was without jurisdiction of the cause, based the order of payment solely on a supposed exception to the rule which denies to a court lacking jurisdiction the power to allow receivers' charges. According to the supposed exception, a party who has acquiesced and has thereby joined in misleading the court into an erroneous exercise of jurisdiction, may not complain when he is, thereafter, saddled with the charges. And he will be held to have acquiesced, despite a challenge of the jurisdiction, if his challenge was placed wholly upon an untenable ground; for, by objecting only on the untenable ground, he may have misled the court as much as if he had not objected at all. The trial court rested its finding of acquiescence on the fact that, while vigorously opposing continuance of the receiver-

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[2] See *Leary* v. *Columbia River Nav. Co.,* 82 Fed. 775; *Sidway* v. *Missouri Land Co.,* 101 Fed. 481; *Parks* v. *Bankers' Corporation,* 140 Fed. 160; *Pearce* v. *Sutherland,* 164 Fed. 609; *Maguire* v. *Mortgage Co.,* 203 Fed. 858.

[3] Compare *Central Trust Co.* v. *McGeorge,* 151 U. S. 129; *Lewis* v. *American Naval Stores,* 119 Fed. 391; *Scattergood* v. *American Pipe Co.,* 249 Fed. 23; *Ward* v. *Foulkrod,* 264 Fed. 627; *Kynerd* v. *McCarthy,* 3 F. (2d) 32; *See & Depew, Inc.* v. *Fisheries Products Co.,* 9 F. (2d) 235. Compare also, *North American Land Co.* v. *Watkins,* 109 Fed. 101.

ship on other grounds, the corporation did not intimate a lack of jurisdiction until months after the appointment; that, aside from failing to object to the venue, it failed to appeal from the decree continuing the appointment of the receivers, when the case was heard upon the order to show cause; and that it stood by in silence while the receivers were borrowing and spending money upon its property, thus taking the benefit of their action. The assumption of the District Court in matter of law and its finding of fact were affirmed by the Court of Appeals.

We have no occasion to determine whether a federal district court which appoints a receiver in a case in which it necessarily lacks jurisdiction of the subject matter, so that jurisdiction cannot be acquired by acquiescence, may nevertheless impose upon the corporation, because of acquiescence, the usual charges incident to a receivership. For in the case at bar, the District Court had throughout jurisdiction of the subject matter. It is settled that where a receiver is appointed in a stockholders' suit by a federal court having jurisdiction, and the appointment is held on review to have been wrongly made, the court may, in the exercise of its judicial discretion, require that the receivers' charges be paid either by the corporation or by the unsuccessful plaintiff.[4] See *Palmer* v. *Texas,* 212 U. S. 118, 132; *Lion Bonding and Surety Co.* v. *Karatz,* 262 U. S. 640, 642. Compare *Atlantic Trust Co.* v. *Chapman,* 208 U. S. 360. And where a court, in the exercise of jurisdiction, has erroneously appointed a receiver, the acquiescence of the defendant may influence the court, in its discretion, to make the receivership expenses a charge

[4] See *Ferguson* v. *Dent,* 46 Fed. 88, 96–99; *Clark* v. *Brown,* 119 Fed. 130; *Beach* v. *Macon Grocery Co.,* 125 Fed. 513; *In re Lacov,* 142 Fed. 960; *In re T. E. Hill Co.,* 159 Fed. 73; *In re Aschenbach Co.,* 183 Fed. 305; *In re Wentworth Lunch Co.,* 191 Fed. 821; *In re Wilkes-Barre Light Co.,* 235 Fed. 807; *In re Independent Machine Corp.,* 251 Fed. 484.

upon the fund.[5] It was well within the discretion of the District Court to charge the fund in the case at bar.

We have no occasion to consider the contention, made as to a part of the charges, that they were incurred after the acquiescence had ceased and, hence, do not fall within the supposed exception above referred to. For the waiver of the objection to venue conferred upon the District Court complete jurisdiction of the cause, and the power to impose upon the corporation payment of the receivers' charges does not rest on acquiescence. There is no serious contention that any particular charge allowed was, in its nature or in amount, improper, or that in allowing it as a charge against the fund there was an abuse of discretion.

The contention that the first decision of the Circuit Court of Appeals directing dismissal of the bill for want of jurisdiction had become "the law of the case" and that, therefore, this Court must assume that the dismissal of the bill directed was properly a dismissal for want of jurisdiction, is groundless. *Messenger* v. *Anderson,* 225 U. S. 436, 444; *Diaz* v. *Patterson,* 263 U. S. 399, 402; *Davis* v. *O'Hara,* 266 U. S. 314, 321.

Affirmed.

LIGGETT & MYERS TOBACCO COMPANY *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 362. Argued March 3, 1927.—Decided May 2, 1927.

1. A continuing order for naval supplies made during the late war by direction of the President, under Acts of March 4 and June 15, 1917, examined and *held* to be not an offer to purchase but a command, acceptance of which "subject to conditions" specified, did

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[5] See *Clark* v. *Brown,* 119 Fed. 130; *In re Wilkes-Barre Light Co.,* 235 Fed. 807; *In re Independent Machine Corp.,* 251 Fed. 484. Compare *Dillingham* v. *Moran,* 81 Fed. 759; 101 Fed. 933; *Pennsylvania Steel Co.* v. *New York City Ry. Co.,* 198 Fed. 721, 725–734.

not make a contract; therefore, the property delivered under it was taken by eminent domain. P. 220.

2. For property not paid for when taken, just compensation includes the value at that time, with enough more, measurable by interest, to produce the equivalent of full value paid at the taking. *Id.*

61 Ct. Cls. 693, reversed.

CERTIORARI to a judgment of the Court of Claims allowing a recovery less than the petitioner's claim, for tobacco products furnished the Government during the war.

Mr. Chester A. Gwinn, with whom *Mr. Adrian C. Humphreys* was on the brief, for petitioner.

The owner is not limited to the value of the property at the time of the taking but is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking. Interest at a proper rate is a good measure by which to ascertain the amount so to be added. *Seaboard A. L. Ry.* v. *United States,* 261 U. S. 299; *Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106; *United States* v. *Benedict,* 261 U. S. 294; *United States* v. *Rogers,* 255 U. S. 163.

Petitioner's property was taken by the United States through the exercise of its right of eminent domain. *American Smelting & Ref. Co.* v. *United States,* 259 U. S. 75; *Atlantic Ref. Co.* v. *United States,* 59 Ct. Cls. 108; *Seaboard A. L. Ry.* v. *United States, supra; Brooks-Scanlon Corp.* v. *United States, supra.*

Since Congress has no power to limit the right to just compensation guaranteed by the Fifth Amendment, § 177 of the Judicial Code does not apply to this case. *Brooks-Scanlon Corp.* v. *United States, supra; United States* v. *Benedict, supra; Seaboard A. L. Ry.* v. *United States, supra; Monongahela Nav. Co.* v. *United States,* 148 U. S. 312; *United States* v. *New York,* 160 U. S. 598; *Plymouth Coal Co.* v. *Pennsylvania,* 232 U. S. 531.

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

The question presented is whether under the circumstances of this case there was a taking or requisition under the power of eminent domain, or a voluntary sale under contract. It must be conceded that the question is not settled by the decision in the case of *American Smelting Co.* v. *United States,* 259 U. S. 75. In that case the order for merchandise did not state that compliance with it was obligatory, and made no reference to statutes authorizing the United States to requisition property, as did the naval order in the present case. The order in that case also specified a price for the copper, and the Smelting Company not only agreed to deliver it as specified in the order, but agreed to the price fixed. The view that in the present case there was no requisition or taking under the power of eminent domain rests on the contention that where an "obligatory" order or requisition is issued under a statute authorizing the exercise of the power of eminent domain, the property owner to whom it is directed may not voluntarily deliver the property in obedience to the order, but must require the United States to come and take it, and that if he does indicate an "acceptance" or willingness to comply with the order, except as to the price suggested, and thereafter voluntarily delivers the merchandise to the United States, he has made a contract which limits him to the value as of the date of delivery without interest thereon to the date of payment, whereas if he had stood fast and refused to comply with the order in any particular, and required the government to send and seize his property, he would place himself in the better position of being entitled, in addition to the value as of the date of the taking, to interest thereon to the date of payment.

The conclusion reached by the Court of Claims is not so obviously correct as to remove the question from the

field of reasonable debate. The question is one of importance affecting constitutional rights of citizens. Other cases involving the same problem are pending.

Messrs. Ira Jewell Williams, John H. Stone, and *F. R. Foraker* filed a brief as *amici curiae,* by special leave of Court.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Plaintiff brought this action to recover a balance claimed for tobacco products obtained from it for the Navy and Marine Corps between September 8, and November 23, 1918. The Court of Claims found the value to be $483,504.30 and that in the same period the United States paid on account $423,893.96, and gave judgment for the difference, $59,610.34, without more. The plaintiff contends that the products were taken under the power of eminent domain and that it is entitled to such additional sum as will produce the equivalent of their value paid at the time of the taking; and that interest at a reasonable rate is the measure of the amount required to be added in order to make just compensation.

The sole question is whether the facts found constitute a taking by eminent domain. Plaintiff was engaged in the manufacture and sale of tobacco products. August 26, 1918, the Bureau of Supplies and Accounts of the Navy issued and delivered to it Navy order N-4128, stating that pursuant to the Act of March 4, 1917 (39 Stat. 1168, 1193) and the Act of June 15, 1917 (40 Stat. 182) and under the direction of the President an order thereby was placed to furnish specified tobacco products for which provisional prices were named; that compliance was obligatory; that no commercial orders should be allowed to interfere with the delivery called for; that, as it was impracticable then to " determine a reasonable and just compensation for the material to be delivered, the fixing of the price will be sub-

ject to later determination. You are assured of a reasonable profit under this order; and as an advance payment you will be paid the unit prices stated hereon, with the understanding that such advance payment will not be considered as having any bearing upon the price to be subsequently fixed. Any difference between the amount of such advance payment and the amount finally determined upon as being just and reasonable will be paid to you or refunded by you, as the case may be." The document stated that the order must be accepted and filled in any event; that it was to be signed and returned by plaintiff; that deliveries were to be made as directed by a designated officer and bills sent to him bearing a certificate that the prices were those stated in the order; and that the conditions appearing on the reverse side of the order were made a part of it. These included printed portions of the above-mentioned Acts of Congress empowering the President in time of war to place an order with any person for war material, of a kind and quantity being produced by him, as the necessities of the Government might require; declaring that "compliance with all such orders shall be obligatory," and that, whenever the United States shall requisition any war material" it shall make just compensation therefor"; and authorizing the President to exercise this power through agencies to be determined by him. September 9, 1918, the Paymaster General of the Navy directed that any orders issued by the Quartermaster General of the Marine Corps should be executed and billed at the prices specified in order N-4128. And, October 14 and November 22 following, the order was further modified so as to call for additional tobacco products. Upon receipt of the order and each of the modifications plaintiff signed a statement thereon that it was "accepted subject to the conditions" specified. The President had authorized the Secretary of the Navy, either directly or through any officer who, acting under the Secretary, had

authority to make contracts on behalf of the Government, to exercise all the power and authority vested in the President applicable to the production, purchase and requisitioning of war material.

Navy order N-4128 did not purport to be an offer to purchase; it commanded delivery of specified merchandise. Plaintiff's consent was not sought; it was not consulted as to quantity, price, time or place of delivery. The Navy relied upon the compulsory provisions of the Acts of Congress and commanded compliance with the order. These Acts authorized the requisition of plaintiff's property for public use. The President was empowered to take immediate possession of its plant to manufacture the tobacco products called for. Act of June 3, 1916, 39 Stat. 166, 213. And it is to be presumed that the plant would have been taken if plaintiff had refused compliance. The acceptance was not the closing of a contract; it was the expression of purpose to obey. And the order was a continuing one and operated to require delivery of the specified articles whether then on hand or thereafter to be produced.

The findings show that plaintiff's property was taken by eminent domain; and its just compensation includes the additional amount claimed. *Seaboard Air Line Ry.* v. *United States,* 261 U. S. 299, 304; *Brooks-Scanlon Corp.* v. *United States,* 265 U. S. 106, 123.

Judgment reversed.

KERCHEVAL *v.* UNITED STATES.

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

No. 705. Argued January 19, 1927.—Decided May 2, 1927.

A plea of guilty withdrawn by leave of court is not admissible against the defendant on the trial of the issue arising on a substituted plea of not guilty. P. 223.

12 F. (2d) 904, reversed.

CERTIORARI (273 U. S. 685) to a judgment of the Circuit Court of Appeals affirming a conviction and sentence in the District Court, in a prosecution for using the mails to defraud.

Mr. Edward J. Callahan, with whom *Messrs. William E. Leahy, William J. Hughes, Jr., George R. Smith, William B. Movery, Paul Jones, Paul Jones, Jr.,* and *H. C. Wade* were on the brief, for petitioner.

Assistant to the Attorney General Donovan, with whom *Solicitor General Mitchell* and *Mr. William D. Whitney,* Special Assistant to the Attorney General, were on the brief, for the United States.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Petitioner was indicted in the District Court for the Western District of Arkansas under § 215 of the Criminal Code for using the mails to defraud. He pleaded guilty, and thereupon the court sentenced him to the penitentiary for three years. Afterwards he filed a petition alleging that he was induced so to plead by the promise of one of the prosecuting attorneys to recommend to the court that he be punished by sentence of three months in jail and by fine of $1,000, and by the statement of such attorney that the court would impose that sentence. The petition asserted that the sentence given was excessive and prayed to have it set aside and the punishment alleged to have been promised substituted. The United States denied the allegations of the petition. After hearing evidence on the issue, the court declined so to change the sentence, but, on petitioner's motion, set aside the judgment and allowed him to withdraw his plea of guilty and to plead not guilty. At the trial the court, against objection by petitioner, permitted the prosecution as a

part of its case in chief to put in evidence a certified copy of the plea of guilty. The petitioner in defense introduced the court's order setting aside the sentence and granting leave to withdraw that plea. Then both sides gave evidence as to matters considered by the court in setting aside the conviction. The court charged the jury: "The plea of guilty is introduced as evidence by the government. . . . If you find that Mr. Kercheval made that plea of guilty and that no promise was held out to him for the purpose of getting him to make that plea, or if you find that he was notified before he made the plea that nothing that was ever said to him with reference to it theretofore would be met, then it is evidence for you to consider in connection with the other evidence in the case. If . . . you find that he was deceived, that this was brought about by conversations that he had had with reference to it, and that he made that plea of guilty when as a matter of fact he was not guilty, then you will disregard that particular part of it and consider just the other testimony in the case." The jury returned a verdict of guilty, and the court sentenced petitioner to the penitentiary for three years. The Circuit Court of Appeals affirmed the judgment. 12 F. (2d) 904. It said (p. 907): "In the motion made by defendant to set aside the judgment he admits that he had pleaded guilty. The purpose was to reduce the punishment, but if this failed he asked to withdraw his plea, and that the judgment be set aside. We know of no reason why the plea of guilty was not admissible under all these circumstances for what it might be worth. It was not conclusive of guilt, and the court so instructed the jury. The defendant probably knew better than any one else whether or not he was guilty. Under the evidence in this case a plea of guilty upon his part would have seemed a very reasonable thing. We see no substantial or prejudicial error in the admission of any of

the evidence complained of." The case is here on certiorari. 273 U. S. 685.

In support of the rulings below, the United States cites *Commonwealth* v. *Ervine,* 8 Dana (Ky.) 30; *People* v. *Jacobs,* 165 App. Div. 721; *State* v. *Carta,* 90 Conn. 79; *People* v. *Boyd,* 67 Cal. App. 292, 302; and *People* v. *Steinmetz,* 240 N. Y. 411. The arguments for admissibility to be gleaned from these cases are that the introduction of the withdrawn plea shows conduct inconsistent with the claim of innocence at the trial; that the plea is a statement of guilt having the same effect as if made out of court; that it is received on the principle which permits a confession of the accused in a lower court to be shown against him at his trial in the higher court; that it is not received as conclusive, and, like an extra-judicial confession, it is not sufficient without other evidence of the *corpus delicti.* It is sometimes likened to prior testimony of the defendant making in favor of the prosecution.

Other decisions support the petitioner's contention that a plea of guilty withdrawn by leave of court is not admissible on the trial of the issue arising on the substituted plea of not guilty. *Heim* v. *United States,* 47 App. D. C. 485; *State* v. *Meyers,* 99 Mo. 107, 119; *People* v. *Ryan,* 82 Cal. 617; *Heath* v. *State,* 214 Pac. (Okla.) 1091. And see *White* v. *State,* 51 Ga. 286, 290; *Green* v. *State,* 40 Fla. 474, 478. We think that contention is sound. A plea of guilty differs in purpose and effect from a mere admission or an extra-judicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence. Out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences. When one so pleads

he may be held bound. *United States* v. *Bayaud,* 23 Fed. 721. But, on timely application, the court will vacate a plea of guilty shown to have been unfairly obtained or given through ignorance, fear or inadvertence. Such an application does not involve any question of guilt or innocence. *Commonwealth* v. *Crapo,* 212 Mass. 209. The court in exercise of its discretion will permit one accused to substitute a plea of not guilty and have a trial if for any reason the granting of the privilege seems fair and just. *Swang* v. *State,* 2 Coldw. (Tenn.) 212; *State* v. *Maresca,* 85 Conn. 509; *State* v. *Nicholas,* 46 Mont. 470, 472; *State* v. *Stephens,* 71 Mo. 535; *People* v. *McCrory,* 41 Cal. 458, 461; *State* v. *Coston,* 113 La. 717, 720; Bishop's New Criminal Procedure, § 747.

The effect of the court's order permitting the withdrawal was to adjudge that the plea of guilty be held for naught. Its subsequent use as evidence against petitioner was in direct conflict with that determination. When the plea was annulled it ceased to be evidence. By permitting it to be given weight the court reinstated it *pro tanto. Heim* v. *United States, supra,* 493. The conflict was not avoided by the court's charge. Giving to the withdrawn plea any weight is in principle quite as inconsistent with the prior order as it would be to hold the plea conclusive. Under the charge, if the plea was found not improperly obtained, the jury was required to give it weight unless petitioner was shown to be innocent. And if admissible at all, such plea inevitably must be so considered. As a practical matter, it could not be received as evidence without putting petitioner in a dilemma utterly inconsistent with the determination of the court awarding him a trial. Its introduction may have turned the scale against him. "The withdrawal of a plea of guilty is a poor privilege, if, notwithstanding its withdrawal, it may be used in evidence under the plea of not guilty." *White* v. *State, supra,* 290. It is beside the

mark to say, as observed by the Circuit Court of Appeals, that petitioner knew better than any one whether or not he was guilty and that under the evidence a plea of guilty was a reasonable thing. These suggestions might bear upon the weight of admissible evidence but they have no relation to the admissibility of a withdrawn plea.

Courts frequently permit pleas of guilty to be withdrawn and pleas of not guilty to be substituted. We have cited all the decisions, state and federal, which have come to our attention, that pass on the question here presented. The small number indicates that in this country it has not been customary to use withdrawn pleas as evidence of guilt. Counsel have cited no case, and we have found none, in which the question has been considered in English courts.

We think the weight of reason is against the introduction in evidence of a plea of guilty withdrawn on order of court granting leave and permitting the substitution of a plea of not guilty.

Judgment reversed.

MR. JUSTICE STONE concurs in the result.

UNITED STATES *v.* STONE & DOWNER COMPANY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS APPEALS.

No. 150. Argued February 24, 1927.—Decided May 16, 1927.

1. A judgment of the Court of Customs Appeals deciding the classification of goods and the duty upon their importation is not *res judicata*, estopping the Government, upon another importation of the same kind of goods by the same importer. P. 230.
2. This rule was established by the Court of Customs Appeals during the years succeeding its creation when its jurisdiction over such customs cases was exclusive and final, and for that reason and

because of the wisdom of the rule as applied to the peculiar subject matter, this Court upholds it. P. 235.

3. In par. 18 of the Emergency Tariff Act of May 27, 1921, imposing duties on "wool, commonly known as clothing wool," the term "clothing wool" is to be interpreted in its natural and usual meaning of wool used in making clothing and not in its commercial or trade meaning of wool used in the carding process, as distinguished from that used in the combing process, in the making of yarn. P. 237.
4. The rule giving controlling weight to commercial or trade meanings of words designating particular kinds of goods in tariff acts, is but an aid in ascertaining the intent of Congress and must yield where the words used and the history and manifest object of the provision show clearly that other meanings were intended. Pp. 239, 247.
5. In this instance, the words "commonly known as," evince an intention to adopt the common meaning of "clothing wool," in accord with the purpose of Congress to protect the wool market in this country and increase the revenue, while acceptance of the trade meaning of "clothing wool" would permit combing wool, constituting one-half of the wool of which clothing is made, to be imported free of duty, in defeat of that purpose. P. 248.
6. Testimony of expert witnesses is admissible to prove the ordinary meaning of the terms "clothing wool," and "carpet wool," used in a tariff classification. P. 245.

12 Cust. Appls. 557, reversed.

CERTIORARI (269 U. S. 542) to a judgment of the Court of Customs Appeals which affirmed the Board of General Appraisers, G. A. 8842, 46 T. D. 142, in classifying certain importations of wool in the fleece and in yarn and in cloth as entitled to free entry, under the Tariff Act of October 3, 1913, and as not subject to duty as "clothing wool" and manufactures thereof, under paragraphs 18 and 19 of the Act of May 27, 1921. The judgment of the Board sustained protests of the importers against assessments made by the collector under the latter enactment.

The importations in this case were nine in number. In a previous case, not reviewed here, there were thirteen. See 12 Cust. Appls. 557; G. A. 8613; T. D. 141. The

issue was exactly the same in both cases, except that the thirteenth importation in the first case was conceded by all parties to come within pars. 18 and 19. By error, the opinion originally filed treated the second case as involving the same number of importations. A petition for rehearing was submitted and denied, but the error as to the number of importations was corrected by order of Court, October 10, 1927.

Mr. William W. Hoppin, Special Assistant to the Attorney General, with whom *Solicitor General Mitchell* and *Assistant Attorney General Lawrence* were on the brief, for the United States.

Mr. Edward P. Sharretts for respondents.

Congress in prior tariff acts has recognized the classification of wool into clothing wool, combing wool and carpet wool. Tariff Act of 1867, c. 197, 14 Stat. 559; Tariff Act of 1883, c. 121, 22 Stat. 488; Tariff Act of 1909, 38 Stat. 11. If it has been its purpose to designate wool used in the manufacture of wearing apparel, it is obvious that the term "clothing wool" would have been the last term adopted, knowing as it must be presumed Congress did know, its legislative history and the fact that this particular term was in general common use among those to whom the law was directed, and who would necessarily have to conduct their business under it.

The mere fact that the term is widely used, discussed and defined in official publications of the federal government, would in itself leave no doubt as to what Congress understood to be its scope and meaning. As late as May 26, 1924, the Treasury Department in a regulation required importers to classify clothing wool and combing wool separately on their customs entries. Cf. T. D. 40217 (45 Treas. Dec. 670); *United States* v. *Buffalo Nat. Gas Fuel Co.,* 78 Fed. 110; aff'd 172 U. S. 339; *Merck* v.

United States, 6 Ct. Cust. Appls. 32. Obviously the commercial understanding could not be excluded without excluding the only meaning in which the term is ever understood or used. The union of these various sources in a common definition simply established what already existed. *Swan* v. *Arthur,* 103 U. S. 597. Raw wool because of its very nature exists only as an article of commerce. Laws imposing duties upon imported merchandise are intended for practical use and application by men engaged in commerce and presumably are drafted in language understood by those to whom they are necessarily directed. *In re Two Hundred Chests of Tea,* 9 Wheat. 438; *Elliott* v. *Swartout,* 10 Pet. 137; *United States* v. *Davies,* 11 Ct. Cust. App. 392; *Cooper* v. *Dobson,* 157 U. S. 148; *United States* v. *Hopewell,* 51 Fed. 798.

If the phrase "usually known," in the provision involved in *Cooper* v. *Dobson* did not make the meaning of the term "combing wool" ambiguous, there is no reason why the synonymous phrase "commonly known" should make the same term ambiguous in the present enactment.

Even where the terms of an act are obscure or ambiguous, this Court has never authorized an indiscriminate search for intent through the journals of the legislature. *Duplex Co.* v. *Deering,* 254 U. S. 443; *Pennsylvania R. Co.* v. *International Coal Co.,* 230 U. S. 184. It must be presumed that the assessment of duty on clothing wool met the emergency just as Congress intended that it should, and provided the intended protection, and that an assessment of duty on "combing wool" was not deemed necessary or expedient in order to accomplish the purpose. *Chung Fook* v. *White,* 264 U. S. 443; *United States* v. *Citroen,* 223 U. S. 407; *Pennington* v. *Coxe,* 2 Cr. 33.

It is useless for petitioner to attempt to show that it was the policy of the Government to include what the statute omits. *United States* v. *First Nat. Bank,* 234 U. S. 245.

Even if there was no good reason why combing wool should have been omitted, that would not constitute a reason for its being interpolated by the Court. *Bates Ref. Co.* v. *Sultzberger,* 157 U. S. 1. The rule against enlarging the subject-matter of a statute by judicial interpretation has been applied with great particularity in the case of statutes levying taxes including customs duties. *Eidman* v. *Martinez,* 184 U. S. 578; *Gould* v. *Gould,* 245 U. S. 151; *United States* v. *Merriam,* 263 U. S. 179; *Partington* v. *Atty. Gen.,* L. R. 4.

If the present question were one of doubt, the doubt would be resolved in favor of the importer. *American Net Twine Co.* v. *Worthington,* 141 U. S. 468; *Hartranft* v. *Weigmann,* 121 U. S. 609; *Benziger* v. *United States,* 192 U. S. 38.

The doctrine of *res judicata* has a clear application to the case at bar.

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

This is a proceeding by certiorari to review the judgment of the Court of Customs Appeals in the classification for duty of nine importations of wool in the fleece, one of cloth and one of yarn. 12 C. Cust. App. 557. The certiorari was granted by this Court October 12, 1925, 269 U. S. 542, a certificate of importance by the Attorney General under § 195 of the Judicial Code, as amended August 22, 1914, c. 267, 38 Stat. 703, having been filed in the Court of Customs Appeals before the case was decided in that court.

A similar case between the same parties, involving the same questions and importations of similar merchandise, was decided adversely to the Government by the Court of Customs Appeals on November 17, 1923, *Stone &*

Downer Co. v. *United States,* 12 Court of Customs Appeals Reports 62; 45 Treasury Decisions 167, T. D. 40019. In that case, however, there was no certificate of importance filed by the Attorney General, and no application was made for a writ of certiorari.

The case as now presented to this Court involves two questions.

First, Is the judgment of the Court of Customs Appeals, in November, 1923, involving the same customs classification an estoppel by *res judicata* against the Government?

Second, If it does not so operate, was the Court of Customs Appeals right in holding that the importations of wool herein are entitled to come in as wool of the sheep under the Tariff Act of October 13, 1913 (c. 16, 38 Stat. 114), and not as clothing wool under paragraph 18 of the Emergency Tariff Act of May 27, 1921 (c. 14, 42 Stat. 9, 10)?

First Question. It is settled in this Court that the general rule by which a judgment estops the parties in future litigation between them, to question either a fact or a point of law necessary to the first judgment and adjudicated therein, applies to cases of taxation as well as to other subjects of litigation. This was decided in the case of *New Orleans* v. *Citizens' Bank,* 167 U. S. 371. That was a tax suit, and the issue was whether the judgment of a court of competent jurisdiction, in holding that the Citizens' Bank had exemption by contract from certain taxation, was *res judicata* and estopped the city from attempting to enforce subsequent taxes contrary to the same exemption. The Court, through Mr. Justice White, said (p. 396):

"The proposition that because a suit for a tax of one year is a different demand from the suit for a tax for another, therefore *res judicata* can not apply, whilst admitting in form the principle of the thing adjudged, in

reality substantially denies and destroys it. The estoppel resulting from the thing adjudged does not depend upon whether there is the same demand in both cases, but exists, even although there be different demands, when the question upon which the recovery of the second demand depends has under identical circumstances and conditions been previously concluded by a judgment between the parties or their privies."

This is not the rule in a number of the States. *City of Newport* v. *Commonwealth,* 106 Ky. 434; *Louisville Bridge Co.* v. *City of Louisville,* 81 Ky. 189; *Bank* v. *Memphis,* 101 Tenn. 154; *State* v. *Bank,* 95 Tenn. 221, 231; *Georgia Railroad & Banking Co.* v. *Wright,* 124 Ga. 596, 603; *Michigan Southern, etc. R. R.* v. *People,* 9 Mich. 448, 450; *L. S. & M. S. R. R.* v. *People,* 46 Mich. 193, 208; *C. B. & Q. R. R.* v. *Cass County,* 72 Neb. 489, 491; *Adams* v. *Yazoo & Miss. R. R.,* 77 Miss. 194, 266; *State* v. *American Sugar Refining Co.,* 108 La. 603. Judge Cooley in his work on Taxation, 8th ed., says, at pages 2648–9, that the state courts, differing from this Court, do not generally regard an adjudication as to taxes for one year as making the decision of the supporting points *res judicata* for the following years.

We have held that where, in a federal court, a judgment of a state court in a tax case is pleaded in a subsequent tax case arising in a federal court, the estoppel from the judgment of the state court will not be given greater effect than it would have in the state court, and that a judgment not operating as *res judicata* in suits for taxes for another year in the state court will not be an estoppel in a federal court for subsequent years. *Phoenix Fire and Marine Insurance Co.* v. *Tennessee,* 161 U. S. 174; *Covington* v. *First National Bank of Covington,* 198 U. S. 100.

The question here differs from that presented in ordinary tax suits, and involves the effect of an adjudication

of a peculiar character. Prior to the passage of the McKinley Tariff Administrative Act, approved June 10, 1890 (c. 407, 26 Stat. 131, 136, § 12), litigation over the collection of duties and the classification of importations under tariff acts was carried on by suits against the collectors who imposed the duties and was in the form of an action against the collecting official as an individual. After the judgment was obtained, the collecting officer was relieved from personal obligation and the judgment was paid from the Treasury of the United States. See U. S. Rev. Stat., §§ 3009-3014. In 1890, new machinery was introduced by which a board of nine general appraisers was created which, sitting in divisions of three, constituted in a sense administrative courts of appeals to pass on questions of classification and the imposition of duties; and appeals were allowed from it to the proper circuit court of the United States, whence, upon an allowance of an appeal by the circuit court, the cases came to this Court. By the Act of 1891, creating circuit courts of appeals (26 Stat. 826, c. 517, § 6), these cases went by appeal to those courts, and then by certiorari to this Court. By the Tariff Act of August 5, 1909 (36 Stat. 11, 105, § 29), another change was made by which appeals from the decisions of the Board of General Appraisers were allowed to a new court created by the act, called the Court of Customs Appeals, and by that act the whole question of classification and refunding of duties was taken out of the jurisdiction of the regular federal judiciary. The classification by the Court of Customs Appeals was made final, and no appeal was granted to this Court. This independent plan for the settlement of tariff questions, and the complete finality of the decisions of the Court of Customs Appeals in that field of litigation, lasted until August, 1914, when, by the Act of August 22 of that year (c. 267, 38 Stat. 703), a limited review by writ of certiorari was given to this Court of judgments of the

Court of Customs Appeals, in cases in which the construction of the Constitution, or any part thereof, or any treaty made pursuant thereto, was drawn in question, and in any other case when the Attorney General of the United States should, before the decision of the Court of Customs Appeals was rendered, file with the court a certificate that the case was of such importance as to render expedient its review by this Court. For five years, however, the Board of General Appraisers and the Court of Customs Appeals between them exercised complete jurisdiction in the construction of tariff acts and the determination of the amount due as duties from every importation coming into the country. By the Act of 1909 (36 Stat. 105) the court was given power "to establish all rules and regulations for the conduct of the business of the Court and as might be needful for the uniformity of decisions within its jurisdiction as conferred by law." It was by the law to exercise exclusive appellate jurisdiction in all cases as to the construction of the law and the facts respecting the classification of merchandise and the rate of duty imposed thereon under such classification, and the fees and charges connected therewith, and all appealable questions as to the jurisdiction of the Board of General Appraisers, and all appealable questions as to the laws and regulations governing the collection of the customs revenues; and the judgment or decrees of said Court of Customs Appeals were made final in all such cases. (p. 106). It was thus for five years put in a position where it must not only make its own rules, but it must determine, as a practical matter, what should be the conclusive effect of its own judgments in the determination of questions of fact and statutory construction and classification, in subsequent cases brought before it by the same parties and presenting similar issues. In the exercise of this jurisdiction, it established the practice that the finding of fact and the construction of the statute and classification

thereunder, as against an importer, was not *res judicata* in respect of a subsequent importation involving the same issue of fact and the same question of law.

In *Beuttell & Sons* v. *United States,* 8 U. S. Court of Customs Appeals Reports, 409, the question was whether machine-made Wilton rugs were dutiable under par. 300 of the Tariff Act of 1913, or under par. 294 by virtue of par. 303 of that act. In delivering the opinion of the court, Judge Barber, who has been a member of the court since its organization, in 1909, used this language:

"At the outset it should be noted that the precise issue here has been before and decided by this court in *Beuttell & Sons* v. *United States* (7 Ct. Cust. Appls., 356; T. D. 36905). The Government, being of opinion that such issue, which was there decided adversely to its contention, ought again to be here considered, and following a recognized practice in customs litigation, has made up a new record, which for practical purposes results as a retrial of the former case."

It is clear that this has been the practice since the beginning of the court. See *Stone & Downer Co.* v. *United States,* 4 U. S. Court of Customs Appeals, 47. In *United States* v. *Hearst Company,* 49 Treasury Decisions, 854, T. D. 41584, the court said:

" Precisely the same kind of merchandise was under consideration in *Hearst & Company* v. *United States,* 12 Court of Customs Appeals, 81; T. D. 40021. The record of the evidence in that case is incorporated in this and it is agreed that this case is, in effect, a retrial of the issues involved in that upon additional testimony introduced on behalf of the government, none having been offered by it in the earlier case."

Provision for just such rehearings was made in the rules of procedure and practice adopted by the Board of General Appraisers (35 Treasury Decisions, 113, Rule 22) as follows:

"Where a question of the classification of imported merchandise is under consideration for decision by any one of the boards and the decision has been previously made involving the classification of goods of substantially the same character, the record and testimony taken in the latter case may, within the discretion of the board, be admitted as evidence in the pending case on motion of either the Government or the importer or on the board's own order: Provided, That either party may have any one or more of the witnesses who testified in such case summoned for re-examination or cross-examination as the case may be. The rule shall, furthermore, apply to the printed records which may have been acted on by the courts in the case of appeals taken from the decisions of the board."

There would seem to be an analogy between the proper respect of this Court for the conclusion of the Court of Customs Appeals upon the question of the estoppel of its own decisions, when it was an independent court not subject to review by this Court, and our respect for judgments of the state courts, in limiting the application of the estoppel of their decisions in tax cases, and unless some controlling reason exists why we should overrule the established practice in this matter of the Court of Customs Appeals, now that the power of review of some of its judgments has been given us, we should follow it.

We think that, not only was it within the power of the Court of Customs Appeals to establish the practice, but that it was wise to do so. The effect of adjudicated controversies arising over classification of importations may well be distinguished from the irrevocable effect of ordinary tax litigation tried in the regular courts. There of course should be an end of litigation as well in customs matters as in other tax cases; but circumstances justify limiting the finality of the conclusion in customs controversies to the identical importation. The business of importing is carried on by large houses between whom and

the Government there are innumerable transactions, as here for instance in the enormous importations of wool, and there are constant differences as to proper classifications of similar importations. The evidence which may be presented in one case may be much varied in the next. The importance of a classification and its far-reaching effect may not have been fully understood or clearly known when the first litigation was carried through. One large importing house may secure a judgment in its favor from the Customs Court on a question of fact as to the merchandise of a particular importation, or a question of construction in the classifying statute. If that house can rely upon a conclusion in early litigation as one which is to remain final as to it, and not to be reheard in any way, while a similar importation made by another importing house may be tried and heard and a different conclusion reached, a most embarrassing situation is presented. The importing house which has, by the principle of the thing adjudged, obtained a favorable decision permanently binding on the Government will be able to import the goods at a much better rate than that enjoyed by other importing houses, its competitors. Such a result would lead to inequality in the administration of the customs law, to discrimination and to great injustice and confusion. In the same way, if the first decision were against a large importing house, and its competitors instituted subsequent litigation on the same issues, with new evidence or without it, and succeeded in securing a different conclusion, the first litigant, bound by the judgment against it in favor of the Government, must permanently do business in importations of the same merchandise at great and inequitable disadvantage with its competitors.

These were doubtless the reasons which actuated the Court of Customs Appeals when the question was first presented to it to hold that the general principle of *res judicata* should have only limited application to its judg-

ments. These are the reasons, too, why the principle laid down by this Court in the decision already referred to, in *New Orleans* v. *Citizens' Bank,* 167 U. S. 371, should not apply or control. There, the thing adjudged was the existence of an immunity of the property of a bank from taxation, due to a contractual obligation of the state or city government to the bank,—a personal relation which might without embarrassment and with much more safety be permanently fixed for one tax payer than a question of fact or law affecting discriminatingly one of a whole class of importers and giving the exceptional operation in its favor of a general tariff on articles of merchandise largely imported. The fact that objection to the practice has never been made before, in the history of this Court or in the history of the Court of Customs Appeals in eighteen years of its life, is strong evidence not only of the wisdom of the practice but of general acquiescence in its validity. The plea of *res judicata* can not be sustained in this case.

Second question. Paragraph 18 of the Emergency Tariff Act of May 27, 1921, c. 14, 42 Stat. 9, 10, under which the wool was classified for duty herein, is as follows:

"Wool, commonly known as clothing wool, including hair of the camel, angora goat, and alpaca, but not such wools as are commonly known as carpet wools: Unwashed, 15 cents per pound; washed, 30 cents per pound; scoured, 45 cents per pound. . . ."

Paragraph 19 is as follows:

"Wool and hair of the kind provided for in paragraph 18, when advanced in any manner or by any process of manufacture beyond the washed or scoured condition, and manufactures of which wool or hair of the kind provided for in paragraph 18 is the component material of chief value, 45 cents per pound in addition to the rates of duty imposed thereon by existing law."

The respondents claim, and the Court of Customs Appeals held, that all but one of these importations in the

fleece were entitled to free entry under par. 650 of the free list of the Tariff Act of October 3, 1913, c. 16, 38 Stat. 114, 164, as follows:

"650. Wool of the sheep, hair of the camel, and other like animals, and all wools and hair on the skin of such animals, and paper twine for binding any of the foregoing. . . ."

and that yarn of the importations was dutiable only under par. 287, p. 142, as follows:

"287—Yarns made wholly or in chief value of wool, 18 per centum ad valorem."

Wool clothing is made from wool yarn prepared either by the carding process or by the combing process. The adaptability of the raw wool for one or the other is determined chiefly by the length of the staple, so that wools used for clothing are often described in the trade as short wools or long wools. The exact question is whether paragraph 18 includes in the term clothing wool, long staple or combing wool as well as short staple or carding wool. They are both used in clothing. Carpet wools are ordinarily not used for clothing. They are generally too coarse for that purpose but are well adapted and generally used for the making of carpets. They are not grown in the United States, so that there is no motive for putting a tariff on them to protect domestic growers or the home markets.

In the case between the same parties, presenting the same issues in 1923, the Board of General Appraisers by a majority of two to one gave judgment for the Government. *Stone & Downer Co.* v. *United States*, 43 Treasury Decisions, 141, T. D. 39473. One held that the words "wool commonly known as clothing wool" must be given their ordinary non-trade meaning of wool used for clothing, and therefore included both carding and combing wools. His view was that evidence of the technical or commercial meaning of clothing wool was not relevant and

was excluded by the words " commonly known as." The other General Appraiser, supporting the Government view, examined the evidence at length and found from it that the first great division among wools was between clothing wools and carpet wools, and that while, in the trade, clothing wools were divided into and were distinguished commercially as clothing wools and combing wools, the expression " commonly known as clothing wool," as testified by competent witnesses of large experience, included wool for clothing, whether treated by the carding or combing process.

The Customs Court, on appeal, held that if there was a trade term to determine classification under a tariff act, the overwhelming weight of authority showed that it must prevail over the ordinary meaning if different, and that under this rule of construction clothing wool was wool used in the carding process, as distinguished from that used in the combing process, in the making of cloth. *Stone & Downer Co.* v. *United States,* 12 Court of Customs Appeals Reports, 62.

When the case now in hearing came before the Board of General Appraisers, the Board unanimously gave judgment for the importers, following the previous judgment of the Court of Customs Appeals on the same issues in the case presented in 1923, and this action was affirmed by the Court of Customs Appeals. *United States* v. *Stone & Downer Co.,* 12 Court of Customs Appeals Reports, 557. The record contains all the evidence in the first case, and the new evidence introduced by the Government in the second case, in accord with Rule XXII of the Board of General Appraisers, already referred to.

In this case, as in every other involving the interpretation of a statute, the intention of Congress is an all important factor. The greatest light is thrown on that intention in this case by an examination of the existing conditions and the anticipated evils against which by this legislation Congress sought to protect the country.

When the Emergency Tariff Act was passed, we had been through the greatest war of history and were attempting to return to peace conditions, and had reached a time, in 1920, when business was bad and financial disaster threatened. The result of the Congressional elections in November, 1918, was to change the political complexion of the House and Senate. Before that Congress finished its term, in the winter of 1920–1921, an emergency tariff bill was introduced to relieve the agricultural depression which was at hand. Such a bill went through Congress, but was vetoed. The National administration changed on the succeeding 4th of March, 1921. With a new Congress and new Executive, another emergency tariff bill like the one already vetoed was introduced. The Committee on Ways and Means of the new House of Representatives, in recommending the passage of the bill (1 House Reports, 67th Congress, 1st Session, page 1), commented on the serious obstacles to the revival of industry in the paralysis of agriculture. It pointed out that the purchasing power of the farmers had been in large part destroyed and must be restored, and called attention to the fact that we were in the grip of a nation-wide industrial and business depression, and that agriculture was hardest hit.

Coming then to the subject of wool, as one of the agricultural products needing legislative aid, the report said:

"(1) In previous years the average production of wool in the United States was 314,000,000 pounds and average imports 203,000,000 pounds.

"During the war imports increased in response to increased manufacturing to about 445,893,000 pounds in 1919, and declined to 259,618,000 pounds in 1920.

"(2) Both importation and consumption of wool have decreased since May. However, there has been a large increase for January and February, 1921. Importations

in recent months appear to be speculative, in anticipation of tariffs.

"(3) The stocks of wool on hand were large when the price slump came last May. To the stocks on hand was added the new clip of 280,000,000 pounds.

"(4) The accompanying tables show the wool supply in sight to be near 1,000,000,000 pounds. The normal consumption is about 600,000,000 pounds, with about 400,000,000 pounds carried as stock. A year's supply is in sight at normal consumption. At the present rate of consumption (about two-thirds normal) the supply would be sufficient for a year and a half.

"(5) The effect of an embargo or high tariff would be to gradually increase the prices.

" The justification for an emergency tariff is:

"(a) A fundamental industry that it takes years to develop is facing ruin.

"(b) The prosperity of large numbers of people, not sheep growers, is dependent on the sheep industry. Hence, merchants and bankers who have made large advances to sheep producers are in serious financial trouble and favor a wool tariff.

"(c) At present the supply of wool in the United States is approximately 650,000,000 pounds, of which 175,000,000 pounds is held by the producers. With the coming 1921 wool clip the amounts controlled by producers would be approximately 450,000,000 pounds, while the dealers would hold approximately 500,000,000 pounds. Therefore, the benefit derived from a tariff would be equally divided between producers and the dealers and manufacturers. Undoubtedly any tariff on wool would reflect in the price of finished goods and the charge passed on to the consumer.

"(d) Wool dealers who purchased wool stocks at higher prices than now obtain are in serious financial straits and would be directly benefited. Forced liquida-

tion on the part of wool dealers would make the present bad situation worse and break a trade organization of value to agriculture.

"(e) It can be shown that the price of wool is so small a factor in the ultimate cost of manufactured goods that no large burden need be placed on the consuming public."

The same report was adopted without change by the Finance Commitee of the Senate in recommending the bill to that body. 1 Senate Reports, 67th Congress, 1st Session, page 6. The bill passed both Houses and was approved May 27, 1921.

The situation as set forth in the Ways and Means Report, as to the wool market of the World in 1921, was confirmed in a pamphlet issued by the United States Tariff Commission at Washington in 1922, on "Recent Tendencies in the Wool Trade," in which it said (p. 1):

"For the pre-war years 1909 to 1913, inclusive, the world's annual production of raw wool averaged approximately 3,335,242,000 pounds, of which about 30 per cent. was carpet wools. Of this amount 587,350,000 pounds were produced in South America, 157,761,000 in South Africa, and 903,620,000 in Australasia, the three great exporting regions which supply the deficiencies *in production of clothing wools of western Europe and North America.* For 1921, world production is estimated at 2,770,852,000 pounds, of which the three exporting regions above mentioned are credited with 491,269,000 pounds, 127,177,000 pounds and 798,443,000 pounds, respectively, or a decline in these areas of 231,000,000 pounds from pre-war production." (The italics are ours.)

The Emergency Tariff Act, so designated by its terms, was Title I of the law of Congress of May 27, 1921, c. 14, which as a whole was entitled:

"An Act Imposing temporary duties upon certain agricultural products to meet present emergencies, and to

provide revenue; to regulate commerce with foreign countries; to prevent dumping of foreign merchandise on the markets of the United States; to regulate the value of foreign money; and for other purposes."

The Emergency Tariff Act imposed for the period of six months from the date of the Act, May 27, 1921, a tariff on the following articles: wheat, flour, flax seed, corn and maize, beans, peanuts, potatoes, onions, rice, lemons, vegetable oils, sheep, beef, veal, mutton and lamb, cotton and manufactures of cotton, in its paragraphs 18 and 19 on wool, on sugars, butter, cheese, milk, wrapper and filler tobacco, apples, cherries, olives.

Title II directed an investigation into the question whether any industry of the United States is likely to be injured by dumping of foreign goods upon our markets at less than market value. It provided for a special dumping duty and a means of determining what that should be, and it made that title the Anti-Dumping Act.

Title V provided for an increased duty on dyes and chemicals, which title was to be known as the Dye and Chemical Control Act.

The whole act was directed to protecting the markets of the United States from being swamped by importations from abroad, and to increasing the revenue. Congress proposed to keep the wool market free from demoralization in the interests of the wool growers of the country, on the one hand, and the owners of wool stocks on hand in the country, on the other.

It was asserted in the argument on behalf of the Government, and the assertion was acquiesced in by counsel for the importers, that at least half in weight and value of the importations of wool from which clothing is made is combing wool. The contention of the importers in this case, if successful, would therefore bring about the result that half, both in weight and in value, of the foreign wool in competition with wool produced in the

United States and with the stocks of wool on hand in the United States, would not be kept out of its markets by the emergency tariff at all, and that the swamping of the domestic wool markets to that extent would continue under the free importation of combing wools. More than this, such combing wools as would come in under the emergency tariff, if construed as the Government contends, would produce as much revenue as the carding wools, and yet, by the importers' construction that revenue would be lost.

If the language of the statute is such that such results can not be avoided, of course it must be enforced accordingly. If Congress by its language has made a mistake, and so has failed in its purpose, this Court can not supply by its decision the omission of a necessary legislative provision to effect its purpose. With the intent of the Act clearly in mind, however, we must see whether it is true that the language used can only bear the construction insisted upon by the importers and upheld by the Court of Customs Appeals, or whether there is a broader and more reasonable construction that can be fairly placed upon the statute which will serve the plain Congressional purpose.

From the 500 pages of the evidence, we find that, in the custom of the trade, the term "clothing wool" applies to the short staple wool which is suitable for carding and which goes into what is known as the woolen or felting process for making cloths of that character, and the term "combing wool" refers to wool of longer staple which goes into another process known as combing for making worsted cloths; that in the trade, clothing wool and combing wool are thus contrasted; second, that originally the worsted process could not be used with the fine wools like the merino wools, because the staple was not long enough; but that the development of combing machinery, particularly what is called the French

combing process, has enabled manufacturers to comb wool of shorter staple than formerly, and to make it into worsteds; and that, in addition to this, cross breeding between the merino and other wools has increased the length of the staple and the amount of available combing wools as compared with the carding wools, so that the border line between the use of combing wools for clothing and that of carding wool has changed; that the definitions in the principal dictionaries and encyclopedias set forth the same trade distinction between clothing wool and combing wool, as between manufactures of wool, and manufactures of worsteds; that both clothing wool and combing wool are largely grown in this country.

The expert witnesses of the importers generally testified that there was no other meaning for clothing wool but carding wool. There was other substantial evidence, however, from expert witnesses for the Government, of large experience in dealing in wool, who testified that, speaking generally, and in ordinary parlance, wools were divided into clothing wools and carpet wools with reference to their chief use, and that it was only in the trade in the grading and sorting of wools and in their purchase and sale that the term clothing wool was distinguished from combing wool. The competency and relevancy of such evidence as to the ordinary meaning of language in tariff classifications is sustained by the decision of this Court in *Robertson* v. *Salomon,* 130 U. S. 412, 415.

The natural and usual meaning of the words " clothing wool " is wool for clothing. That is what the non-expert reader of the words would understand until he was advised of a different meaning by reason of the language of the trade. When, therefore, the words are used " *commonly known as* clothing wools," the ordinary inference from the collocation of the words is that they refer to wool that is used in making clothing. If Congress had intended that the words " clothing wool " should have their commercial

designation, it would simply have used the words without qualification or it would have said "commercially known as." It would not have used the phrase "*commonly known as.*" The phrase indicates not only that clothing wool is used in its ordinary or non-expert meaning, but is to serve the same purpose as the same phrase in connection with carpet wools, in the same clause, by indicating that, while these wools were capable of use for other than clothing and carpets, respectively, they were to be classified by reference to their chief use.

In the world view which the committee report shows clearly that the Congress was taking of the wool market, it was not dealing with the processes by which wool was made into cloth, and distinguishing between them. If it had wished to make a distinction based on the process of manufacture rather than on the material which was to be used, it certainly would not have included, as expressly within the operation of paragraph 18, the hair of the camel, the angora goat and the alpaca; for in preparing those materials for the making of cloth the hair is always combed and never carded. It had chiefly in mind, as shown by the contrast made in paragraph 18, the distinction between wool which was made into carpets and could not be grown in the United States, and wool made into clothing which could be, and was, grown in the United States and in England and on the continent and in South America, Australasia and South Africa. The world view of the production of wools which affected Congress in enacting this legislation is also revealed in the passage from the Tariff Commission report, which we have already quoted, where it refers to South America, South Africa and Australasia as "the three great exporting regions which supply the deficiencies in production of clothing wools of western Europe and North America." This use of the words "clothing wools" of course is used only in contrast to the carpet wools which together with the cloth-

ing wools embrace the whole world production. We do not find it difficult, therefore, in our interpretation of paragraph 18 to give effect to the evident purpose of Congress.

We are confronted by counsel for the importers with the language to be found in many of our own cases giving controlling effect in classification of merchandise for duty in tariff acts to trade terms and commercial usage. It is these cases also upon which the Court of Customs Appeals relied in reaching its conclusion. Their principle has nowhere been more strongly stated than by Mr. Justice Gray in the case of *Cadwalader* v. *Zeh,* 151 U. S. 171, 176:

"It has long been a settled rule of interpretation of the statutes imposing duties on imports, that if words used therein to designate particular kinds or classes of goods have a well known signification in our trade and commerce, different from their ordinary meaning among the people, the commercial meaning is to prevail, unless Congress has clearly manifested a contrary intention; and that it is only when no commercial meaning is called for or proved, that the common meaning of the words is to be adopted."

This statement is supported by a long line of authorities, one of which is *Robertson* v. *Salomon,* 130 U. S. 412, 415, in which Mr. Justice Bradley used the following language:

"The commercial designation, as we have frequently decided, is the first and most important designation to be ascertained in settling the meaning and application of the tariff laws. See *Arthur* v. *Lahey,* 96 U. S. 112, 118; *Barber* v. *Schell,* 107 U. S. 617, 623; *Worthington* v. *Abbott,* 124 U. S. 434, 436; *Arthur's Executors* v. *Butterfield,* 125 U. S. 70, 75. But if the commercial designation fails to give an article its proper place in the classification of the law, then resort must necessarily be had to the common designation."

What we hold here is that Congress, by using the expression "commonly known as clothing wool," indicated expressly its intention not to give to the expression "clothing wool" the commercial designation that it has when used in contrast with combing wool, and that the history of the legislation shows that the trade or commercial meaning is contrary to the purpose of Congress in the enactment of the law. In other words, the authorities upon which the Court of Customs Appeals proceeded we think have no application to the interpretation of this act, save as they recognized that in the last analysis effect must be given to the intention of Congress.

It should be noted that the tariff division of wools in 1867 was of three classes. Class 1—Clothing wool, wools which are of merino blood and wools of like character. Class 2—Combing wool, wools which are of the English blood; and the hair of the alpaca, goat and other like animals. Class 3—Carpet wools and other similar wools. These divisions were continued in the Tariff Act of 1883. In the Tariff Act of 1890 and in the Act of 1897, when the duties on wool were restored after the free wool of the Tariff Act of 1894, the division was made into three classes, while the tariff divisions between clothing and combing wools were dropped. Again, in the Act of 1909, there was a division of three classes without reference to the trade division between clothing and combing wools.

There may have been other reasons for this change in the acts of 1890, 1897 and 1909, but there were two, already referred to, which were obvious, one arising from the cross breeding of sheep, so that the staple in the merino and like wools was lengthened thereby (see par. 380 of the McKinley Act, c. 1244, 26 Stat. 595), and the other in the improvement in the combing process, so that short wools of the merino blood which before could only be carded and not combed, became combing wools in the

trade sense and could be used for worsteds as well as for woolen cloths. The merino wools were finer wools; and as they became subject to combing by breeding and mechanical process, their use in making clothing was enlarged and their value was enhanced. See Report of the Tariff Commission on the Wool Growing Industry 1921—pages 428, 448. The result of these changes was that the first class of wools in the acts of 1890, 1897 and 1909, included many combing wools, while the first class under the Act of 1883 was expressly designated as clothing wools. This is illustrated in this case, in which the wools here imported are partly merino wools by the blood and come from South America, and yet twelve of the importations out of thirteen are combing wools, while the thirteenth was declared doubtful by the experts and was held to be a clothing wool by the Court of Customs Appeals.

A similar change, after 1890, took place in the lessening of importance from a tariff standpoint of the trade distinction between manufactures of wool, the product of carding wool, and manufactures of worsted, the product of combing wool; for while the names of woolens and worsteds were retained in the tariff acts from 1890 on, these were usually classified together for the same duty.

In holding as we do in this case that the plain purpose of Congress requires the interpretation of the words in their ordinary rather than their commercial or trade meaning, we find full support in a case which was not cited in the opinions of the courts below or in the briefs of counsel on either side. We refer to the case of *United States* v. *Klumpp,* 169 U. S. 209. That case turned on paragraph 297 of the Wilson-Gorman Tariff Act of 1894, 28 Stat. 509, c. 349, passed in Mr. Cleveland's administration, to take the place of the McKinley Tariff Act of 1890, 26 Stat. 567, c. 1244. The new Act applied to all imports from the date of its passage, August 27, 1894, except merchandise covered by paragraph 297 which read as follows:

"The reduction of the rates of duty herein provided for manufactures of wool shall take effect January first, eighteen hundred and ninety-five."

The contention of the Government in that case, which both the District Court and the Circuit Court of Appeals had upheld, *Murphy* v. *United States,* 68 Fed. 908, 72 Fed. 1008, was that, under the language of the McKinley Act and the previous tariff acts for a great many years, manufactures of wool and manufactures of worsteds were separate subjects of importation, and that paragraph 297 postponing the reduction of duties on manufactures of wool, did not apply to manufactures of worsteds. It had been expressly decided by this Court in *Seeberger* v. *Cahn,* 137 U. S. 95, 97, that cloths popularly known as diagonals, and in the trade as worsteds, were subject to duty under the Act of March 3, 1883, as manufactures of worsteds and not as manufactures of wool. It was admitted that the merchandise in controversy was worsted dress goods made from the fleece of the sheep, which had been combed and spun into worsted yarn, and paid a high duty under the McKinley Act. By the Act of May 9, 1890, it was provided that worsted cloths should be classified as, and with, woolen cloths, 26 Stat. 105, c. 200. That, however, seems to have been repealed by the McKinley Act (*Murphy* v. *United States,* 72 Fed. 1008, 1009), but though the words wool and worsted continued to be used separately throughout the McKinley Act in description of the various materials for dress goods, they were classified together for duties. There was no doubt about the commercial or trade meaning of manufactures of wool as distinguished from manufactures of worsteds, a distinction which exists today in all woolen and clothing markets. This Court, however, in view of the evident purpose of Congress in the paragraph in question, found that there was no imperative ground for the reinstatement of that trade distinction between manufactures of wool and those of worsted, in construing paragraph 297, although the two terms continued to be

used separately in the McKinley and in the new Act of 1894. Referring to paragraph 297 and its words "Manufactures of Wool," the Court said (p. 215):

"The reason for the postponing of the taking effect of the reduction of duties obviously had nothing to do with the process of manufactures, but related to the material of which the goods were composed, which material had been relieved from duty by paragraph 685 of the act.

"Congress undoubtedly concluded that the manufacturers of goods from wool had laid in a large stock of material, which equitably they should be allowed a reasonable time to work off, and that there was probably on hand a large stock of goods, to dispose of which reasonable time should be allowed, rather than that the large dealers should be induced to bring in foreign goods at a cost which involved ruinous competition; while at the same time the wool growers ought to have their original market until they could adjust themselves to the new condition of things.

"The specific rate was compensatory, and, when stricken out, and the duty on raw material abolished, a postponement was provided for in order to avoid injustice.

"But the reason for postponing the reduction on manufactures of wool, which, on the face of the act, we think properly imputable to Congress, is as applicable to worsted goods as to any other goods fabricated from wool."

And the opinion concludes:

"We think that the words 'manufactures of wool,' in paragraph 297, had relation to the raw material out of which the articles were made, and that as the material of worsted dress goods was wool, such goods fell within the paragraph."

We think the *Klumpp* case very like the one at bar. They both consider the same trade distinction between different clothing wools growing out of the different processes used in the manufacture of the yarn, and reject its application because of Congress's purpose. In both cases

the trade distinctions had ceased to be important from a tariff standpoint, and classification was made on a different basis from that of carding or combed wools, or woolen cloth and worsted cloth. The trade distinctions were very important in the transaction of business, but not in the fixing of duties.

This Court was able, from the language and the circumstances in the *Klumpp* case, as it is here, to determine what the purpose of Congress was in the use there of the words "manufactures of wool," as in the words here, "wool commonly known as clothing wool." Seeing clearly that purpose, this Court held, in the *Klumpp* case, as it holds here, that the case came within the exception to the general rule for the use of trade terms in interpreting tariff acts. The exception was stated by Mr. Justice Gray in *Cadwalader* v. *Zeh, supra*—that "the commercial meaning is to prevail unless Congress has clearly manifested a contrary intention; and that it is only when no commercial meaning is called for or proved, that the common meaning of the words is to be adopted"; and by Mr. Justice Bradley in *Robertson* v. *Salomon, supra,* where he says, after stating the general rule, "but if the commercial designation fails to give an article its proper place in the classifications of the law, then resort must necessarily be had to the common designation." In other words, the pole star of interpretation of statutes, whether it be of tariff acts or any other, must be the intention of Congress, when that can be clearly ascertained and is reasonably borne out by the language used.

Neither in the briefs presented to us nor in the opinions of the courts below has there been a suggestion of a reason why Congress should have distinguished, in its attempt to avoid the demoralization of the wool markets in this country and to increase the revenue, between carding wool and combing wool. The only argument of the Court of Customs Appeals is, *ita lex scripta est;* and

the answer to the argument must be, that it is not so written and that the language is easily capable of being construed in accordance with the Congressional intention.

What we have said leads to the conclusion that we must reverse the Court of Customs Appeals.

Reversed.

MR. JUSTICE MCREYNOLDS is unable to discern any satisfactory answer to the forceful opinion by the Court of Customs Appeals, and thinks that its judgment should be affirmed. In his view, they rightly accepted the statute as written by Congress; the contrary course would have required them to usurp the functions of a legislator and desert those of an expounder of the law.

Nearly one hundred years ago Mr. Justice Story announced the fundamental doctrine which no court should forget. "Arguments drawn from impolicy or inconvenience ought here to be of no weight. The only sound principle is to declare, *ita lex scripta est,* to follow, and to obey. Nor, if a principle so just and conclusive could be overlooked, could there well be found a more unsafe guide in practice than mere policy and convenience."

ZIMMERMANN ET AL. *v.* SUTHERLAND, ALIEN PROPERTY CUSTODIAN, ET AL.

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

No. 180. Argued March 1, 1927.—Decided May 16, 1927.

In a suit under the Trading with the Enemy Act to satisfy a claim of the plaintiffs as depositors against an Austrian bank (whose property in this country was seized under the Act), the debt being due

and payable in Austria and governed by the Austrian law, a payment into court there, which by that law operated as a discharge, is a complete defense. P. 255.

7 F. (2d) 443, affirmed.

APPEAL from a decree of the Circuit Court of Appeals in a suit brought under the Trading with the Enemy Act by depositor-creditors of an Austrian bank, property of which in this country had been seized by the Alien Property Custodian during the war. The District Court awarded a recovery at the rate of exchange on August 12, 1919. The court below reversed this, holding that a deposit of kronen in Austria, April 1, 1920, had operated as a discharge.

Mr. Charles E. Hughes, with whom *Messrs. Joseph M. Hartfield* and *Hamilton Vreeland, Jr.,* were on the brief, for appellants.

Mr. Samuel R. Wachtell for appellee Wiener Bank-Verein.

Solicitor General Mitchell, Assistant Attorney General Farnum, and *Mr. Dean Hill Stanley,* Special Assistant to the Attorney General, for appellees Sutherland, Alien Property Custodian, and White, Treasurer of the United States, submitted.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a suit to reach and apply property in the hands of the Alien Property Custodian or the Treasurer of the United States, seized as property of the Wiener Bank-Verein, as allowed by the amendment of The Trading with the Enemy Act of June 5, 1920, c. 241; 41 Stat. 977. The appellants were the plaintiffs. Before the late war they were depositors in the Wiener Bank-Verein, and on April 6, 1917, had on deposit 2,063,799.03 kronen.

The war intervened and after the cessation of hostilities the plaintiffs demanded the amount of said kronen on deposit as of April 6, 1917, at the average call rate of exchange for the month preceding the outbreak of war between the United States and Austria Hungary, viz., 11.18 United States cents for each Austrian krone. The General Civil Law of Austria, § 1425, provided that—If a debt could not be paid because of dissatisfaction with the offer or other important reasons the debtor might deposit in court the subject matter in dispute, and that if legally carried out and if the creditor was informed, this measure should discharge the debtor and place the subject matter delivered at the risk of the creditor. The creditor not being satisfied with what the Bank was willing to do, the Bank, on April 1, 1920, deposited the amount stated to be due in the proper court, with interest at 2½ per cent., and notified the plaintiffs. It relies upon the deposit as a defence, and the Circuit Court of Appeals held it to be one, 7 Fed. (2d) 443, overruling the decision of the District Court which allowed a recovery at the rate of exchange on August 12, 1919, on the ground that the plaintiffs showed that they wanted their money, although they made no adequate demand, on that day. 2 F. (2d) 629.

The decision of the Circuit Court of Appeals was right and in view of the recent case of *Deutsche Bank Filiale Nurnberg* v. *Humphrey,* 272 U. S. 517, does not need extended reasoning. Here as there the debt was due and payable in the foreign country. The only primary obligation was that created by the law of Austria-Hungary and if by reason of an attachment of property or otherwise the courts of the United States also gave a remedy the only thing that they could do with justice was to enforce the obligation as it stood, not to substitute something else that seemed to them about fair. The distinction between the *Deutsche Bank* case and *Hicks* v. *Guin-*

ness, 269 U. S. 71, is not, as argued, that the plaintiff in *Hicks* v. *Guinness* was in the United States, but that, as the Court understood the facts, the debt was payable in New York and subject to American law, so that upon a breach of the contract there arose a present liability in dollars. As the present debt was governed wholly by the law of Austria-Hungary on April 1, 1920, when the deposit was made, it was discharged by the deposit which was substituted as the only object of the creditor's claim. An elaborate argument is made that the original contract between the parties was dissolved by the war. Such considerations are immaterial when it is realized that in any view of all that had happened the only obligations of the Wiener Bank-Verein were those imposed by the law of Austria-Hungary, and that if that law discharged the debt the debt was discharged everywhere.

The plaintiffs argue that they have rights under the Treaty of August 24, 1921, between the United States and Austria. But the short answer is that their rights against the Bank were ended before that treaty was made. They also urge that this is a suit under The Trading with the Enemy Act. But so was *Deutsche Bank* v. *Humphrey.* That Act did not turn the Austrian into an American debt and impose a new and different obligation upon the Austrian Bank.

Decree affirmed.

WESTFALL *v.* UNITED STATES.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 766. Argued March 8, 9, 1927.—Decided May 16, 1927.

1. Section 9 of the Federal Reserve Act, as amended June 21, 1917, is constitutional in so far as it provides that state banks which have joined the Federal Reserve System, their officers, etc., shall

be subject to the penalties of Rev. Stats. § 5209, which punishes misapplications, etc., of a bank's funds. P. 258.

2. The acts thus made criminal may be punishable also under the laws of the State. P. 258.
3. It is not a condition to the power of Congress to punish such acts that they result in any loss to the Federal Reserve Banks. P. 258.
4. When necessary in order to prevent an evil, the law may embrace more than the precise thing to be prevented. P. 259.
5. Congress may employ state corporations, with their consent, as federal instrumentalities and make frauds that impair their efficiency crimes. P. 259.

RESPONSE to a question certified by the Circuit Court of Appeals arising upon a review of convictions under indictments for aiding and procuring misapplication of state bank funds and conspiracy to misapply them.

Mr. D. S. Face, with whom *Mr. Harry D. Jewell* was on the brief, for Westfall.

Solicitor General Mitchell, with whom *Assistant Attorney General Luhring, Mr. Harry S. Ridgely,* Attorney in the Department of Justice, and *Mr. Walter Wyatt,* General Counsel, Federal Reserve Board, were on the brief, for the United States.

MR. JUSTICE HOLMES delivered the opinion of the Court.

Westfall was convicted under two indictments, the first of which charged him with aiding and procuring the branch manager of a State bank which was a member of the Federal Reserve System to misapply the funds of the bank. The second indictment charged a conspiracy to misapply the funds of the bank between the same and other parties. Both were based upon the issuing a fraudulent certificate of deposit for ten thousand dollars and the paying the same from the funds of the bank. The Circuit Court of Appeals for the Sixth Circuit certifies this

question: "Is the provision of section 9, chapter 6, of the Federal Reserve Act of December 23, 1913 [38 Stat. 259, 260,] as amended June 21, 1917 [c. 32, §3; 40 Stat. 232,] and July 1, 1922 constitutional in so far as it provides that 'such banks and the officers, agents and employees thereof shall also be subject to the provisions of and the penalties prescribed by Section 5209 of the Revised Statutes?'" The amendment of July 1, 1922, referred to is, we presume, c. 274; 42 Stat. 821. It has no immediate bearing upon the question propounded and as it is not relied upon in argument we shall leave it on one side.

It is not disputed that Rev. Stat. §5209, if applicable, punishes the bank manager, and those who aided and abetted him in his crime. *Coffin* v. *United States,* 156 U. S. 432, 447. The argument is that Congress has no power to punish offences against the property rights of State banks. It is said that the statute is so broad that it covers such offences when they could not result in any loss to the Federal Reserve Banks, and it is suggested that if upheld the Act will invalidate similar statutes of the States. This argument is well answered by *Hiatt* v. *United States,* 4 F. (2d) 374, 377. Certiorari denied. 268 U. S. 704. Of course an act may be criminal under the laws of both jurisdictions. *United States* v. *Lanza,* 260 U. S. 377, 382. And if a state bank chooses to come into the System created by the United States, the United States may punish acts injurious to the System, although done to a corporation that the State also is entitled to protect. The general proposition is too plain to need more than statement. That there is such a System and that the Reserve Banks are interested in the solvency and financial condition of the members also is too obvious to require a repetition of the careful analysis presented by the Solicitor General. The only suggestion that may deserve a word is that the statute applies indifferently

whether there is a loss to the Reserve Banks or not. But every fraud like the one before us weakens the member bank and therefore weakens the System. Moreover, when it is necessary in order to prevent an evil to make the law embrace more than the precise thing to be prevented it may do so. It may punish the forgery and utterance of spurious interstate bills of lading in order to protect the genuine commerce. *United States* v. *Ferger,* 250 U. S. 199. See further, *Southern Ry. Co.* v. *United States,* 222 U. S. 20, 26. That principle is settled. Finally, Congress may employ state corporations with their consent as instrumentalities of the United States, *Clallam County* v. *United States,* 263 U. S. 341, and may make frauds that impair their efficiency crimes. *United States* v. *Walter,* 263 U. S. 15. We answer the question: *Yes.*

UNITED STATES *v.* SULLIVAN.

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

No. 851. Argued April 27, 1927.—Decided May 16, 1927.

1. Gains from illicit traffic in liquor are subject to the income tax. P. 263.
2. The Fifth Amendment does not protect the recipient of such income from prosecution for wilful refusal to make any return under the income tax law. P. 263.
3. If disclosures called for by the return are privileged by the Amendment, the privilege should be claimed in the return. P. 264.

15 F. (2d) 809, reversed.

CERTIORARI (273 U. S. 689) to a judgment of the Circuit Court of Appeals which reversed a judgment of the District Court sentencing Sullivan for wilfully refusing to make a return of net income under the Revenue Act of 1921.

Assistant Attorney General Willebrandt, with whom *Solicitor General Mitchell,* and *Messrs. A. W. Gregg,* General Counsel, Bureau of Internal Revenue, *Sewall Key,* Attorney in the Department of Justice, and *Raymond L. Joy,* were on the brief, for the United States.

The gains and profits derived from illicit traffic in liquor constitute income. It has been uniformly held by the courts that such income was intended by Congress to fall within the purview of the Income Tax Act of 1921. This interpretation is shown by the all-inclusive language used by Congress to define income and by the history of the changes in income-tax legislation. The questions asked in the required income tax return do not compel the disclosure of any fact which tends to incriminate. Only information of the most general character relating to the nature of the taxpayer's business is demanded, none of which in itself constitutes proof of unlawful dealings. In determining the nice balance that exists between the constitutional rights of the individual and the sovereign's right to compel information necessary for governmental purposes the courts will go as far "as may be consistent with the liberty of the individual." This is illustrated in *Mason* v. *United States,* 244 U. S. 362, and *Ex parte Irvine,* 74 Fed. 954. The taxpayer will not be permitted to set himself up as the judge of his rights under the Fifth Amendment. He must comply with the Government's demand on him for information at least to the point where the information would tend to incriminate. *Podolin* v. *Lesher Warner Dry Goods Co.,* 210 Fed. 97. In this case respondent failed to raise any claim of immunity he might have had under the Fifth Amendment in the proper manner and form, and in the failure to do so his privilege must be deemed to be waived. *United States ex rel. Vajtauer* v. *Comm'r of Immigration,* 273 U. S. 103.

A tax return is the statement of account between the taxpayer and his Government. It is impressed with a

public interest and constitutes a public document. The cases of *Boyd* v. *United States,* 116 U. S. 616, and *Wilson* v. *United States,* 221 U. S. 361, both recognize that records required by law to be kept constitute an exception to the application of the Fifth Amendment. Numerous State cases have recognized this principle. *United States* v. *Sischo,* 262 U. S. 165, is authority for the Government's contention herein, because the effect of the Fifth Amendment on the interpretation contended for by the Government, of the statute requiring manifests, underlay the whole case. The effect of the interpretation of the Circuit Court of Appeals of the Income Tax Act in this case would be to favor the lawbreaker and excuse from the operation of the Act any person who set up a claim that his income had been derived from criminal operations. Such interpretation is to be avoided because it is contrary to the purposes of the Act and is not demanded by a proper application of the Fifth Amendment.

Mr. Frederick W. Aley, with whom *Mr. E. Willoughby Middleton* was on the brief, for respondent.

Section 223 of the Revenue Act of 1921, in so far as it requires an income tax return of one whose income is derived from a violation of the criminal law, is in conflict with the Fifth Amendment. The obvious intent of the Fifth Amendment is that no one shall be compelled to be the means of exposing his own criminality. This privilege is for the protection of the innocent as well as the guilty, and is intended to prevent for all time anything in the nature of inquisitorial proceedings to compel confession of crime. Such protection is an essential part of the liberties of a free people and should be jealously guarded from encroachment by the legislative branch of the government. *United States* v. *Boyd,* 116 U. S. 616; *Counselman* v. *Hitchcock,* 142 U. S. 547; *Emory's Case,* 107 Mass. 172; *McKnight* v. *United States,* 115 Fed. 972.

See *Steinberg* v. *United States,* 14 F. (2d) 564, and *Peacock* v. *Pratt,* 121 Fed. 772.

The privilege is not limited to testimony, as ordinarily understood, but extends to every means by which one may be compelled to produce information which may incriminate. *Boyd* v. *United States, supra; Brown* v. *Walker,* 161 U. S. 591. Distinguishing *Hale* v. *Henkel,* 201 U. S. 43; *Wilson* v. *United States,* 221 U. S. 361; *Baltimore etc. R. Co.* v. *Interstate Commerce Commission,* 221 U. S. 612; and *United States.* v. *Sischo,* 262 U. S. 165. See *McCarthy* v. *Arndstein,* 266 U. S. 34; *United States* v. *Lombardo,* 228 Fed. 980; *United States* v. *Dalton,* 286 Fed. 756; *United States* v. *Mulligan,* 268 Fed. 893; *United States* v. *Cohen Grocery Co.,* 255 U. S. 81; *United States* v. *Sherry,* 294 Fed. 684.

The Income Tax Law does not grant immunity from prosecution.

The question of immunity is properly before this Court.

Direct proceeds of crimes against the laws of the United States cannot be considered as income within the meaning of the Income Tax Law of 1921. *Eisner* v. *Macomber,* 262 U. S. 189; *Steinberg* v. *United States, supra; Smith* v. *Minister of Finance,* 2 Dom. L. Rep., reversed by Privy Council.

Mr. Justice Holmes delivered the opinion of the Court.

The defendant in error was convicted of wilfully refusing to make a return of his net income as required by the Revenue Act of 1921; November 23, 1921, c. 136, §§ 223 (a), 253; 42 Stat. 227, 250, 268. The judgment was reversed by the Circuit Court of Appeals. 15 F. (2d) 809. A writ of certiorari was granted by this Court.

We may take it that the defendant had sufficient gross income to require a return under the statute unless he was exonerated by the fact that the whole or a large

part of it was derived from business in violation of the National Prohibition Act. The Circuit Court of Appeals held that gains from illicit traffic in liquor were subject to the income tax, but that the Fifth Amendment to the Constitution protected the defendant from the requirement of a return.

The Court below was right in holding that the defendant's gains were subject to the tax. By § 213 (a) gross income includes "gains, profits, and income derived from . . . the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever." These words are also those of the earlier Act of October 3, 1913, c. 16, § II, B; 38 Stat. 114, 167, except that the word 'lawful' is omitted before 'business' in the passage just quoted. By § 600; 42 Stat. 285, and by another Act approved on the same day Congress applied other tax laws to this forbidden traffic. Act of November 23, 1921, c. 134, § 5; 42 Stat. 222, 223. *United States* v. *One Ford Coupé,* 272 U. S. 321, 327. *United States* v. *Stafoff,* 260 U. S. 477, 480. We see no reason to doubt the interpretation of the Act, or any reason why the fact that a business is unlawful should exempt it from paying the taxes that if lawful it would have to pay.

As the defendant's income was taxed, the statute of course required a return. See *United States* v. *Sischo,* 262 U. S. 165. In the decision that this was contrary to the Constitution we are of opinion that the protection of the Fifth Amendment was pressed too far. If the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all. We are not called on to decide what, if anything, he might have withheld. Most of the items warranted no complaint. It would be an extreme if not an extravagant application

of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime. But if the defendant desired to test that or any other point he should have tested it in the return so that it could be passed upon. He could not draw a conjurer's circle around the whole matter by his own declaration that to write any word upon the government blank would bring him into danger of the law. *Mason* v. *United States,* 244 U. S. 362. *United States ex rel. Vajtauer* v. *Commissioner of Immigration,* 273 U. S. 103. In this case the defendant did not even make a declaration, he simply abstained from making a return. See further the decision of the Privy Council, *Minister of Finance* v. *Smith,* [1927] A. C. 193.

It is urged that if a return were made the defendant would be entitled to deduct illegal expenses such as bribery. This by no means follows, but it will be time enough to consider the question when a taxpayer has the temerity to raise it.

Judgment reversed.

UNITED STATES *v.* ALFORD.

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

No. 983. Argued April 28, 1927.—Decided May 16, 1927.

1. In the Act of June 25, 1910, providing that " whoever shall build a fire in or near any forest, timber, or other inflammable material upon the public domain, or upon any Indian reservation . . . shall, before leaving said fire, totally extinguish the same; and whoever shall fail to do so shall " be punished, etc., the words " upon the public domain " are to be referred to the words immediately preceding, viz., " forest, timber, or other inflammable material," so that the statute applies where the fire is on private lands, but " near " to inflammable grass on the public domain. P. 266.

2. The Act, so construed, is constitutional; for Congress may prohibit the doing of acts upon privately owned lands that imperil the publicly owned forests. P. 267.
3. The word "near" is not too indefinite. P. 267.

Reversed.

ERROR to a judgment of the District Court sustaining a demurrer to an indictment.

Mr. R. W. Williams, Solicitor, Department of Agriculture, with whom *Solicitor General Mitchell,* and *Messrs. Fred Lees,* and *H. H. Clarke* were on the brief, for the United States.

The statutory language is reasonably plain. Where the words of a statute are susceptible of two constructions, the broader of which will carry out fully the evident legislative purpose, and the narrower will so unduly restrict its operation as to render it largely ineffective to accomplish that purpose, the construction should be adopted which will give full effect to the known intent of Congress in its enactment. *Millard* v. *Roberts,* 202 U. S. 429. This evident legislative purpose can be subserved only if the statute be construed as prohibiting the leaving unextinguished of all fires which, by reason of being built in or near the timber on the public domain, constitute a menace thereto. *United States* v. *Hartwell,* 6 Wall. 385; *Lau Ow Bew* v. *United States,* 144 U. S. 47; *Ash Sheep Co.* v. *United States,* 252 U. S. 159.

The application to the words of this statute of that construction which will effectuate the known legislative intent is not violative of the rule that criminal and penal statutes will be strictly construed. *Ash Sheep Co.* v. *United States,* 252 U. S. 159; *United States* v. *Bowman,* 260 U. S. 94; *Johnson* v. *Southern Pacific Co.,* 196 U. S. 1; *United States* v. *Chemical Foundation,* 272 U. S. 1; *United States* v. *Wiltberger,* 5 Wheat. 76; *United States*

v. *Hartwell,* 6 Wall. 385; *United States* v. *Lacher,* 134 U. S. 624; *United States* v. *Corbett,* 215 U. S. 233.

It is clearly within the constitutional power of Congress to prohibit one from leaving unextinguished a fire built by him on private land, but near timber or other inflammable material, upon the public domain. *Hamilton* v. *Kentucky Distilleries Co.,* 251 U. S. 146; *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U. S. 196; *Brooks* v. *United States,* 267 U. S. 432; *Ex parte Siebold,* 100 U. S. 371; *Pensacola Telegraph Co.* v. *Western Union Tel. Co.,* 96 U. S. 1; *In re Neagle,* 135 U. S. 1; *United States* v. *Ferger,* 250 U. S. 199; *Camfield* v. *United States,* 167 U. S. 518; *McKelvey* v. *United States,* 260 U. S. 353; *Perley* v. *North Carolina,* 249 U. S. 510, and *United States* v. *Ramsey,* 271 U. S. 467.

No appearance for defendant in error.

Mr. Justice Holmes delivered the opinion of the Court.

Alford was indicted for building a fire near inflammable grass and other inflammable material and timber situated upon the public domain of the United States, and for not extinguishing the same before leaving it, by reason of which the said grass and other material was burned. The count was demurred to on the ground that the statute concerned does not cover the building or leaving of fires at any place except upon a forest reservation, and that if it attempts to cover fires elsewhere it is unconstitutional and void. The District Court construed the statute in the same way and sustained the demurrer. A writ of error was taken by the United States.

By the Act of June 25, 1910, c. 431, § 6; 36 Stat. 855, 857, amending § 53 of the Penal Code of March 4, 1909, "Whoever shall build a fire in or near any forest, timber, or other inflammable material upon the public domain, or upon any Indian reservation, or lands belonging to or

occupied by any tribe of Indians under the authority of the United States, or upon any Indian allotment while the title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the allottee without the consent of the United States, shall, before leaving said fire, totally extinguish the same; and whoever shall fail to do so shall be fined not more than one thousand dollars, or imprisoned not more than one year, or both." The Court read the words 'upon the public domain' as qualifying the phrase 'whoever shall build a fire.' We are of opinion that this was error, and that 'upon the public domain' should be referred to the words immediately preceding it: 'forest, timber, or other inflammable material.'—So interpreted, they make better English and better sense. The purpose of the Act is to prevent forest fires which have been one of the great economic misfortunes of the country. The danger depends upon the nearness of the fire, not upon the ownership of the land where it is built. It is said that the construction that we adopt has been followed by the Department of Justice and by a number of cases in the District Courts ever since the passage of the original Act of February 24, 1897, c. 313; 29 Stat. 594. We regard the meaning as too plain to be shaken by the suggestion that criminal statutes are to be construed strictly. They also are to be construed with common sense.

The statute is constitutional. Congress may prohibit the doing of acts upon privately owned lands that imperil the publicly owned forests. *Camfield* v. *United States*, 167 U. S. 518. See *McKelvey* v. *United States*, 260 U. S. 353. The word 'near' is not too indefinite. Taken in connection with the danger to be prevented it lays down a plain enough rule of conduct for anyone who seeks to obey the law.

Judgment reversed.

UNITED STATES *v.* SISAL SALES CORPORATION ET AL.

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

No. 200. Argued March 9, 1927.—Decided May 16, 1927.

1. A combination, entered into by parties within the United States and made effective by acts done therein, to monopolize the supply abroad, and the domestic stock, of an article of commerce produced only in a foreign country, monopolize and control its importation and sales, destroy competition, and arbitrarily advance and fix prices and make other unreasonable exactions of purchasers, is in violation of the Sherman Anti-Trust Act and of § 73 of the Wilson Tariff Act, as amended February 12, 1913. P. 274.
2. The fact that their control of the production was aided by discriminatory legislation of the foreign country does not prevent punishment of the forbidden results of the conspiracy, within the United States. *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, distinguished. P. 275.

Reversed.

APPEAL from a decree of the District Court dismissing, on motion equivalent to a demurrer, a bill by the United States to enjoin an alleged combination and conspiracy to monopolize the importation and sale in the United States of sisal—a fiber which is used for the manufacture of binder twine and which is produced in Yucatan almost exclusively.

Assistant to the Attorney General Donovan, with whom *Solicitor General Mitchell,* and *Messrs. Rush H. Williamson, Miller Hughes,* and *William D. Whitney,* Special Assistants to the Attorney General, were on the brief, for the United States.

The entry into a conspiracy with unlawful intent to restrain foreign trade and commerce is an offense under

the Sherman Anti-Trust Law and the anti-trust provisions of the Wilson Tariff Law. The unlawful character of such a conspiracy is not dependent upon the unlawfulness of any one or more of the particular acts relied upon by the defendants to make such conspiracy effective. The offense is complete when the conspiracy is entered into. *Nash* v. *United States,* 229 U. S. 373. The *American Banana Case,* 213 U. S. 359, was an action for damages under § 7 of the Sherman Act, and the injury relied upon was committed at the instigation of the defendant by the Government of Costa Rica. The right to damages must depend upon the unlawful character of the injury. When a conspiracy is one to restrain foreign commerce and to monopolize the importation of a particular product, it is unlawful irrespective of the means employed to carry it out, and is subject to be enjoined under § 4 of the Sherman Act and § 74 of the Wilson Tariff Act.

In the case at bar, moreover, the Government has not merely charged the entry into a conspiracy with unlawful purpose and aim, but also the actual attainment of the ends of that conspiracy by various overt acts. The *Banana Case, supra,* is not authority upon the present case. The cases which followed it establish the rule that even acts done abroad which are lawful there may be the basis of a suit if they are operative here and are unlawful under our law. *United States* v. *Nord Deutscher Lloyd,* 223 U. S. 512; *United States* v. *Pacific & Arctic Co.,* 228 U. S. 87; *United States* v. *Twenty Five Packages of Panama Hats,* 231 U. S. 358; *United States* v. *Bowman,* 260 U. S. 94; *United States* v. *American Tobacco Co.,* 221 U. S. 106.

The anti-trust provisions of the Wilson Tariff Act are particularly directed against restraints upon foreign commerce by importers.

Repeal by the State of Yucatan of the discriminatory legislation would not render the case moot.

Mr. Winthrop W. Aldrich for appellee Sisal Sales Corporation.

It is clear from the allegations of the petition that the alleged monopoly depended entirely upon the discriminatory tax laws of the State of Yucatan in favor of Comisión Exportadora. The "unlawful agreement" alleged to have been made by a number of the defendants, in pursuance of which it is claimed the monopoly resulted, contemplated that Castellanos should proceed to Yucatan, Mexico, and "cause to be enacted in the Republic of Mexico or the States of Yucatan and Campeche any laws or regulations necessary to create a monopoly of the sisal produced in said States and such laws and regulations as might be necessary for a reduction of acreage and control of prices." Prior to the enactment of the discriminatory tax laws competition existed, and immediately upon the enactment thereof competition ceased.

It is manifest that the creation of a monopoly by the laws of a foreign State would not constitute a violation of our anti-trust statutes. *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347.

It would be utterly futile to grant the injunction prayed for in the petition, for, if granted, it would not affect the discriminatory tax laws of the State of Yucatan by virtue of which the monopoly is alleged to have been created and become effective; nor would it prevent the Comisión Exportadora from continuing to sell sisal in the United States through agencies other than the defendants and with other financial support.

Mr. Harold R. Medina for appellee Hanson & Orth et al.

The petition alleges a monopoly existing as the direct result of a series of enactments, proclamations and decrees of sovereign foreign governments without which nothing remains of the alleged conspiracy in this case.

(1) A conspiracy to effect monopoly by means of enactments, proclamations and decrees of a sovereign foreign government is not within the scope of the Anti-Trust laws of the United States, and the decision in the *American Banana Case,* 213 U. S. 347, is conclusive on that point. (2) Moreover, the question raised by the existence of the foreign government monopoly in this case is a broad international, economic and political one, and in so far as the United States conceives itself to be injured by such monopoly, the remedy should not be attempted by the courts but by the executive and legislative departments of the United States.

Mr. JUSTICE MCREYNOLDS delivered the opinion of the Court.

The United States seek an injunction to prevent appellees from taking further action in pursuance of a contract, combination or conspiracy said to be forbidden by the Sherman Anti-trust Act and the Wilson Tariff Act as amended, c. 647, 26 Stat. 209; c. 349, 28 Stat. 509, 570; c. 40, 37 Stat. 667. The trial court regarded *American Banana Co.* v. *United Fruit Co.,* 213 U. S. 347, as controlling; held that no cause of action had been alleged; and dismissed the bill upon motion.

The bill is confused, difficult to follow, and an excellent example of bad pleading. An order should direct that it be recast and conformed to the established rules. Courts ought not to be burdened by rambling and obscure statements. Nevertheless, we think enough is alleged to indicate a meritorious cause and to require reversal of the judgment below.

Appellees are three banking corporations doing business at New York and New Orleans; two Delaware corporations—The Eric and the Sisal Sales—organized to deal in sisal; a Mexican corporation—Comisión Exportadora de Yucatan—which buys sisal from the producers;

certain officers and agents of the foregoing corporations; and members of Hanson and Orth, brokers.

Sisal is the fiber of the henequen plant, a native of Mexico, and from it is fabricated more than eighty per centum of the binder twine used for harvesting our grain crops. The annual requirements of the United States are from two hundred and fifty to three hundred million pounds. During one year a million bales—375 pounds each—were imported. Adequate quantities can be obtained only from Yucatan. The plant is extensively cultivated there and the supply has often exceeded market demands. Prices paid to producers have varied from less than four to seven or eight cents per pound.

Prior to 1919 appellee banks advanced large sums to parties endeavoring to monopolize importation and sale of sisal in the United States. The Mexican corporation, Comisión Reguladora del Mercado de Henequen, was utilized as an important instrumentality for making necessary purchases, and legislation favorable to it was secured. For a time the scheme succeeded; then came collapse. Through foreclosure of liens held to secure their loans (several million dollars) appellee banks acquired four hundred thousand bales of fiber stored in this country. About that time, through change of laws, the Yucatan markets were again opened; competition became active and prices declined.

Thereupon, appellee banks, acting jointly and within the United States, entered into and undertook to make effective another and somewhat different combination or scheme to control the sisal market, with the ultimate purpose of selling their holdings, recouping losses and securing large gains. Later, the other defendants became parties thereto.

As the direct outcome of this unlawful combination, conspiracy and accompanying contracts, it is alleged—

Appellees have secured a monopoly of interstate and foreign commerce in sisal. The Comisión Exportadora de Yucatan has become sole purchaser of sisal from producers and the Sisal Sales Corporation, sole importer into the United States. There is no longer any competition in the trade; excessive prices are arbitrarily fixed. The sisal acquired by the banks during 1919 has been sold; undue profits and commissions have been and are demanded; the conspirators have realized great sums at the expense of our manufacturers and farmers.

All steps necessary to bring about the above-stated results have been deliberately taken by appellees. Some of them are stated below.

The Eric Corporation, organized in August, 1919, and owned and financed by the banks, took over the large stocks of sisal acquired by them through foreclosure, also two hundred and fifty thousand bales accumulated in Yucatan. Laws favorable to it were solicited and secured from the governments of Mexico and Yucatan. Under them, and by the use of large sums supplied by the banks, that corporation and its agents soon became everywhere the dominant factors in the sisal trade. Prior to January, 1921, the Mexican corporation, Comisión Reguladora del Mercado de Henequen, was the agency for buying and selling sisal in that country; but about that time its business collapsed. Thereupon, the Comisión Monetaria was organized under the same laws, furnished with large sums of money and utilized for such purposes. The governments of both Mexico and Yucatan were persuaded to pass discriminatory legislation, and all other buyers were forced out of the markets. But because of the great supply of fiber this plan also proved unsuccessful and The Eric Corporation was obliged to increase its large holdings.

Later, by procurement of the banks, the Sisal Sales Company was organized to deal in sisal, and Hanson and

Orth became its managers. It took title to the sisal held by The Eric Corporation. The old Comisión Reguladora del Mercado de Henequen was revived as the Comisión Exportadora de Yucatan and again became the active agent for buying and selling in Mexico. Laws were solicited and passed which gave it advantages over all others. Under these, and by the use of funds supplied by the banks, it soon became the sole buyer of sisal from the producers. It also acquired the fiber held by the Sisal Sales Corporation on storage in the United States. Thereupon, the Sisal Sales Corporation, through contracts, became the exclusive selling agent of the Comisión Exportadora de Yucatan in all markets of the world, and agreed to furnish the funds necessary for their joint operations. Appellees thus, and by constant manipulation of the markets, acquired complete dominion over them, destroyed all competition, obtained power to advance and arbitrarily to fix excessive prices, and have made unreasonable exactions.

Accepting as true the allegations of the bill—roughly summarized above—it is plain enough that appellees are parties to a successful plan to destroy competition and to control and monopolize the purchase, importation and sale of sisal. The Sherman Act inhibits contracts, combinations and conspiracies to destroy competition in interstate and foreign trade and commerce, as well as attempts to monopolize such trade. Sections 73 and 74 of the Wilson Tariff Act, as amended,* declare unlawful

* Wilson Tariff Act, Aug. 27, 1894, as amended by Act of Feb. 12, 1913.

Sec. 73. That every combination, conspiracy, trust, agreement, or contract is hereby declared to be contrary to public policy, illegal, and void when the same is made by or between two or more persons or corporations either of whom, as agent or principal, is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement, or

every combination, conspiracy, trust, agreement or contract intended to operate in restraint of trade in, or free competition in respect of, or intended to increase the market price of any article when one of the parties is engaged in importing the same, and give the courts power to prevent and restrain those who violate the Act.

The circumstances of the present controversy are radically different from those presented in *American Banana Co.* v. *United Fruit Co., supra,* and the doctrine there approved is not controlling here. The Banana Company sued for treble damages under the Sherman Act, basing

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contract is intended to operate in restraint of lawful trade, or free competition in lawful trade or commerce, or to increase the market price in any part of the United States of any article or articles imported or intended to be imported into the United States, or of any manufacture into which such imported article enters or is intended to enter. Every person who is or shall hereafter be engaged in the importation of goods or any commodity from any foreign country in violation of this section of this Act, or who shall combine or conspire with another to violate the same, is guilty of a misdemeanor, and on conviction thereof in any court of the United States such person shall be fined in a sum not less than one hundred dollars and not exceeding five thousand dollars, and shall be further punished by imprisonment, in the discretion of the court, for a term not less than three months nor exceeding twelve months.

SEC. 74. That the several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of section seventy-three of this Act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petitions setting forth the case and praying that such violations shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

its claim upon acts done outside the United States and not unlawful by the law of the place. "The substance of the complaint is that, the plantation being within the *de facto* jurisdiction of Costa Rica, that state took and keeps possession of it by virtue of its sovereign power. But a seizure by a state is not a thing that can be complained of elsewhere in the courts." "A conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful, if they are permitted by the local law."

Here we have a contract, combination and conspiracy entered into by parties within the United States and made effective by acts done therein. The fundamental object was control of both importation and sale of sisal and complete monopoly of both internal and external trade and commerce therein. The United States complain of a violation of their laws within their own territory by parties subject to their jurisdiction, not merely of something done by another government at the instigation of private parties. True, the conspirators were aided by discriminating legislation, but by their own deliberate acts, here and elsewhere, they brought about forbidden results within the United States. They are within the jurisdiction of our courts and may be punished for offenses against our laws.

Moreover, appellees are engaged in importing articles from a foreign country and have become parties to a contract, combination and conspiracy intended to restrain trade in those articles and to increase the market price within the United States. Such an arrangement is plainly denounced by § 73 of the Wilson Tariff Act, as amended.

The decree of the court below must be

Reversed.

MR. JUSTICE STONE took no part in the consideration or decision of this cause.

DEAL ET AL. *v.* UNITED STATES.

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

No. 344. Submitted April 25, 1927.—Decided May 16, 1927.

1. A postmaster is not liable as an insurer under Rev. Stats. § 3846 for the loss of a registered package containing money which belongs to the United States but which is not such that it may be "ordered by the Postmaster General to be transferred or paid out." P. 279.
2. Under Postal Regulations of 1913, §§ 291 and 940, a postmaster and his surety are responsible for registered mail "lost or rifled," when the postoffice "has been robbed," only if the "depredation or loss be due to negligence or disregard of the Regulations." P. 280.
3. Charges for witness travel outside the district are not taxable against a defeated party to a civil action in the District Court for Alaska. P. 284.

11 F. (2d) 3, reversed.

CERTIORARI (271 U. S. 656) to a judgment of the Circuit Court of Appeals which affirmed a judgment of the District Court for the Territory of Alaska in favor of the United States in a suit against a postmaster and his surety for money abstracted from a registered package.

Mr. Louis S. Beedy for petitioners.

Solicitor General Mitchell, Assistant Attorney General Letts, Mr. Gardner P. Lloyd, Special Assistant to the Attorney General, and *Mr. J. Kennedy White,* Attorney in the Department of Justice, for the United States.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

Upon his appointment as postmaster at Fairbanks, Alaska, petitioner Deal executed the ordinary official bond, with the Fidelity & Guaranty Company as surety, conditioned that he "shall faithfully discharge all duties

and trusts imposed on him as postmaster either by law or by the regulations of the Post Office Department," etc. The United States sued on this bond in a District Court of Alaska and asked judgment for ninety-nine hundred dollars, the amount of currency abstracted from a package deposited in the Fairbanks office for registration and transmission. Judgment upon a verdict went for them and was affirmed by the Circuit Court of Appeals, Ninth Circuit, notwithstanding errors by the trial court, recognized but held to be harmless. 11 Fed. (2d) 3.

Replying to the petition for certiorari from this Court, the Solicitor General very properly said, "The record is in a jumble, and the treatment of the case by the trial court involved so many inconsistencies that the case is difficult to analyse."

The trial judge charged the jury upon three inconsistent theories. (1) That the postmaster was liable for the abstracted money only if guilty of some negligence which caused the loss. (2) That liability existed if he had violated some regulation of the Post Office Department respecting care of the registered package although not shown to be proximate cause of the loss. (3) That the money taken, being property of the United States, was public funds and the postmaster became liable therefor as an insurer as though it had been received from sale of stamps or money orders.

Among other things, the record discloses—

That on September 15, 1921, the First National Bank deposited at the Fairbanks Post Office for registration and transmission a package addressed to the disbursing agent at Healy, Alaska, via Nenana, which contained ninety-nine hundred dollars in currency, and some silver, belonging to the United States. The clerk who received and registered it thought the package contained money, but was not so advised. Another clerk placed it in an iron safe and left the door on the day combination.

That during the night of September 15, petitioner Deal permitted an unauthorized person to enter the office. September 16 the package was placed in the pouch destined to Nenana. Upon its arrival at that place the currency was gone—a magazine filled the space.

That some evidence touching treatment of the package at the Fairbanks office and much testimony concerning transportation, tended to show the bills were abstracted while it remained there.

Considering the serious nature of the errors committed by the trial court, and upon the entire record, we must conclude that they caused material prejudice to the petitioners' substantial rights. Act February 26, 1919, c. 48, 40 Stat. 1181. Accordingly, the challenged judgment must be reversed and the cause remanded for another trial. Under this conclusion, we need only consider matters probably important for further conduct of the cause.

The Circuit Court of Appeals properly rejected, and the Solicitor General does not rely upon, the theory that under § 3846 R. S. (§ 360, Postal Regulations 1913) the postmaster became liable for the registered package as an insurer. That section provides: "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." Public money, within this provision, "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." *Smyer* v. *United States,* 273 U. S. 333.

It is admitted that petitioner Deal failed to observe certain regulations intended to secure safety of registered matter; but it is stoutly denied that the evidence showed any causal connection between such negligence or disregard of duty and the loss sustained.

During 1921 the 1913 Edition, Postal Laws and Regulations, was in force. Sections which require special consideration follow:

"Sec. 291. When a post office has been robbed, the postmaster shall immediately report all the facts to the Chief Inspector and to the post-office inspector in charge of the division in which the post office is located. (See sec. 35.) The report should give, if possible, all the circumstances connected with the robbery, the date, a detailed inventory of the loss, the denominations of stamped paper stolen, the amount of postal and money-order funds and of each class of Government property. The postmaster shall be held responsible for the loss if he fails to exercise due care in the protection of the property. If the loss includes the mail key the number should be given. (See sec. 1527.) Full particulars regarding registered mail lost or rifled should be reported. The Chief Inspector shall promptly notify the Assistant Attorney General of every such casualty from which a claim for credit under the provisions of section 150 may arise. . . .

"Sec. 940. Postmasters and other postal employees will be held personally responsible by the Post Office Department for the wrong delivery, depredation upon, or loss of any registered letter or parcel if such wrong delivery, depredation, or loss be due to negligence or disregard of the regulations. [The provisions of this section appear unchanged as § 989, Edition 1924 of the Regulations.]

"Sec. 150 [Act May 9, 1888, c. 231, 25 Stat. 135, as amended by Act June 11, 1896, c. 424, 29 Stat. 458]. That the Postmaster General be, and he is hereby, authorized to investigate all claims of postmasters for the loss of money-order funds, postal funds, postage stamps, stamped envelopes, newspaper wrappers, and postal cards, belonging to the United States in the hands of such postmasters, resulting from burglary, fire, or other un-

avoidable casualty, and if he shall determine that such loss resulted from no fault or negligence on the part of such postmasters, to pay to such postmasters, or credit them with the amount so ascertained to have been lost or destroyed, etc., etc."

Did § 291 impose liability for theft from the registered package while held by the postmaster and not protected as the Regulations required, without evidence to show that the loss resulted from failure to observe them? If so, it was unnecessary to show such causal connection, as the United States maintain. But if § 940 defined the responsibility, as he insists, that relation was essential.

Section 492, Edition 1879, Postal Laws and Regulations; § 700, ed. 1887; § 669, ed. 1893; § 278, ed. 1902; § 328, ed. 1924, correspond to § 291, ed. 1913.

Edition 1879. "Sec. 492. *Postmasters to immediately report robbery of post office.* Whenever a post office has been robbed the postmaster will immediately report all the facts . . . This report must state as fully as possible all the circumstances connected with the robbery, giving the date and extent of the loss. He must be careful to state whether the loss consists of stamps, stamped envelopes, postal cards, letters (stolen or rifled), postal or money-order funds, or government property. . . . He must give all the information in his possession relating to each lost or rifled registered letter . . . For the value of registered or ordinary mail lost by robbery of post offices postmasters will be held responsible if, upon investigation, it appears that due care was not taken to secure the mail matter from depredation."

Edition 1887. "Sec. 700. *Reports of robberies of post offices.* . . . As to registered matter lost or rifled, the report should specify the post office where mailed, date of mailing, number of letter and registered package envelope, by whom written, to whom addressed, and con-

tents, if known. For the value of registered or ordinary mail matter lost by robbery of post offices, the postmaster may be held responsible to the losers, if upon investigation it appears that due care was not taken for the protection of the property. . . ."

Section 669, Edition 1893, does not differ materially from § 700, Edition 1887; and this is true of § 278, Edition 1902, except the latter declares "the postmaster *will be held* responsible," while the two previous editions say "*may be held.*"

Edition 1924. "Sec. 328. When a post office has been broken into by burglars, the postmaster shall [make report, etc.] . . . Full particulars also regarding registered mail lost or rifled should be given. . . . The postmaster shall be held responsible for the loss if he fails to exercise due care in the protection of the property."

Section 864, Edition 1902, (to which § 940, Edition 1913, corresponds) provides—"Postmasters will be held personally responsible by the Post Office Department for the wrong delivery, depredation upon, or loss of any registered letter or parcel while in their custody, if such wrong delivery, depredation, or loss be due to negligence or disregard of the regulations. They are also liable on their bond for any damage resulting to the Department on account of such wrong delivery, depredation, or loss."

For many years the Regulations imposed possible or positive liability upon postmasters for loss of registered mail when the office had been robbed and lack of care appeared; also the general provisions of § 940. And the argument is that we cannot deduce from the altered language of § 291, Edition 1913, intention to relieve from the strict liability theretofore imposed. But why the change if it meant nothing? And may petitioners be subjected to liability because of language found in ancient Regulations of which, probably, they had no knowledge?

On the other hand is the suggestion that to hold postmasters responsible under § 291 for the loss of currency from registered packages would produce an anomalous situation, since this would leave the Postmaster General with full power, under § 150, to relieve where money order funds are lost but with no such power where money belonging to the United States is taken from a registered package the contents of which had not been revealed.

Difficulties, of course, arise from the words "robbery" in § 291 and "depredation upon" in § 940. Robbery, accurately defined, is "the felonious and forcible taking from the person of another, goods or money to any value, by violence or putting him in fear." *Bouvier's Law Dictionary; Jolly* v. *United States,* 170 U. S. 402, 404. Depredation is "the act of plundering; a robbing; a pillaging." *Century Dictionary.* Apparently the Regulations contained no definition of these terms. Generally, at least, the word "robbery" conveys the idea of violence and it is hardly appropriate to stealthy abstraction. One may well doubt the application of § 291 in the circumstances here disclosed. The author of § 328, of the Regulations, Edition 1924, probably noted that larceny, burglary and robbery are distinct offenses.

The structure and language of § 291 are not wholly inconsistent with the theory that postmasters "shall be held responsible for the loss" of property described by the lines immediately preceding the quoted words; but for "registered mail lost or rifled" "when a post office has been robbed" they become responsible only if the "depredation or loss be due to negligence or disregard of the Regulations."

Certainly the Regulations of 1913 are far from clear. Considering the language and the arrangement of § 291 along with the general provisions of § 940, and not forgetting that both were prepared by the Post Office Department, are subject to alteration, impose large respon-

sibility, and should be construed according to the probable understanding of men who accept such offices, we conclude that § 940 prescribed the petitioners' responsibility, and the jury should have been charged accordingly. It was necessary to show causal connection between the loss and the alleged negligence or disregard of regulations.

We accept the ruling by the Circuit Court of Appeals as to the disputed items of costs taxed against petitioners by the trial court, except as to charges by witnesses for travel outside the district. That item should be eliminated.

Reversed.

HOPE NATURAL GAS COMPANY *v.* HALL, STATE TAX COMMISSIONER, ET AL.

ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

No. 815. Argued April 21, 1927.—Decided May 16, 1927.

1. A state court's construction of a state statute is to be gathered from the application made of it as shown by the final decree in connection with the opinion rather than by excerpts selected from the opinion. P. 288.
2. West Virginia "annual privilege tax" on the business of producing natural gas in the State, computed on the value of the gas produced "as shown by the gross proceeds derived from the sale thereof by the producer"—the measure of the tax being otherwise stated as "the value of the entire production in this State, regardless of the place of sale, or the fact that deliveries may be made to points outside the State,"—is not unconstitutional as respects gas transported to and sold in other States, since it is construed as requiring the tax to be computed on the value of the gas at the well, before it enters interstate commerce, which is valid. P. 288.
3. The contention that the tax violates due process by taxing gross receipts from interstate commerce beyond the jurisdiction of the State, therefore, is without basis. P. 288.

4. The exemption from gross proceeds of $10,000, allowed by the statute in all cases, does not violate the Equal Protection Clause. P. 289.

102 W. Va. 272, affirmed.

ERROR to a decree of the Supreme Court of Appeals of West Virginia, which reversed a decree enjoining Hall, Tax Commissioner, and Lee, Attorney General, from enforcing against the plaintiff, Hope Natural Gas Company, the taxing act discussed in the opinion.

Mr. John W. Davis, with whom *Messrs. H. D. Rummel, Arthur E. Young, Charles Powell, Kemble White, Anthony F. McCue, S. E. W. Burnside,* and *Edward M. Borger* were on the brief, for plaintiff in error.

Mr. Fred O. Blue, with whom *Messrs. Howard B. Lee,* Attorney General of West Virginia, and *T. C. Townsend* were on the brief, for defendants in error.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

This writ brings up a decree by the Supreme Court of Appeals, West Virginia, which construed § 2-a, c. 1, Acts of the Legislature, Extraordinary Session 1925,* and sus-

* An Act to provide for the raising of additional public revenue by a tax upon the privilege of engaging in certain occupations; to provide for the ascertainment, assessment, and collection of such tax; to provide penalties for violations of the terms hereof; and to repeal certain statutes, [passed by the Legislature of West Virginia June 5, 1925].

Sec. 2. That from and after the thirtieth day of June, one thousand nine hundred twenty-five, there is hereby levied and shall be collected annual privilege taxes against the persons, on account of the business activities, and in the amounts to be determined by the application of rates against values or gross income, as the case may, as follows:

Sec. 2-a. Upon every person engaging or continuing within this state in the business of mining and producing for sale, profit, or use,

tained it against objections based upon § 8, Art. I, Federal Constitution and the Fourteenth Amendment. The grounds relied upon for reversal are without merit and the decree must be affirmed.

The original proceeding challenged the validity of the tax prescribed by § 2-a and sought an injunction to prevent defendant State officers from attempting to enforce it. The chief objection rested upon the direction of the statute that, "The measure of this tax is the value of the entire production in this State, regardless of the place of sale or the fact that deliveries may be made to points outside the State." The trial court held that the tax would substantially burden and interfere with interstate commerce and ordered an appropriate injunction.

In an opinion, 102 W. Va. 272, indicating very definite purpose to follow rulings here, the court below, as shown by the authoritative head note, declared: "Under Section

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any coal, oil, natural gas, limestone, sand or other mineral product, or felling and producing timber for sale, profit, or use, the amounts of such tax to be equal to the value of the articles produced as shown by the gross proceeds derived from the sale thereof by the producer (except as hereinafter provided), multiplied by the respective rates as follows: coal, forty-two one-hundredths of one per cent.; oil, one per cent.; natural gas, one and seventeen-twentieths of one per cent.; limestone, sand or other mineral product, nine-twentieths of one per cent. The measure of this tax is the value of the entire production in this state, regardless of the place of sale or the fact that deliveries may be made to points outside the state.

. . . .

Sec. 2-h. In computing the amount of tax levied hereunder, however, for any year, there shall be deducted from the values, or from the gross income of the business, as the case may be, an exemption of ten thousand dollars of the amount of such values or gross income. Every person exercising any privilege taxable hereunder for any fractional part of a tax year shall be entitled to an exemption of that part of the sum of ten thousand dollars which bears the same proportion of the total sum that the period of time during which such person is engaged in such business bears to a whole year.

2a, Chapter 1, *supra,* the State may take into consideration the gross proceeds of a commodity produced in this State and sold in another State, but only for the purpose of determining the value of such commodity *within the State* and before it enters interstate commerce." And among other things it there said—

"If the taxation value of the products named in the statute be limited to their value *in the State,* and before they enter interstate commerce, the statute does not manifest a purpose to violate Art. I of the Federal Constitution, and we so hold." "We therefore hold, under the facts in this case, that the defendants may not treat the gross proceeds of plaintiff's sales outside the State as the worth of its gas within the State, but that they may enforce the Act upon the value thereof *within the State,* and *before it enters interstate commerce.* The injunction herein will be accordingly so modified."

The final order directed: "That the decree of the Circuit Court of Kanawha County, pronounced in this cause on the 25th day of May, 1926, in so far and in so far only as it enjoins the defendants from enforcing against the plaintiff the provisions of Sec. 2-a of . . . by imposing a tax upon the natural gas produced by the plaintiff, based upon the value thereof within the State and before it enters interstate commerce, be and the same hereby is modified and corrected so as to permit defendants to impose and enforce against the plaintiff a tax, under said section, upon the natural gas so produced by it, based upon the value thereof within the State and before it enters upon interstate commerce, and that in all other respects said decree as hereby modified and corrected be and the same hereby is affirmed."

The chief business of plaintiff in error is production and purchase of natural gas in West Virginia and the continuous and uninterrupted transportation of this through pipe lines into Pennsylvania and Ohio, where it is sold, deliv-

ered and consumed. The corporation owns three thousand, one hundred and seventy-eight producing wells located in twenty-five counties of West Virginia, from which it took in the year ending June 30, 1925, more than twenty-three billion cubic feet of gas. And during the same period it purchased from other producers more than twenty-five billion cubic feet. Most of this passed into interstate commerce by continuous movement from the wells.

Here it has been argued that the challenged Act burdens interstate commerce and therefore conflicts with Section 8, Article I, of the federal Constitution. Also, that to enforce the Act would deprive plaintiff in error of property without due process of law and deny equal protection of the laws.

Counsel admit that without violating the commerce clause the State may lay a privilege or occupation tax upon producers of natural gas reckoned according to the value of that commodity at the well. *American Mfg. Co.* v. *St. Louis,* 250 U. S. 459; *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245; *Oliver Iron Co.* v. *Lord,* 262 U. S. 172. But they insist that, accepting the statute under consideration as construed by the highest court of the State, plaintiff in error will be subjected to an unlawful direct tax upon gross receipts derived from interstate commerce. This argument rests chiefly upon certain language excerpted from the opinion below. But we review the final decree and must accept the statute as authoritatively construed and applied. The plain result of the opinion and final decree is to require that the tax be computed upon the value of the gas at the well, and not otherwise. If, hereafter, executive officers disregard the approved construction and fix values upon any improper basis appropriate relief may be obtained through the courts.

The suggestion concerning deprivation of due process goes upon the assumption that the imposition is upon

gross receipts from interstate commerce, in reality upon property beyond the State's jurisdiction. As already pointed out, this assumption conflicts with the definite ruling of the highest court of the State.

The claim that equal protection of the laws has been denied rests upon the assertion, first, that an unlawful tax has been imposed upon the gross proceeds from sales regardless of their place and, second, that the exemption of ten thousand dollars from gross income by § 2-h creates undue inequality. The true meaning of the statute and the thing actually taxed oppose the first assertion. We cannot say that the Legislature acted either arbitrarily or unreasonably by authorizing the deduction. Nothing indicates a purpose to extend different treatment to those of the same class; no actual unreasonable inequality has been shown. Plaintiff in error is permitted to deduct ten thousand dollars; the same privilege, and nothing more, is extended to all other producers. *Lake Superior Mines* v. *Lord,* 271 U. S. 577; *Swiss Oil Corporation* v. *Shanks,* 273 U. S. 407.

Affirmed.

The CHIEF JUSTICE took no part in the consideration or decision of this cause.

ALSTON v. UNITED STATES.

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

No. 898. Argued April 14, 1927.—Decided May 16, 1927.

1. Section 9 of the original Harrison Narcotic Act, prescribing that any person who violates or fails to comply with any requirements of the Act shall be punished in a manner prescribed, applies also to violations of requirements added to the Act by subsequent amendments. P. 294.

2. The provisions of § 1 of this Act, as amended, which impose a stamp tax on certain drugs and declare it unlawful to purchase or sell them except in or from original stamped packages, are within the taxing power of Congress, and have no necessary connection with any other requirement of the Act which may be subject to reasonable disputation. P. 294.

District Court affirmed.

THIS was a prosecution for purchasing morphine and cocaine from unstamped packages. Plaintiff in error, after pleading guilty and being sentenced, took the case to the Circuit Court of Appeals, which referred certain questions to this Court upon a certificate. The entire cause was brought up and decided under Jud. Code § 239.

Messrs. Hooper Alexander and *Frans E. Lindquist,* with whom *Messrs. John B. Boddie, Wm. H. Mason, Richard O. Mason,* and *Thomas W. Hardwick* were on the brief, for Alston.

The statute is invalid. *United States* v. *Daugherty,* 269 U. S. 360; *Doremus* v. *United States,* 249 U. S. 86; *Veazie Bank* v. *Fenno,* 8 Wall. 533; *Bailey* v. *Drexel Furniture Co.,* 259 U. S. 20; *Child Labor Tax Case,* 259 U. S. 41; *McCray* v. *United States,* 195 U. S. 27; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107; *Hammer* v. *Dagenhart,* 247 U. S. 251; *Hill* v. *Wallace,* 259 U. S. 44; *Linder* v. *United States,* 268 U. S. 5; *United States* v. *Jin Fuey Moy,* 241 U. S. 394. The invalidity goes to the whole Act. *Hill* v. *Wallace,* 259 U. S. 70.

The amendments of 1919 and 1921 were included in the Revenue Acts of those years. Had they appeared there as independent enactments, they might be earnestly supported as *bona fide* excise taxes legitimately imposed in the exercise by Congress of its undoubted power under the first enumerated grant in the Constitution. We take it to be recognized law that where an act of Congress is unconstitutional and void, and must fall for that reason, it necessarily drags down with it every string that is tied

to it. An unconstitutional law is no law, and therefore the amendment must fall because there was nothing to amend by.

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

These provisions of the Act are clearly valid under the power to levy taxes. They are intended to produce revenue; they actually produce substantial revenue; they do not have the effect of prohibiting transactions; the taxes are not imposed as penalties for infraction of law, and there are no discriminating provisions to indicate that by colorable use of the taxing power Congress is attempting to invade the police power of the States.

The provisions of § 2 relating to order forms and possession of drugs and which have the effect, among other things, of preventing individuals, not registered physicians or legitimate dealers who have paid the required occupation taxes, from purchasing and possessing the drug other than by means of medical prescriptions, which provisions are the only ones heretofore seriously questioned, are readily severable, and the remainder of the Act may and should be sustained regardless of their validity.

The order-form provisions, aside from the one which prohibits sale of order forms to other than registered physicians and dealers, are clearly valid as tending to enforce the stamp and occupation tax provisions. In so far as they prevent the purchase by an unregistered individual of quantities of the drug exceeding his personal requirements, they are valid as enforcing the occupation tax on dealers, because such a purchase is only made by one who proposes to sell the drug. To the same extent the order-form provisions may be sustained as in aid of the Narcotic Drugs Import and Export Act, which prohibits the importation of the drugs in excess of an amount

required for medicinal and legitimate use, as they trace the use to which the imports are devoted and operate to disclose smuggling.

In addition the Opium Convention required the United States to enact such legislation. The public records show that the Harrison Act as amended has the double purpose of raising revenue and executing the treaty, and was enacted after the treaty had been signed, and the Act, by its terms, took effect after the treaty became operative. The public records show that no opium or coca leaves are produced in the United States, but all materials from which opium, morphine, or cocaine are derived are imported. The order form and possession clauses of Section 2 of the Harrison Act may not be held invalid without at the same time striking down the Opium Convention as beyond the treaty power. The narcotic problem has been historically proved to be an international problem, unsolvable except by general international agreement. If the narcotic problem is a proper subject of international agreement and the domestic legislation stipulated for in it is germane and reasonably required to make the international agreement effective, the treaty and the laws executing it are valid. That this is the case has been declared by the President and the Senate in negotiating and ratifying the treaty, by Congress in enacting this legislation to execute it, and by high Executive officials of the United States who have studied the problem.

Mr. Justice McReynolds delivered the opinion of the Court.

In the United States District Court, Southern District of Iowa, an indictment with three counts, filed December 2, 1924, charged Alston with violating § 1, Harrison Narcotic Act, approved December 17, 1914, c. 1, 38 Stat. 785, as amended February 24, 1919, c. 18, 40 Stat. 1057, 1130,

1131, by purchasing morphine and cocaine from unstamped packages. He pleaded "guilty" and was sentenced to the penitentiary. A writ of error took the cause to the Circuit Court of Appeals, Eighth Circuit, and it asked our instruction upon certain questions. Thereupon, we required the entire record to be sent here for final determination of the whole matter. § 239, Jud. Code.

Sections 1 and 6 of the Harrison Narcotic Act were amended by the Act of February 24, 1919, and, as thus amended, were reënacted without change by §§ 1005 and 1006, Revenue Act approved November 23, 1921, c. 136, 42 Stat. 227, 298, 300. The amending Act added the following provisions (among others) to Section 1.

"That there shall be levied, assessed, collected, and paid upon opium, coca leaves, any compound, salt, derivative, or preparation thereof, produced in or imported into the United States, and sold, or removed for consumption or sale, an internal-revenue tax at the rate of 1 cent per ounce, and any fraction of an ounce in a package shall be taxed as an ounce, such tax to be paid by the importer, manufacturer, producer, or compounder thereof, and to be represented by appropriate stamps, to be provided by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury; and the stamps herein provided shall be so affixed to the bottle or other container as to securely seal the stopper, covering, or wrapper thereof.

"The tax imposed by this section shall be in addition to any import duty imposed on the aforesaid drugs.

"It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the aforesaid drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this section by the

person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid special taxes as required by this section shall be prima facie evidence of liability to such special tax: *Provided*, . . ."

Section 9 of the original Harrison Act has remained without change. It provides: "That any person who violates or fails to comply with any of the requirements of this Act shall, on conviction, be fined not more than $2,000 or be imprisoned not more than five years, or both, in the discretion of the court."

The judgment of the trial court is assailed upon two grounds: That Congress has failed to prescribe any punishment for the purchase of drugs from unstamped packages, forbidden by amended § 1. And, that the entire Act, as amended, is invalid because Congress has undertaken thereby to regulate matters beyond its powers and within exclusive control of the States.

Section 9, above quoted, obviously applies to the requirements of the amended Act as well as to those found in the original. The first objection has no merit.

The present cause arises under those provisions of § 1 which impose a stamp tax on certain drugs and declare it unlawful to purchase or sell them except in or from original stamped packages. These provisions are clearly within the power of Congress to lay taxes and have no necessary connection with any requirement of the Act which may be subject to reasonable disputation. They do not absolutely prohibit buying or selling; have produced substantial revenue; contain nothing to indicate that by colorable use of taxation Congress is attempting to invade the reserved powers of the States. The impositions are not penalties.

The judgment of the trial court must be

Affirmed.

UNITED STATES *v.* LUDEY.

CERTIORARI TO THE COURT OF CLAIMS.

No. 289. Argued April 21, 22, 1927.—Decided May 16, 1927.

1. Under the income and excess profits provisions of the Revenue Act of 1916, as amended by Revenue Act of 1917, in determining the existence and amount of profit realized from a sale of oil-mining properties—land, leases, and equipment—the cost of the property sold is the original cost to the taxpayer (if purchased after March 1, 1913, or its value on that date if acquired earlier for less) diminished by deductions for depreciation and depletion occurring between the dates of purchase (or March 1, 1913) and sale. P. 300.
2. The depreciation charge permitted as a deduction from the gross income in determining the taxable income of a business for any year represents the reduction, during the year, of the capital assets through wear and tear of the plant used. P. 300.
3. When a plant is disposed of after years of use, the thing then sold is not the whole thing originally acquired. The amount of the depreciation must be deducted from the original cost of the whole in order to determine the cost of that disposed of in the final sale of properties. P. 301.
4. This rule applies to mining as well as to mercantile business. P. 301.
5. The depletion charge permitted as a deduction from the gross income in determining the taxable income of mines for any year represents the reduction in the mineral contents of the reserves from which the product is taken. Because the quantity originally in the reserve is not actually known, the percentage of the whole, withdrawn in any year, and hence the appropriate depletion charge, is necessarily a rough estimate. P. 302.
6. The amounts of depreciation and depletion to be deducted from cost to ascertain gain on a sale of oil properties, are equal to the aggregates of depreciation and depletion which the taxpayer was entitled to deduct from gross income in his income tax returns for earlier years; but are not dependent on the amounts which he actually so claimed. P. 303.

61 Ct. Cls. 126, reversed.

CERTIORARI (271 U. S. 651) to a judgment of the Court of Claims for an amount exacted as additional income and excess profits taxes.

Mr. T. L. Lewis, Jr., Attorney in the 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 United States.

Mr. Wayne Johnson, with whom *Mr. Mark J. Ryan* was on the brief, for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

Ludey brought this suit in the Court of Claims to recover an amount exacted as additional taxes for 1917, under the income and excess profits provisions of the Revenue Act of 1916, September 8, 1916, c. 463, Title I, 39 Stat. 756, 757–759, as amended by the Revenue Act of 1917, October 3, 1917, c. 63, 40 Stat. 300, 329. The tax was assessed on the alleged gain from a sale in 1917 of oil mining properties which had been owned and operated by him for several years. The Commissioner of Internal Revenue determined that there was a gain on the sale of $26,904.15. Ludey insists that there was a loss of $14,777.33. The amount sued for is the tax assessed on the difference. Whether there was the gain or the loss depends primarily upon whether deductions for depletion and depreciation are to be made from the original cost in determining gain or loss on sale of oil mining properties. The question is one of statutory construction or application. The Court of Claims entered judgment for the plaintiff. 61 Ct. Cls. 126. This Court granted a writ of certiorari. 271 U. S. 651.

The properties consisted, besides mining equipment, in part of oil land held in fee, in part of oil mining leases. The aggregate original cost of the properties was $95-977.33.[1] Of this amount $30,977.33 was the cost of the

[1] Some of the properties were purchased before March 1, 1913. As to these the term cost is used, throughout the opinion, as mean-

equipment used in the business; $65,000 the cost of the oil reserves. The 1917 sale price was $81,200. For the purpose of determining the cost of the properties sold in 1917 the Commissioner deducted from the original cost $10,465.16 on account of depreciation of the equipment through wear and tear, and $32,258.81 on account of depletion of the reserves through the taking out of oil by the plaintiff, after March 1, 1913. There was no dispute of fact concerning the correctness of the estimates upon which these deductions were made. The finding of the depletion was in accordance with the method of computation employed by the Bureau of Internal Revenue; and there was no objection specifically to the method of computation. But Ludey insisted that the amount of depletion, if any, could not be found or stated as a fact, since, in the nature of the case, it was impossible to determine how much oil was recoverable either when he acquired the properties or when he disposed of them. The finding of the depreciation was, likewise, in accordance with the method of computation employed by the Bureau; and there was no objection to the method of computation. But Ludey insisted also in respect to depreciation that the property was, as a matter of law, unchanged in character and quantity throughout the period of operation.

Until 1924, none of the revenue acts provided in terms that, in computing the gain from a sale of any property, a deduction shall be made from the original cost on account of depreciation and depletion during the period of operation.[2] But ever since March 1, 1913, the revenue

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ing their value as of March 1, 1913, that value being higher than the original cost.

[2] The 1924 Act, June 2, 1924, § 202 (b), 43 Stat. 253, 255, provided that in computing gain or loss from sales, adjustment should be made for items of exhaustion, wear and tear, and depletion "previously allowed with respect to such property." See Regulations 65, Arts.

acts have required that gains from sales made within the tax year shall be included in the taxable income of the year, and that losses on sales may be deducted from gross income. And each of the acts has provided that, in computing the taxable income derived from operating a mine, there may be made a deduction from the gross income for the depreciation and that some deduction may be made for depletion. The applicable provisions of § 5 (a) of the Revenue Act of 1916 concerning deductions to be allowed in computing net income are these:

"Fourth. Losses actually sustained during the year, incurred in his business or trade . . . *Provided,* That . . . the . . . value of . . . property [acquired before March 1, 1913] as of March first, nineteen hundred and thirteen, shall be the basis for determining the amount of such loss. . . .

"Seventh. A reasonable allowance for the exhaustion, wear and tear of property arising out of its use or employment in the business or trade;

"Eighth. (a) In the case of oil and gas wells a reasonable allowance for actual reduction in flow and production . . . (b) in the case of mines a reasonable allowance for depletion thereof . . . : *Provided,* That when the allowances . . . shall equal the capital originally invested . . . no further allowance shall be made."

Ludey does not deny that Congress has power to require that deductions for depreciation and depletion shall be made from the original cost when determining the cost of oil properties sold. His contention is that, at the time of the sale in question, Congress had not in terms re-

1591–1603. The 1926 Act, Feb. 26, 1926, § 202 (b) 44 Stat. 9, 11–12, has a similar provision with respect to deductions "allowable . . . under this Act or prior income tax laws." See Regulations 69, Art. 1561.

quired the deductions in the case of any property, and that special reasons exist why the acts should be construed as not requiring the deductions in the case of oil wells. He urges that a corporation organized for the purpose of utilizing a wasting property, like an iron mine, is not deemed to have divided a part of its capital, merely because it has distributed the net proceeds of its mining operations; that this is true even where the necessary result of the operation is a reduction of the mineral reserve; that, *a fortiori,* the proceeds of oil mining are to be deemed income, not a partial return of capital, since there is no ownership in oil until it is actually reduced to possession; that a purchase of an oil reserve cannot be likened to the purchase of a certain number of barrels of oil; that an oil reserve is not a reservoir; that Congress allowed the deduction from gross income for depreciation and depletion probably as a reward in an extrahazardous enterprise in order to encourage new producing properties; and that to allow the deductions would result, in the event of a sale of the property, in taking back the rewards so offered.

The Government contends that in operating the properties Ludey disposed, in the form of oil, of part of his capital assets; that in the extraction of the oil he consumed so much of the equipment as was represented by the depreciation and disposed of so much of the oil reserves as was represented by the depletion; that the sale of the properties made by him in 1917 was not a sale of all of the property represented by the original cost of $95,977.33, since physical equipment to the amount of the depreciation, and oil reserves to the amount of the depletion, had been taken from it during the preceding years; and that, for this reason, the cost to plaintiff of the net property sold in 1917 was not $95,977.33, but $53,258.36.

The Court of Claims did not consider whether ordinarily deductions for depreciation and for depletion from the

original cost would be proper in determining whether there had been a profit on a sale of property. It held that no deduction from original cost should be made here because of the nature of oil mining properties. The deduction for depletion was, in its opinion, wrong, because oil properties are in essence merely the right to extract from controlled land such oil as the owner of the right can find and reduce to possession; because the existence of oil in any parcel of land is dependent upon the movement which the oil makes from time to time under the surface; and because whether there is oil in place which can be reduced to possession, and if so, how much, cannot be definitely determined. It held that, in the case at bar, the right to explore for and take out oil may actually have been more valuable at the time of the sale than at the time of the purchase; and that, for this reason, the removal of the oil by plaintiff during the years of operation cannot be said to have depleted the capital. It held that the depreciation was not deductible, because wear and tear of equipment was an expense or incident of the business.

We are of opinion that the revenue acts should be construed as requiring deductions for both depreciation and depletion when determining the original cost of oil properties sold. Congress, in providing that the basis for determining gain or loss should be the cost or the 1913 value, was not attempting to provide an exclusive formula for the computation.[3] The depreciation charge permitted as a deduction from the gross income in determining the taxable income of a business for any year represents the reduction, during the year, of the capital assets through wear and tear of the plant used. The amount of the allowance for depreciation is the sum which should be

[3] See *Appeal of Even Realty Co.*, 1 B. T. A. 355. Compare *Appeal of Steiner Coal Co.*, 1 B. T. A. 821; *Appeal of W. W. Carter Co.*, 1 B. T. A. 849; *Appeal of Keighley Mfg. Co.*, 2 B. T. A. 10.

set aside for the taxable year, in order that, at the end of the useful life of the plant in the business, the aggregate of the sums set aside will (with the salvage value) suffice to provide an amount equal to the original cost. The theory underlying this allowance for depreciation is that by using up the plant, a gradual sale is made of it. The depreciation charged is the measure of the cost of the part which has been sold. When the plant is disposed of after years of use, the thing then sold is not the whole thing originally acquired. The amount of the depreciation must be deducted from the original cost of the whole in order to determine the cost of that disposed of in the final sale of properties.[4] Any other construction would permit a double deduction for the loss of the same capital assets.

Such being the rule applicable to manufacturing and mercantile businesses, no good reason appears why the business of mining should be treated differently. The reasons urged for refusing to apply the rule specifically to oil mining properties seem to us unsound. If the equipment had been used by its owner on the oil properties owned by another, it would hardly be contended that the depreciation through wear and tear resulting from its use should be ignored in determining, on a sale of the equipment, whether its owner had made a gain or a loss. The fact that the equipment sold is owned by

[4] Under regulations of the Bureau the amount of the year's depreciation is required to be fixed in accordance with a reasonably consistent plan; and it must, in order to be allowed, have been entered on the books of the business either as a deduction from the book value of the plant or as a credit to a depreciation reserve account. See Regulations 33 Revised, Art. 159; Regulations 45, Art. 169; Regulations 62, Art. 169; Regulations 65, Art 169; Regulations 69, Art 169. In either event it would be reflected in the annual balance sheet. After the total of such credits equals the original cost no further deduction is allowed.

the person who owned the mining rights, like the fact that it is used in one class of mining rather than in another, may have an important bearing both upon the price realized on the sale and upon the rate of depreciation which should be allowed; but these facts cannot affect the question whether the part which has been theretofore consumed by use shall be ignored in determining whether a sale of what remains has resulted in a loss or a gain.

The depletion charge permitted as a deduction from the gross income in determining the taxable income of mines for any year represents the reduction in the mineral contents of the reserves from which the product is taken. The reserves are recognized as wasting assets. The depletion effected by operation is likened to the using up of raw material in making the product of a manufacturing establishment. As the cost of the raw material must be deducted from the gross income before the net income can be determined, so the estimated cost of the part of the reserve used up is allowed. The fact that the reserve is hidden from sight presents difficulties in making an estimate of the amount of the deposits. The actual quantity can rarely be measured. It must be approximated. And because the quantity originally in the reserve is not actually known, the percentage of the whole withdrawn in any year, and hence the appropriate depletion charge, is necessarily a rough estimate. But Congress concluded, in the light of experience, that it was better to act upon a rough estimate than to ignore the fact of depletion.

The Corporation Tax Law of 1909 had failed to provide for any deduction on account of the depletion of mineral reserves. *Stratton's Independence* v. *Howbert*, 231 U. S. 399; *von Baumbach* v. *Sargent Land Co.*, 242 U. S. 503; *United States* v. *Biwabik Mining Co.*, 247 U. S. 116; *Goldfield Consolidated Mines Co.* v. *Scott*, 247 U. S.

126. The resulting hardship to operators of mines induced Congress to make provision in the Revenue Law of 1913 and all later Acts for some deduction on account of depletion in determining the amount of the taxable income from mines.[5] It is not lightly to be assumed that Congress intended the fact to be ignored in determining whether there was a loss or a gain on a sale of the mining properties. The proviso limiting the amount of the deduction for depletion to the amount of the capital invested shows that the deduction is to be regarded as a return of capital, not as a special bonus for enterprise and willingness to assume risks. It is argued that, because oil is a fugacious mineral, it cannot be known that the reserve has been diminished by the operation of wells. Perhaps some land may be discovered which, like the Widow's cruse, will afford an inexhaustible supply of oil. But the common experience of man has been that oil wells, and the territory in which they are sunk, become exhausted in time. Congress in providing for the deduction for depletion of oil wells acted on that experience. Compare *Lynch* v. *Alworth-Stephens Co.*, 267 U. S. 364. In essence, the deduction for depletion does not differ from the deduction for depreciation.

The Court of Claims erred in holding that no deduction should be made from the original cost on account of depreciation and depletion; but it does not follow that the amount deducted by the Commissioner was the correct one. The aggregate for depreciation and depletion claimed by Ludey in the income tax returns for the years 1913, 1914, 1915 and 1916, and allowed, was only $5,156.

[5] The Bureau requires that taxpayers claiming depletion deductions shall keep a ledger account in which deductions claimed are credited against the cost of the property, or that a depletion reserve account be set up. See Regulations 33 Revised, Art. 171, 172; Regulations 45, Art. 216; Regulations 62, Art 216; Regulations 65, Art. 217; Regulations 69, Art. 217.

He insists that more cannot be deducted from the original cost in making the return for 1917. The contention is unsound. The amount of the gain on the sale is not dependent on the amount claimed in earlier years. If in any year he has failed to claim, or has been denied, the amount to which he was entitled, rectification of the error must be sought through a review of the action of the Bureau for that year. He cannot choose the year in which he will take a reduction. On the other hand, we cannot accept the Government's contention that the full amount of depreciation and depletion sustained, whether allowable by law as a deduction from gross income in past years or not, must be deducted from cost in ascertaining gain or loss. Congress doubtless intended that the deduction to be made from the original cost should be the aggregate amount which the taxpayer was entitled to deduct in the several years.

The findings do not enable us to determine what that aggregate is. The sale included several properties purchased at different times. The deduction allowable in the several years for each of the properties is not found. Under the Act of 1913 the full amount of the depletion was not necessarily deductible. In order that the amount of the gain in 1917 may be determined in the light of such facts, the case is remanded for further proceedings in accordance with this opinion.

Reversed.

ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY ET AL. *v.* SPILLER ET AL.

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

No. 577. Argued April 12, 1927.—Decided May 16, 1927.

1. Assuming that a shipper's claim for moneys collected from him by a railroad through excessive charges might be entitled to prefer-

ential payment from receivers of the railroad, subsequently appointed, if the moneys were traced into their hands, they are not so traced by showing that, for years which elapsed between the time of the overcharges and the transfer of the railroad property from the receivership to a new company, the old company and the receivers had at all times in banks on which checks for current expenses were drawn, an aggregate working balance largely exceeding the claim. P. 309.

2. The equitable doctrine giving preferential payment out of operating income accruing during a railroad receivership to debts previously incurred by the railroad corporation for labor, supplies, etc., does not apply to liabilities for excess charges illegally exacted of a shipper which accrued many years before the receivership began. P. 310.
3. A claim to recover excess transportation charges which arose many years before the property of the railroad making them went into the hands of receivers and passed to a new company, can not be allowed preferential payment on the ground of public policy. P. 311.
4. A provision in a decree foreclosing a railway mortgage which exempted the purchaser from paying claims not already presented in accordance with orders theretofore made, excepting claims which might "arise" after entry of the decree, is to be construed as employing the term "arise" in the sense of "accrue"; and a claim for overcharges against the mortgagor railroad arose in that sense at least as early as the time when the claimant obtained his reparation order from the Interstate Commerce Commission and not when judgment was recovered upon the order. P. 312.
5. An unsecured creditor of an insolvent railroad has no standing to attack a reorganization plan upon the ground that he was not offered an opportunity to participate, when his exclusion was due to his own failure to file his claim in the foreclosure suit within the time limited by an order. P. 313.
6. In this connection, it is immaterial that the excluded creditor had no actual knowledge of the order limiting time for filing claims, notice by publication being legally sufficient; nor did the fact that his claim was being contested in other litigation prevent him from filing it on time. P. 313.
7. Where an unsecured creditor of a railroad prosecuted his claim diligently in an independent suit before and after the railroad passed into a receivership and was sold to a new company pursuant to a plan of reorganization, during which period his suit was

resisted by the railroad, the receivers, and counsel for the new company, successively; and where, having recovered judgment after the sale, he appeared at the hearing on the order to confirm the sale and gave notice to the old company, the receivers, the reorganization committee, and the new company of his claim and that the judgment would be a charge on the property in the hands of the purchaser, notwithstanding which the new company continued defending his suit and the new securities were issued, *Held*, that the creditor was not guilty of laches; that his failure to file his claim within the time limited in the foreclosure case and thus conform to the terms of the reorganization plan, did not bar him from participating in its benefits with the other unsecured creditors, if that were still equitably possible; and that such relief might be had as well upon an intervening petition as upon an original bill. P. 314.

14 F. (2d) 284, reversed in part, affirmed in part.

CERTIORARI (273 U. S. 680) to a decree of the Circuit Court of Appeals which reversed a decree of the District Court dismissing an intervening petition in a railroad foreclosure suit.

Mr. Frederick H. Wood, with whom *Messrs. Edward T. Miller, Alexander P. Stewart,* and *Robert T. Swaine* were on the briefs, for petitioners.

Messrs. Walter H. Saunders and *David A. Murphy,* with whom *Messrs. S. H. Cowan* and *John S. Leahy* were on the brief, for respondents.

Messrs. Edward J. White and *Thomas T. Railey* filed a brief as *amici curiae,* by special leave of Court, on behalf of the Missouri Pacific Railroad Company.

Messrs. North T. Gentry, Attorney General of Missouri, and *Lee B. Ewing* filed a brief as *amici curiae,* by special leave of Court, on behalf of the State of Missouri.

Mr. Clifford B. Allen filed a brief as *amicus curiae,* by special leave of Court.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

In 1913, the federal court for eastern Missouri appointed receivers for the St. Louis and San Francisco Railroad. In 1916, the system was sold on foreclosure, was purchased for the Reorganization Committee and was conveyed to the St. Louis-San Francisco Railway Company, which has operated it since. In 1920, Spiller recovered in the federal court for western Missouri a judgment against the old company *in personam* for $30,212.31 and for counsel fees taxed as costs pursuant to § 16 of the Act to Regulate Commerce.[1] Thereupon, he filed in the receivership suit,[2] upon leave granted, an intervening petition praying that the judgment be satisfied out of the property so acquired by the new company. The Master recommended that the prayers of the petition be granted. The District Court denied Spiller any relief and dismissed the intervening petition without costs to either party. 288 Fed. 612. The Court of Appeals reversed the decree; remanded the case to the lower court with directions to enter a decree for Spiller in the amount of the judgment with interest but without counsel fees; declared that the judgment was prior in lien and superior in equity to the mortgages of the old company; and directed that it be enforced against the property conveyed to the new company. 14 F. (2d) 284. This Court granted the petition of the two companies for a writ of certiorari. 273 U. S. 680.

The judgment which Spiller seeks to enforce through the intervening petition was entered by the trial court

[1] The intervening petition and the decree cover also another judgment for $3,652.97 in favor of Spiller and others.

[2] There were in fact four suits; two brought by unsecured creditors and two by the trustees of mortgages under which the foreclosure was had. All the suits were consolidated in May, 1914.

in 1916, after the foreclosure sale and before confirmation thereof; was reversed by the Court of Appeals in 1918; and was reinstated by this Court in 1920. *Spiller* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 253 U. S. 117. It is for overcharges collected by the old company, in 1906, 1907 and 1908 under a freight tariff which had been increased in 1903 and which was held by the Interstate Commerce Commission to be unreasonable in 1905, and again in 1908. *Cattle Raisers' Association* v. *Missouri, Kansas & Texas R. R. Co. et al.*, 11 I. C. C. 296; 13 I. C. C. 418. The action in which the judgment was recovered was begun in 1914, after the appointment of the receivers. The reparation order on which the action was based was entered also after their appointment; but the petition for reparation was filed prior thereto.

The validity of the judgment as against the old company is not challenged in this proceeding. The question here is whether Spiller is entitled to have it satisfied out of the property of the new company. The railroads contend that in nature the claim is one not entitled to preferential payment; and that, in any event, Spiller is barred by laches or otherwise from obtaining any relief in this suit. The Court of Appeals held that the old company became liable as trustee *ex maleficio* for overcharges and that this liability is enforceable, as upon a constructive trust, against the property acquired by the new company on foreclosure. It held further that Spiller was not barred by laches or otherwise, because of the provision of the foreclosure decree, by which the purchaser became bound to pay, as a part of the purchase price, any unpaid claims of creditors of the old company which should be adjudged superior in equity to its mortgages, the court reserving to itself jurisdiction to determine the amount and validity of any such claim.

First. The contention that the judgment constitutes a lien or equity upon the property of the new company,

as upon a constructive trust, rests upon the following argument. The freight rates being unreasonable were unlawful. The shipper was obliged to pay the charges exacted, although they were unlawful, because they were the published rates. As the shipper was obliged to pay the unlawful charges the payment was made under duress. One may be held as trustee *ex maleficio* of funds obtained by duress as well as of those procured by fraud. The old company by collecting the unlawful charges became trustee *ex maleficio* of the funds collected. These can be traced and may be followed. They passed to the receivers who took the funds with notice and without paying value. Upon the foreclosure they passed to the new company. It also took them with notice and is subject to the trust, either because the shipper's equitable lien or interest was not cut off by the foreclosure sale, to one with notice, in a suit to which the shipper was not a party, or because the new company agreed to pay pursuant to the foreclosure decree claims prior in lien and superior in equity to the mortgages of the old company.

We need not consider whether, in the absence of legislation, charges illegally exacted by a carrier may be recovered under the doctrine of a constructive trust; or whether the alleged equitable remedy is applicable to overcharges subject to the Interstate Commerce Act, which provides a different remedy; [3] or whether the equitable remedy, if any, has been lost by proceeding to judgment at law. For, even if the overcharges when collected, were subject to a constructive trust in favor of the shipper, the contention that the money exacted by

[3] See §§ 8, 16(1), and 16(2) of the Interstate Commerce Act as it stood at the time of the overcharges in question, Act of Feb. 4, 1887, c. 104, 24 Stat. 379, 382, 384, as amended by the Act of June 29, 1906, c. 3591, 34 Stat. 584, 590. See also *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426.

the old company in 1906, 1907 and 1908 can be traced into the hands of the receivers is unfounded. The money was not ear-marked. It was mingled when collected with other money received from operation. And no special account was kept of it. The latest exaction occurred five years before the appointment of the receivers. The assertion that the money collected can be traced into the receiver's hands is confessedly without any support except the stipulated fact that, throughout the ten years which elapsed between the earliest exaction and the transfer of the properties to the new company, the old one and the receivers had, at all times, in the several banks on which checks for current expenses were drawn, a working balance, in the aggregate, largely in excess of Spiller's claim. Such a showing fails to bring the present case within the rule by which, when trust funds are mingled with others, the *cestui* may assert an equitable lien upon the mingled mass to the extent of his contribution thereto.[4] *American Can Co.* v. *Williams,* 178 Fed. 420, 423; *In re A. D. Matthews' Sons,* 238 Fed. 785, 787. An illegal exaction does not impress an indelible trust upon all funds which the wrongdoer and his successors may thereafter have on deposit in their banks. For aught that appears, all the money illegally exacted may have been spent for current operating expenses.

Second. Spiller contends that he was entitled to preferential payment of his judgment for the excess charges, out of operating income accruing during the receivership, on the doctrine of *Fosdick* v. *Schall,* 99 U. S. 235, 251–255. See *New York Dock Co.* v. *S. S. "Poznan,"*

[4] Compare *National Bank* v. *Insurance Co.,* 104 U. S. 54, 63–68; *Schuyler* v. *Littlefield,* 232 U. S. 707, 710; *United States* v. *Leary,* 245 U. S. 1, 5; *Cunningham* v. *Brown,* 265 U. S. 1, 11–13; *Southern Cotton Oil Co.* v. *Elliotte,* 218 Fed. 567, 570–571; *In re A. Bolognesi & Co.,* 254 Fed. 770; *Knatchbull* v. *Hallett,* 13 Ch. Div. 696.

ante, p. 117. It is argued that the test of this equity is the nature of the claim; that a liability for excess charges unlawfully exacted by the carrier before the receivership is an expense of operation like a debt incurred for labor, supplies, equipment or improvements; and that, as such, it is entitled to priority over bondholders. We need not determine whether the noncontractual claim here in suit is in its nature within the class of debts entitled to preferential payment under the doctrine of *Fosdick* v. *Schall.* For, by long established practice, the doctrine has been applied only to unpaid expenses incurred within six months prior to the appointment of the receivers. See *Lackawanna Coal Co.* v. *Trust Co.,* 176 U. S. 298, 316. Compare *Gregg* v. *Metropolitan Trust Co.,* 197 U. S. 183. The cases in which this time limit was not observed, are few in number and exceptional in character. See *Burnham* v. *Bowen,* 111 U. S. 776, 780–783; *Union Trust Co.* v. *Morrison,* 125 U. S. 591. In no case which has come to our attention has the doctrine been applied to liabilities which, like those here in question, accrued many years before the receivership began.

Third. Preferential payment is urged also on the ground of public policy. The argument is that the carrier is invested through its franchise with a part of the sovereign power; that in the exercise of the power conferred the old company exacted illegal rates which the shipper was obliged by law to pay; that when the old company's property passed into the hands of the court it was augmented by the illegal exactions; that it became the court's duty to make restitution; and that, having failed to do so while the property was in its hands, the court may require payment from the new company. It may be assumed that this claim for overcharges is meritorious in character; but the fact that it arose many

years before the appointment of the receivers is conclusive against including it among those entitled to preferential payment.

Fourth. In order to establish as against the new company either the alleged equity or a right to preferential payment, it was moreover assumed to be necessary that the claim should be one of those which the purchaser, under the decree of foreclosure, agreed to pay, as part of the purchase price. The decree provided that the purchaser would not be required to pay any "claim or demand which has not been presented in this cause in accordance with the orders heretofore made requiring presentation thereof" unless it be "a claim or demand which may arise after the entry of this decree." An interlocutory decree had ordered that all claims be presented before February 1, 1916 or be barred of enforcement against the property in the hands of the receivers or the proceeds thereof. Due notice of the order had been given by publication. Spiller did not file his claim within the time limited. He contends that the time limit has no application to his claim, because it arose after entry of the decree.

The argument is that, while the claim accrued in 1914, when the reparation order was entered, or earlier, when the overcharges were illegally collected, it did not "arise" until 1920, when this Court, reversing the Court of Appeals, reinstated the judgment sought to be enforced by the intervening petition; that, in this connection, the term "arise" must have been used by the District Court in a sense different from "accrue." For, knowing through its receivers, that their counsel were, at the time of the entry of the decree of foreclosure, hotly contesting Spiller's claim, and that he was asserting that it was superior in equity to the mortgages to be foreclosed, and knowing also that the claim had not been filed in the receivership suit, the court must have intended that, if

Spiller ultimately prevailed, his claim should be satisfied by the new company. Unless so construed, the provision for claims which may "arise" after the decree would be practically inoperative. The argument is not persuasive. We are of opinion that the term "arise" was used in the decree as the equivalent of "accrue"; that Spiller's claim arose at least as early as 1914, when the reparation order was entered, not when the judgment was recovered; and that the new company did not assume to pay it. See *Phillips* v. *Grand Trunk Ry. Co.*, 236 U. S. 662, 666. Moreover, while the barring clause of the final decree excepted claims arising after entry thereof, the clause stating the liability of the purchaser included only claims against the old company which should be adjudged prior in equity to the old company's mortgages. We have already decided that the claims in question are not of such a character.

Fifth. Spiller contends also that he is entitled, under the doctrine of *Northern Pacific Ry. Co.* v. *Boyd*, 228 U. S. 482, to require the new company to satisfy in full his judgment against the old. The argument is that, under the reorganization plan, stockholders of the old company were allowed to participate in the new, but that he, a creditor, was not offered an opportunity to do so. There is no evidence in the record which supports the assertion that Spiller was not afforded an opportunity of participating in the reorganization. The contrary appears. The order confirming the foreclosure recites that "a fair and timely offer of cash . . . or participation" was made to those unsecured creditors who had filed claims. Spiller did not file his claim. The fact that he did not have actual knowledge of the order limiting the time for filing claims is not material in this connection. Notice by publication was legally sufficient. The mere fact that his claim was contested did not exclude him from the scope of the order. He might have

filed it although he was litigating elsewhere. He cannot bring himself within the doctrine of the *Boyd* case by showing that no offer was made to him personally. For aught that appears an offer would have been made, or his rights otherwise preserved, if he had filed his claim. There is no occasion to consider whether a petition for intervention filed in the receivership proceedings four years after confirmation of the foreclosure sale is an appropriate method of enforcing the claim on this theory.

Sixth. While the Court of Appeals erred in granting the specific relief prayed in the petition for intervention, it does not follow that Spiller must be denied all remedy. He was guilty of a serious inadvertence in not filing his claim in the receivership suit within the time limited by the interlocutory order. But it is clear that he has not been guilty of laches. *Southern Pacific Co.* v. *Bogert*, 250 U. S. 483, 488–490. And it does not appear that his inadvertence misled in any way the court, the receivers, the Reorganization Committee or the new company. He had prosecuted his claim with vigor for years before the receivers were appointed. His diligence does not appear to have slackened either during the receivership or after the foreclosure sale. Throughout the whole period, the claim appears to have been resisted with equal vigor. After the old company ceased to function, counsel for the receivers conducted the defense. After the receivers ceased to function, counsel for the new company conducted the defense. It is clear that neither the receivers nor the new company considered the failure to file the claim in the receivership a bar to the relief.

Before Spiller recovered judgment in the trial court, the sale on foreclosure was had; but the hearing on the order to confirm the sale was yet to be held. At that hearing Spiller gave, before the confirmation of the sale, notice in open court, and otherwise to the old company, to the receivers, to the Reorganization Committee and

to the new company, that he had recovered judgment fourteen days before. He notified them that he claimed that the purchaser would take the property subject to all his rights; and that these included a charge upon the property in the hands of the purchaser for full payment of the judgment. With knowledge of Spiller's claims, the Reorganization Committee and the new company took over the property. Later, the new company assumed the further defense to the action in which the judgment had been recovered. The issue of the securities of the new company and the distribution of its stock among stockholders in the old occurred after these notices of Spiller's claim had been given. Under such circumstances, neither the long delay, nor the failure to file claims as required by the interlocutory and final decrees, should operate to prevent the appropriate relief; [5] and the District Court had jurisdiction to grant it. Compare *Julian* v. *Central Trust Co.,* 193 U. S. 93; *Wabash Railroad* v. *Adelbert College,* 208 U. S. 38, 54–57.

The new company contends, that since the shipper's claim was not filed within the time limited by the interlocutory decree, it was among those declared barred by the terms of the final decree; and that by intervening he estopped himself from obtaining any relief.[6] No good reason is shown why relief may not be had as well upon an intervening petition as upon an original bill. As this may be done, he should be put, as nearly as may be consistently with the rights of others, into the position which he would have occupied had he filed his claim in the

[5] See *Williams* v. *Gibbes,* 17 How. 239, 254–257; *Park* v. *New York, L. E. & W. R. R. Co.,* 140 Fed. 799; *Employers' Assur. Corp.* v. *Mahogany Co.,* 6 F (2d) 945. Compare *Farmers' Trust Co.* v. *Chicago, etc., R. R. Co.,* 118 Fed. 204; *Western N. Y., etc. Ry. Co.* v. *Penn Refining Co.,* 137 Fed. 343.

[6] Compare *Swift* v. *Black Panther Gas Co.,* 244 Fed. 20; *Commercial Electrical Supply Co.* v. *Curtis,* 288 Fed. 657.

receivership proceedings in the proper time. It does not appear that it is not possible for the new company to give him the benefit now of the offer which was made by the Reorganization Committee to the other unsecured creditors of the old company; nor that such a course would be inequitable to others in interest. The ascertainment of the relevant facts and the precise form of the relief must be left to the District Court. The decree of the Circuit Court of Appeals is affirmed in so far as it reversed the decree of the District Court dismissing the intervening petition; and is reversed in so far as it directed that the judgment is a prior lien enforceable for the full amount exclusive of counsel fees against the property of the new company.

Decree affirmed in part, and reversed in part.

BALTIMORE STEAMSHIP COMPANY ET AL. *v.* PHILLIPS.

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

No. 271. Argued April 18, 1927.—Decided May 16, 1927.

1. A judgment in an action for personal injuries, based on one ground of negligence, bars a second action, for the same injuries, based on another ground of negligence. P. 319.
2. A cause of action does not consist of facts, but of the violation of a right which the facts show. The mere multiplication of grounds of negligence alleged as causing the same injury does not result in multiplying the causes of action. P. 321.
3. Therefore the plaintiff is bound to set forth in his first action for damages every ground of negligence which he claims to have existed and upon which he relies, and cannot be permitted, as was attempted here, to rely upon them by piecemeal in successive actions to recover for the same wrong and injury. Distinguishing *Troxell* v. *Del. Lack. & West. R. R.*, 227 U. S. 434, where the ground of negligence in the second action was not actionable under the state law governing the first action. P. 321.

4. By § 20 of the amended Merchant Marine Act, a seaman has a right of action for personal injuries when due to negligence of officers or employees of the ship as well as when resulting from defects due to negligence, which he may prosecute (under the federal law) either in the state court or in the admiralty court; and every ground of negligence open in the former would be equally so in the latter. P. 324.
5. A judgment merely voidable because based upon an erroneous view of the law is not open to collateral attack, but can be corrected only by a direct review and not by bringing another action upon the same cause. P. 325.
6. Plaintiff sued first in the court of admiralty, to recover damages for a personal injury. Finding that the accident was not due to the negligence alleged—viz., failure to provide a safe place to work, unseaworthiness and insufficiency of gear, and incompetency of officers employed on vessel—and being of the erroneous impression, shared by counsel, that the negligence of officers or members of the crew, found to be the cause, was not indemnifiable in admiralty, the court gave judgment, on an alternative prayer, for cost of maintenance and cure only. *Held* that the judgment was a bar to a second action for the same injury, begun in a state court, alleging negligence of the shipowners, their officers and employees in the control and operation of the vessel and appliances.

9 F. (2d) 902, reversed.

CERTIORARI (270 U. S. 638) to a judgment of the Circuit Court of Appeals which affirmed a judgment for damages in an action for personal injuries, begun in a state court and removed to the federal court.

Mr. Arthur M. Boal, with whom *Solicitor General Mitchell*, and *Messrs. Chauncey G. Parker* and *Harold F. Birnbaum* were on the brief, for petitioners.

Mr. Edgar J. Treacy for respondent.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The respondent, an infant 18 years of age, while employed on board a vessel operated by petitioners was injured by the fall of a strongback used to support a portion

of the hatch, and as a result suffered the amputation of a leg. A libel was filed in admiralty to recover damages in the sum of $15,000 against the petitioners and the United States in the federal district court for the district of Maryland. The libel alleged that the injury was caused by negligence in failing to provide a safe place to work, and to use reasonable care to avoid striking respondent, and by the unseaworthiness and insufficiency of the gear and tackle employed on the vessel. By an amendment, further specifications of negligence were added to the effect that the United States had failed to provide a proper and sufficient gear or socket to support the strongback, that the officers of the vessel were incompetent, and that there was owing to the injured person a special duty because of his youth and inexperience. Libelant prayed that, if negligence should not be established, he have a decree for wages, maintenance and cure. After a trial, the district court held that upon the evidence the accident was not due to the negligence alleged but to the grossly negligent way in which dunnage was taken out of the hold, and that under the decisions no recovery could be had for damages upon that ground. By the decree libelant was denied full indemnity by way of damages and awarded the sum of $500 as the cost of maintenance and cure; and this amount was paid and the decree satisfied. *Phillips* v. *United States,* 286 Fed. 631.

Subsequently, this action was brought in the Supreme Court of the State of New York against the petitioners—the United States not being joined—and removed to the federal district court for the eastern district of New York. The complaint alleges negligence on the part of the petitioners and their officers and employees in the control and operation of the vessel and appliances. The allegations of fact as to the way in which the accident happened are substantially the same in both cases. Petitioners answered in the present case, setting up, among other things,

the decree in the admiralty case as *res judicata;* and by stipulation of the parties this was argued before trial. The district court at first sustained the plea, but, upon reargument, set aside its order to that effect and held the plea bad. A trial resulted in a verdict and judgment for respondent. The court of appeals affirmed the judgment, holding in respect of the plea of *res judicata* that the second action was based upon a different cause of action. 9 F. (2d) 902. And this presents the sole question for consideration here.

The effect of a judgment or decree as *res judicata* depends upon whether the second action or suit is upon the same or a different cause of action. If upon the same cause of action, the judgment or decree upon the merits in the first case is an absolute bar to the subsequent action or suit between the same parties or those in privity with them, not only in respect of every matter which was actually offered and received to sustain the demand, but also as to every ground of recovery which might have been presented. But if the second case be upon a different cause of action, the prior judgment or decree operates as an estoppel only as to matters actually in issue or points controverted, upon the determination of which the judgment or decree was rendered. *Cromwell* v. *County of Sac,* 94 U. S. 351, 352-353; *United States* v. *Moser,* 266 U. S. 236, 241. There is some confusion in the decisions as to whether the present case should fall within the first or the second branch of the rule, but we are of opinion that the great weight of authority, both in respect of the number of decisions and upon reason, sustains the view that the facts here gave rise to a single cause of action for damages and that the first branch of the rule applies. In *United States* v. *California & Ore. Land Co.,* 192 U. S. 355, this court announced the general rule to be that a judgment or decree upon the merits concludes the parties as to all *media concludendi* or grounds

for asserting the right, known when the suit was brought. In that case a bill had been brought to have certain patents for land issued by the United States declared void on the ground that the lands were within an Indian reservation and, therefore, reserved from the operation of the grant. The land company pleaded in bar that the United States had filed an earlier bill seeking the same relief and that a final decree had been entered dismissing that bill. The only thing which the court could find to distinguish the two suits was that in the latter the United States had put forward a new ground for its prayer, but in both cases it sought to establish its own title to the fee. This court sustained the plea in bar, saying, "But the whole tendency of our decisions is to require a plaintiff to try his whole cause of action and his whole case at one time. He cannot even split up his claim, *Fetter* v. *Beale,* 1 Salk. 11; *Trask* v. *Hartford & New Haven Railroad,* 2 Allen, 331; Freeman, Judgments, 4th ed., §§ 238, 241; and, *a fortiori,* he cannot divide the grounds of recovery. Unless the statute of 1889 put the former suit upon a peculiar footing, the United States was bound then to bring forward all the grounds it had for declaring the patents void, and when the bill was dismissed was barred as to all by the decree." The same general doctrine is stated in *Stark* v. *Starr,* 94 U. S. 477, 485, that "a party seeking to enforce a claim, legal or equitable, must present to the court, either by the pleadings or proofs, or both, all the grounds upon which he expects a judgment in his favor. He is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail. There would be no end to litigation if such a practice were permissible." And see also, *Werlein* v. *New Orleans,* 177 U. S. 390, 398–400.

Here the court below concluded that the cause of action set up in the second case was not the same as that alleged in the first, because the grounds of negligence pleaded were distinct and different in character, the ground alleged in the first case being the use of defective appliances and, in the second, the negligent operation of the appliances by the officers and co-employees. Upon principle, it is perfectly plain that the respondent suffered but one actionable wrong and was entitled to but one recovery, whether his injury was due to one or the other of several distinct acts of alleged negligence or to a combination of some or all of them. In either view, there would be but a single wrongful invasion of a single primary right of the plaintiff, namely, the right of bodily safety, whether the acts constituting such invasion were one or many, simple or complex.

A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show. The number and variety of the facts alleged do not establish more than one cause of action so long as their result, whether they be considered severally or in combination, is the violation of but one right by a single legal wrong. The mere multiplication of grounds of negligence alleged as causing the same injury does not result in multiplying the causes of action. "The facts are merely the means, and not the end. They do not constitute the cause of action, but they show its existence by making the wrong appear. 'The *thing,* therefore, which in contemplation of law as its *cause,* becomes a ground for action, is not the group of *facts* alleged in the declaration, bill, or indictment, *but the result of these in a legal wrong, the existence of which, if true, they conclusively evince.*'" *Chobanian* v. *Washburn Wire Company,* 33 R. I. 289, 302.

The injured respondent was bound to set forth in his first action for damages every ground of negligence which

he claimed to exist and upon which he relied, and cannot be permitted, as was attempted here, to rely upon them by piecemeal in successive actions to recover for the same wrong and injury. *Columb* v. *Webster Mfg. Co.*, 84 F. 592; *Cincinnati, N. O. & T. P. Ry. Co.* v. *Gray*, 101 F. 623, 631; *Smith* v. *Missouri Pac. Ry. Co.*, 56 F. 458; *Payne* v. *N. Y. S. & W. R. R. Co.*, 201 N. Y. 436, 440; *Chobanian* v. *Washburn Wire Company, supra*, pp. 300–304; *Senn* v. *Southern Ry. Co.*, 135 Mo. 512, 519; *Munro* v. *Railroad*, 155 Mo. App. 710, 727; *Schweinfurth* v. *Railway Co.*, 60 Oh. St. 215, 230–231; *Berube* v. *Horton*, 199 Mass. 421, 425–426. Many other cases are to the same effect. In the case last cited there was a declaration in an action for personal injuries containing a count at common law alleging failure to provide a reasonably safe place, and a count under the Employers Liability Act alleging a defect in the ways, works, or machinery. To this declaration, after the expiration of the period of the statute of limitations, an amendment was allowed alleging negligence of the defendant's superintendent as the cause of the same accident. The Massachusetts Supreme Court held that the statute of limitations could not be invoked because the amendment did not state a new cause of action, but was simply another statement of the same cause of action, that cause of action being "the injury under the circumstances under which it took place."

Respondent cites and relies upon *The Rolph*, 299 Fed. 52; but the case is not in point. There the first action was for wages and maintenance alone. Here, in the first action, negligence causing a personal injury, was distinctly alleged as the primary ground of recovery. The claim for wages, maintenance and cure was purely dependent and contingent.

The judgment of the court below, as shown by its opinion, was based, in the main if not entirely, upon *Troxell*

v. *Del., Lack. & West. R. R.,* 227 U. S. 434, which was construed as holding "that it was one cause of action not to furnish safe cars, and another to use safe cars carelessly." The opinion in that case is not to be read as announcing any such general rule. If so, in the light of the foregoing discussion, we now should feel obliged to disaffirm it. But the decision rests upon another and a narrow ground, and its authority must be confined accordingly. Mrs. Troxell as surviving widow prosecuted an action against the railway company under a state statute to recover for the death of her husband as the result of a negligent failure to provide safe instrumentalities. After a judgment against her, she brought a second action as administratrix under the federal Employers Liability Act, alleging as a ground of recovery negligence of a fellow-servant. The first case was tried and decided exclusively upon the state law, under which law, as this court said, "there could be no recovery for the negligence of the fellow-servants of the deceased," and, consequently, that ground, it was said, was not and could not be involved in or concluded by the first action,—in other words, as matter of law recovery upon that ground was not open to her in the first action. Obviously, if the court had been of opinion that a recovery upon that ground of negligence could have been had in the action prosecuted under the state law, the decision would have sustained the view that there was but one cause of action.

Whether the later decision in *Wabash R. R.* v. *Hayes,* 234 U. S. 86, 90, has rendered doubtful the soundness of this conclusion even as thus narrowly limited (see *Delaware, L. & W. R. Co.* v. *Yurkonis,* 220 F. 429, 433), we do not pause to consider. It is enough to say that here, as we shall proceed to show, both actions were brought under the same federal law, and the basis upon which the *Troxell* decision rested is entirely lacking.

The injury to respondent occurred after the passage of the amendment of § 20 of the Merchant Marine Act by § 33, c. 250, 41 Stat. 988, 1007, which provides: "That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; . . ." That amendment incorporates into the maritime law the provisions of the federal Employers Liability Act, c. 149, 35 Stat. 65; and the effect by virtue of § 1 of that Act is to give a right of action for an injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of the ship, as well as for an injury or death resulting from defects due to negligence, etc., and irrespective of whether the action is brought in admiralty or at law. *Panama R. R. Co.* v. *Johnson,* 264 U. S. 375; *Engel* v. *Davenport,* 271 U. S. 33; *Panama R. R. Co.* v. *Vasquez,* 271 U. S. 557.

It follows that here both the libel and the subsequent action were prosecuted under the maritime law, and every ground of recovery, open to respondent in the second case, was equally open to him in the first. But evidently in the first proceeding both court and counsel misinterpreted the effect of § 33, and proceeded upon the erroneous theory, that in admiralty the rule laid down in *The Osceola,* 189 U. S. 158, 175,

"That the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident,"

was still in force. Otherwise, it is quite apparent from the language of the opinion that an amendment would

have been sought and allowed, pleading the ground of negligence afterwards set up in the second action. Nevertheless, the cause of action was one and indivisible, and the erroneous conclusion to the contrary cannot have the effect of depriving the defendants in the second action of their right to rely upon the plea of *res judicata.* Plaintiff's claim for damages having been submitted and passed upon, the effect of the judgment in the admiralty case as a bar is the same whether resting upon an erroneous view of the law or not. A judgment merely voidable because based upon an erroneous view of the law is not open to collateral attack, but can be corrected only by a direct review and not by bringing another action upon the same cause. *Colburn* v. *Woodworth,* 31 Barb. (N. Y.) 381, 384; *Wolverton* v. *Baker,* 86 Cal. 591, 593; *Bettys* v. *C. M. & St. P. R. Co.,* 43 Iowa 602, 604; *Bancroft* v. *Winspear,* 44 Barb. (N. Y.) 209, 215-216; *Winslow* v. *Stokes,* 48 N. C. 285.

The conclusion that the judgment below must be reversed cannot be avoided without subverting long established principles of general application, which we are not at liberty to set aside for a special case of hardship.

Judgment reversed.

MR. JUSTICE STONE concurs in the result.

ZAHN ET AL. *v.* BOARD OF PUBLIC WORKS ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 196. Argued March 7, 1927.—Decided May 16, 1927.

1. A zoning ordinance dividing the City of Los Angeles into five building zones and prescribing the kinds of buildings that may be erected in each zone, *held* constitutional in its general scope (*Euclid* v. *Ambler Realty Co.,* 272 U. S. 365), and not violative of due process or equal protection as applied to this case. P. 327.

2. The plaintiff's lot was in a zone limited by the ordinance to buildings for residences, churches, private clubs, educational purposes, etc., and excluding buildings for private business other than physicians' offices. The value of the lot would be much enhanced if it could be used for business purposes, for which it was favorably situated. Other property in the zone was largely restricted by covenant to residential uses. The entire neighborhood at the time of the ordinance was largely unimproved but in course of rapid development. The conclusion of the city council, on these and other facts, that the public welfare would be promoted by establishing the zone can not be adjudged clearly arbitrary or unreasonable; and this court can not in such circumstances substitute its judgment for theirs. P. 328.

195 Cal. 497, affirmed.

ERROR to a judgment of the Supreme Court of California, on an original application for a writ of mandate commanding the Board of Public Works of the City of Los Angeles to issue to the petitioners a permit for the construction of a business building, suitable for occupation by stores, upon property of the petitioners in that city. An alternative writ was issued, returnable in the District Court of Appeal, which found in favor of the petitioners, holding the city zoning ordinances unreasonable and discriminatory. This was reversed, and the ordinances upheld, by the subsequent judgment of the Supreme Court, here under review.

Mr. A. J. Hill for plaintiffs in error.

Mr. Lucius P. Green, with whom *Mr. Jess E. Stephens* was on the brief, for defendants in error.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This is a proceeding in mandamus brought in the state court to compel defendants in error to issue a building permit enabling plaintiffs in error to erect a business

building upon a lot lying within a district of the City of Los Angeles restricted by the zoning ordinance of that city against buildings of that character. The ordinance creates five zones, designated as "A," "B," "C," "D," and "E," respectively, and classifies the kinds of buildings, structures and improvements which may be erected in each. The ordinance is of the now familiar comprehensive type, but in the main regulates only the character of buildings which lawfully may be erected and does not prescribe height and area limitations. It is assailed as being repugnant to the due process of law and equal protection clauses of the Fourteenth Amendment. The property of plaintiffs in error is in zone "B," in which, generally stated, the use is limited to buildings for residential purposes, churches, private clubs, educational and similar purposes. All buildings for private business are excluded, with the exception of offices of persons practicing medicine. The state supreme court, in a well reasoned opinion, upheld the ordinance and denied the relief sought. 195 Cal. 497. And see *Miller* v. *Board of Public Works,* 195 Cal. 477.

The constitutional validity of the ordinance in its general scope is settled by the recent decision of this court in *Euclid* v. *Ambler Co.,* 272 U. S. 365; and upon the record here we find no warrant for saying that the ordinance is unconstitutional as applied to the facts in the present case. The property of plaintiffs in error adjoins Wilshire Avenue, a main artery of travel through and beyond the city; and if such property were available for business purposes its market value would be greatly enhanced. The lands within the district were, when the ordinance was adopted, sparsely occupied by buildings, those in which business was carried on being limited to a few real estate offices, a grocery store, a market, a fruit stand, and a two-story business block. Much of the land

adjoining the boulevard within the restricted district had already been sold with restrictions against buildings for business purposes, although the property of plaintiffs in error and the adjacent property had not been so restricted. The effect of the evidence is to show that the entire neighborhood, at the time of the passage of the zoning ordinance, was largely unimproved, but in course of rapid development. The Common Council of the city, upon these and other facts, concluded that the public welfare would be promoted by constituting the area, including the property of plaintiffs in error, a zone "B" district; and it is impossible for us to say that their conclusion in that respect was clearly arbitrary and unreasonable. The most that can be said is that whether that determination was an unreasonable, arbitrary or unequal exercise of power is fairly debatable. In such circumstances, the settled rule of this court is that it will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining the question. *Euclid* v. *Ambler Co., supra,* 388, 395; *Radice* v. *New York,* 264 U. S. 292, 294; *Hadacheck* v. *Los Angeles,* 239 U. S. 394, 408–412, 413–414; *Cusack Co.* v. *City of Chicago,* 242 U. S. 526, 530–531; *Rast* v. *Van Deman & Lewis,* 240 U. S. 342, 357; *Price* v. *Illinois,* 238 U. S. 446, 452.

Judgment affirmed.

BURNS v. UNITED STATES.

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

No. 135. Argued November 24, 1926.—Decided May 16, 1927.

1. The California statute defining and punishing criminal syndicalism is not violative of the Fourteenth Amendment. *Whitney* v. *California, post,* p. 357. P. 330.

2. An instruction to a jury must be considered in connection with the evidence bearing on the matter to which it refers and with the charge as a whole. P. 331.
3. To advocate among workers such acts as maliciously stowing the cargo of a ship so that it will shift and cause her to list and return to port, is to teach and abet "sabotage," which is defined by the California statute as meaning "wilful and malicious damage or injury to physical property"; it is also to teach and abet "crime" and "unlawful methods of terrorism." P. 332.
4. In a prosecution under the California Act Against Criminal Syndicalism, it is not necessary to show that the elements of criminal syndicalism were advocated or taught with the precision of statement required in indictments for criminal acts involved. The purpose and probable effect of the printed matter circulated and of the things said in furtherance of the declared purposes of the organization are to be considered, having regard to the capacity and circumstances of the persons sought to be influenced. P. 335.
5. Exceptions to a charge must be specifically made in order to give the court opportunity then and there to correct errors and omissions, if any; and where a series of instructions are excepted to in mass, the exception will be overruled if any one of them is correct. P. 336.
6. An instruction in a criminal case authorizing the jury to consider certain facts, must be sustained when the record does not purport to contain all the evidence relating to the things referred to, and where it can not be said as a matter of law that they would be improper for consideration if taken in connection with other facts. P. 336.

Affirmed.

ERROR to a judgment of the District Court sentencing Burns upon his conviction of the crime of criminal syndicalism, under the California law as extended to Yosemite National Park.

Mr. R. W. Henderson, with whom *Mr. Walter H. Pollak* was on the brief, for plaintiff in error.

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

MR. JUSTICE BUTLER delivered the opinion of the Court.

An Act of Congress of June 2, 1920, § 1, c. 218, 41 Stat. 731, provides that, if any offense shall be committed in the Yosemite National Park which is not prohibited by a law of the United States, the offender shall be subject to the same punishment as the laws of California prescribe for a like offense. Plaintiff in error was indicted for violating within that Park the California Criminal Syndicalism Act, c. 188, California Statutes 1919. The indictment was in two counts. The verdict was guilty on the first count and not guilty on the second. Plaintiff in error, by demurrer and by motion to arrest the judgment, insisted that the statute contravenes the Constitution of the United States. His contention was overruled. The case is here under § 238 of the Judicial Code, before the Amendment of February 13, 1925.

The applicable provisions follow: "Section 1. The term 'criminal syndicalism' as used in this act is hereby defined as any doctrine or precept advocating, teaching or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning wilful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change. Section 2. Any person who: . . . organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism . . . is guilty of a felony . . ."

Plaintiff in error here contends that, as applied in the district court, these provisions are repugnant to the due process and equal protection clauses of the Fourteenth Amendment. The only attack upon the validity of the law was by the demurrer and motion in arrest. In each

of these, he asserted that the statute "is in violation of the Fourteenth Amendment of the Constitution of the United States and is void for uncertainty." But that point is determined adversely to his contentions in *Whitney* v. *California, post,* p. 357.

The substance of the count on which plaintiff in error was adjudged guilty is that on or about April 10, 1923, at Yosemite National Park, he did "organize, and assist in organizing, and was, is, and knowingly became, a member of an organization, society, group and assemblage of persons organized and assembled to advocate, teach, aid and abet criminal syndicalism, to wit, The Industrial Workers of the World, commonly known as I. W. W."

1. Plaintiff in error argues that he is entitled to a new trial because the charge contains the following: "Now, there has been presented to you evidence . . . to the effect that this organization, amongst other things, advocated what is known as slowing down on the job, slack or scamped work, such as loading of a ship in such a way that it took a list to port or starboard and therefore had to limp back to port, and things of that kind. I instruct you that under the definition as laid down by the legislature of California, that any deliberate attempt to reduce the profits in the manner that I have described would constitute sabotage." He calls attention to the language in section 1 and says that merely loading telephone poles on a ship so as to occasion more work is not physical damage or injury to physical property within the meaning of the statute.

If that instruction stood alone it might be thought to permit the jury erroneously to expand the meaning of sabotage beyond that defined in the Act. But it does not stand alone; and the mere comparison of the quoted language of the instruction with the words of the statute is not sufficient to disclose whether there was prejudicial error. The instruction must be taken in connection with

the evidence bearing on the matter referred to and is to be considered in the light of the charge as a whole. *New York Cent. R. R.* v. *United States,* 212 U. S. 500, 508; *Hotema* v. *United States,* 186 U. S. 413, 416; *Spring Drug Co.* v. *United States,* 12 F. (2d) 852, 856; *People* v. *Scott,* 6 Mich. 287, 291. There is no contention that plaintiff in error was not connected with the organization substantially as alleged, or that the evidence failed to show it to be the kind of organization specified in the indictment. The record shows that for a number of years he had been a member of the organization; that, at the time alleged and when arrested, he was its authorized delegate and had a quantity of its literature in his possession; that he solicited others to become members and was authorized to initiate new members and to collect initiation fees and dues. It also shows that the organization disseminated large amounts of printed matter declaring its purposes and advocating means to accomplish them. A "preamble" was contained in practically all its publications and was printed on the membership card of plaintiff in error. It declares that the working class and employing class have nothing in common; that a struggle must go on between them until the workers organize, take possession of the earth and the machinery of production and abolish the wage system; that the trade unions aid the employing class to mislead the workers into the belief that they have interests in common with their employers; that, "instead of the conservative motto, 'A fair day's wages for a fair day's work,' we must inscribe on our banner the revolutionary watchword, 'Abolition of the wage system;'" that it is the mission of the working class to do away with capitalism; that the army of production must be organized to carry on when capitalism shall have been overthrown; that "by organizing industrially we are forming the structure of the new society within the shell of the old."

Sabotage, as the evidence indicates it to have been advocated and taught by the organization, is not confined, as is the definition contained in the Act, to physical damage and injury to physical property. The organization's printed matter that was received in evidence contains no precise definition of sabotage, but does give a number of descriptive explanations of what it means. As fairly illustrative, we take the following: "Three versions are given of the source of the word. The one best known is that a striking French weaver cast his wooden shoe—called a sabot—into the delicate mechanism of the loom upon leaving the mill. The confusion that resulted, acting to the workers' benefit, brought to the front a line of tactics that took the name of sabotage. Slow work is also said to be at the basis of the word, the idea being that wooden shoes are clumsy and so prevent quick action on the part of the workers. The third idea is that sabotage is coined from the slang term that means 'putting the boots' to the employers by striking directly at their profits without leaving the job. The derivation, however, is unimportant. It is the thing itself that causes commotion among employers and politicians alike." The evidence shows that the organization advocated, taught and aided various acts of "sabotage" that are plainly within the meaning of that word as defined by the Act. Some examples are: injuring machinery when employed to use it, putting emery dust in lubricating oil, damaging materials when using them in manufacture or otherwise, scattering foul seed in fields, driving tacks and nails in grape vines and fruit trees to kill them, using acid to destroy guy wires holding up the poles provided to support growing vines, putting pieces of wire and the like among vines to destroy machines used to gather crops, scattering matches and using chemicals to start fires to destroy property of employers. One of the witnesses testified: "I heard . . . a member of the I. W. W. say in

a speech on May 10th, 1923: 'When you go back to work, if we do have to go to work, we will put on the wooden shoe.' Then he said: 'In case you are loading telephone poles on a ship down there, sometime the boss is not looking you can slip a couple of poles crossways and then cover up, and then when that ship goes to sea naturally she will start rolling and the cargo will shift, and then she will come in listed like the one you see out in the harbor, then she has got to tie up to the dock, and she will have to unload the telephone poles and put them in again and put them straight, and then we will get paid for the loading originally, and get paid for unloading it and get pay for loading it again, and that will hit the bosses hard in the pocketbook.'"

The foregoing sufficiently shows the foundation of fact for the portion of the charge complained of. Before giving that instruction, the court warned the jury that the Government must establish beyond reasonable doubt that the I. W. W. was such an organization as is denounced by the Act. The definition of criminal syndicalism was given the jury in the exact words of the statute. The court then gave a number of lexicographers' definitions of sabotage. They are broader than the meaning of the word as defined in the Act and are not confined to physical damage or injury to physical property. Then, by way of contrast, the statutory definition of sabotage was repeated, and by the repetition it was emphasized. The court said: "The statute, itself, you will notice, however, denounces sabotage as meaning wilful and malicious physical damage or injury to physical property." The instruction complained of followed. It referred to the evidence indicating that the organization advocated acts *such as* loading a ship so that it would list and have to return, *and things of that kind.* And in that connection the court said that any deliberate attempt to reduce profits *"in the manner that I have described"* would

constitute sabotage. The language excepted to was followed by an instruction containing this: "If you find, therefore, that this organization advocated *sabotage* or any *other criminal matters mentioned in the section that I have read,* either for the purpose of bringing about a change in industrial control, or a political change, then it would constitute criminal syndicalism."

While one of the purposes of such improper loading of ships may be to create more work for the men and so to inflict loss on employers, it is also plainly calculated to endanger the vessels, their cargoes and the lives of those aboard. By the instruction complained of, the consideration of the jury was limited to "things of that kind." The advocating of the malicious commission of such acts is to teach and abet sabotage—physical damage and injury to physical property; it also is to teach and abet crime and unlawful methods of terrorism. It was not necessary for the prosecution to show that the elements of criminal syndicalism were advocated or taught with the precision of statement required in indictments for criminal acts involved. Cf. *Wong Tai* v. *United States,* 273 U. S. 77. The purpose and probable effect of the printed matter circulated and of the things said in furtherance of the declared purposes of the organization are to be considered having regard to the capacity and circumstances of the persons sought to be influenced. When there is taken into account the evidence referred to and the parts of the charge preceding and following the part of the charge here assailed—and especially the giving and reiteration of the statutory language defining sabotage—it is quite apparent that the instruction was not erroneous.

Both sides have dealt with the case here as if the question were properly raised, and we have considered its merits. *McNitt* v. *Turner,* 16 Wall. 352, 362; *Baltimore & Potomac Railroad* v. *Mackey,* 157 U. S. 72, 86; *Nor-*

folk & Western Ry. v. *Earnest,* 229 U. S. 114. Cf. *West* v. *Rutledge Timber Co.,* 244 U. S. 90, 99–100. But, after examining the record, we think plaintiff in error failed to make any objection or effectively to take exception to the charge complained of. The exception there indicated did not call the court's attention to the instruction now attacked. It was general in form and applied to the series of statements that followed it, covering about two pages of the record. Plaintiff in error does not contend that all of them are erroneous, and obviously they are not. The rule is well-established that, where a series of instructions are excepted to in mass, the exception will be overruled if any one of them is correct. *Johnston* v. *Jones,* 1 Black 209, 220; *Beaver* v. *Taylor,* 93 U. S. 46, 54; *McDermott* v. *Severe,* 202 U. S. 600, 610. Exceptions to a charge must be specifically made in order to give the court opportunity then and there to correct errors and omissions, if any. *Pennsylvania R. R. Co.* v. *Minds,* 250 U. S. 368, 375, and cases cited; *Allis* v. *United States,* 155 U. S. 117, 122. Even if some of the instructions were erroneous, the exceptions taken were not such as to require a new trial.

2. Plaintiff in error complains of another part of the charge: "There has been evidence here that advertisements were published in the official organs of the Industrial Workers of the World, what they call also stickerettes, calling upon people to boycott the entire State of California and its products. That would only be legal in the event that it was in furtherance of a strike, and by 'legal' I mean as established by the State of California, that is to say, if it was in furtherance of a strike, if it was in good faith, an attempt to better their conditions, and if it did not indulge in maliciousness or misrepresentation. If, however, you should find from the evidence that that was not so, then it would be an illegal

boycott and you could take it into consideration in determining the facts of this case."

The record does not contain all the evidence and fails to show that it includes all relating to the matter referred to in this instruction. We think it cannot be said as a matter of law that the things there mentioned, when taken in connection with other facts, may not have been proper for consideration in connection with some element of the criminal syndicalism charged. Moreover, no objection was made or exception properly taken to that part of the charge. Here again the exception failed specifically to point out the instruction now assailed as erroneous.

Judgment affirmed.

MR. JUSTICE BRANDEIS, dissenting.

This writ of error was allowed under § 238 of the Judicial Code, on constitutional grounds, prior to the amendment of February 13, 1925. All alleged errors at the trial which were properly excepted to are therefore, before us. *Chaloner* v. *Sherman,* 242 U. S. 455, 457. There was, at least, one error committed which, in my opinion, justifies reversal and which does not involve a constitutional question. For that reason, according to the practice approved by the Court, I refrain from discussing the constitutional questions presented. See *Steamship Co.* v. *Emigration Comm'rs,* 113 U. S. 33, 39; *Chicago & G. T. Ry. Co.* v. *Wellman,* 143 U. S. 339, 345; *Howat* v. *Kansas,* 258 U. S. 181, 184.

The defendant was convicted on the count which charges him with becoming a member of an organization formed to advocate criminal syndicalism. The California statute defines criminal syndicalism as advocating sabotage, among other things; and it defines sabotage " as

meaning wilful and malicious physical damage or injury to physical property." To prove the crime, the Government undertook to show that the defendant was a member of the I. W. W. and that the I. W. W. advocated, among other things, the use of sabotage. On that subject the trial judge gave the following instruction, which was duly excepted to:

"Sabotage has been variously defined. Webster's New International Dictionary defines it as 'Scamped work; malicious waste or destruction of an employer's property by workmen during labor troubles.' Funk & Wagnalls' New Standard Dictionary defines it as: 'Any poor work or other damage done by dissatisfied workmen; also, the act of producing it; plant wrecking.' Nelson's Encyclopedia defines it thus: 'The organized hampering of production by slack work, skilful disabling of machinery or the publication of trade secrets.' The New International Encyclopedia defines it thus: 'Sabotage may consist in throwing the progress of production out of order, through tampering with machinery, improper use of material, or loitering at work.' The Encyclopedia Americana defines it as: 'A method used by labor revolutionists to force employers to accede to demands made on them. It consists in wilful obstruction and interference with the normal processes of industry. It aims at inconveniencing and tying up of production, but stops short of actual destruction or of endangering human life directly.'

"The statute, itself, you will notice, however, denounces sabotage as meaning wilful and malicious physical damage or injury to physical property.

"Now, there has been presented to you evidence, of the truth or falsity of which, however, you are the exclusive judges, to the effect that this organization, amongst other things, advocated what is known as slowing down on the job, slack or scamped work, such as loading of a ship in such a way that it took a list to port or starboard

and therefore had to limp back to port, and things of that kind. I instruct you that under the definition as laid down by the legislature of California, that any deliberate attempt to reduce the profits in the manner that I have described would constitute sabotage."

The testimony referred to by the court in the above instruction was this:

"Under similar circumstances I heard Leo Stark, a member of the I. W. W., say in a speech on May 10th, 1923: 'When you go back to work, if we do have to go to work, we will put on the wooden shoe.' Then he said: 'In case you are loading telephone poles on a ship down there, sometime the boss is not looking you can slip a couple of poles crossways and then cover up, and then when that ship goes to sea naturally she will start rolling and the cargo will shift, and then she will come in listed like the one you see out in the harbor, then she has got to tie up to the dock, and she will have to unload the telephone poles and put them in again and put them straight, and then we will get paid for the loading originally, and get paid for unloading it and get pay for loading it again, and that will hit the bosses hard in the pocketbook.

"Mr. LEWIS. I move that that answer be stricken out as immaterial, irrelevant and incompetent, not within the definition of sabotage as laid down in the statute, or the Criminal Syndicalism law.

"The COURT. I cannot see it. As I said before, I cannot see but what any deliberate act, the purpose of which is to reduce the profits of the physical thing, is not equally an injury. Motion denied.

"Mr. LEWIS. I note an exception."

The exception to the charge is insisted on, although the objection to the admission of the evidence is not urged here. The charge was clearly erroneous. It plainly directed the jury that "slowing down on the job" and "scamped work" constituted sabotage within the mean-

ing of the statute. Since the jury must have taken it to be an exposition or interpretation of the words of the statute, the error was not cured by definition, elsewhere in the charge, of sabotage in the terms of the statute. The court ruled throughout the course of the trial, that evidence to show a program of scamped work was admissible. Much of the Government's evidence consisted of documents showing such a program on the part of the I. W. W. The charge inevitably led the jury to think that all such evidence showed the guilty character of the organization.

It is said that the charge, if erroneous, was not prejudicial, because the illegal character of the organization was established by other evidence than that which formed the basis of the charge, and because even the latter evidence showed the advocacy of acts which amounted to a malicious destruction of property, and so might properly support a conviction even under a proper construction of the statute. Even in civil cases erroneous rulings, especially those embodied in instructions, are presumptively prejudicial. *Filippon* v. *Albion Slate Co.*, 250 U. S. 76, 82; *United States* v. *River Rouge Co.*, 269 U. S. 411, 421. The illegal character of the organization was not conceded. There was evidence from which the illegal character might have been deduced. But the evidence related, in the main, to the acts of individuals. The effort of the defense was to disavow those acts.

It is also said that the exception to the charge was not properly taken. The defendant excepted specifically to that portion of the charge which dealt with sabotage. The precise ground of the exception was not set forth. But the continued objections to the admission of evidence upon the ground here urged, and the court's adverse rulings thereon, could have left no doubt in the mind of the court as to what was meant by the exception here in question. Moreover, the case comes to this

Court from a lower federal court. We have, therefore, the power to correct errors committed below although objection was not taken there. That power has been repeatedly exercised in criminal cases. See *Wiborg* v. *United States,* 163 U. S. 632, 658–660; *Clyatt* v. *United States,* 197 U. S. 207, 221–222. This case, I think, warrants its exercise.

The judgment should be reversed.

PHELPS *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 531. Argued March 3, 1927.—Decided May 16, 1927.

1. A claim for just compensation for the use of property taken by the Government is "founded upon the Constitution," within the meaning of Jud. Code, § 145. P. 343.
2. A claim for just compensation for property taken for public use by officers or agents of the United States pursuant to an Act of Congress, is a claim founded upon an implied contract. Jud. Code, § 145. P. 343.
3. Where the use of private property is taken by eminent domain and paid for later, the owner is entitled to the value at the time of taking and such additional amount that the whole may be equivalent to the value of such use at the time of the taking paid contemporaneously with the taking. P. 344.
4. Such additional allowance may be measured by a reasonable rate of interest, but is not properly interest, and is not within the prohibition of interest before judgment found in Jud. Code, § 177. P. 344.

61 Ct. Cls. 1044, reversed.

CERTIORARI (273 U. S. 678) to a judgment of the Court of Claims allowing a recovery of less than the amount claimed as the balance due for the value of the use of a wharf, on which petitioners had a lease, and which was taken over for military purposes during the late war.

Mr. Harold S. Deming, with whom *Mr. L. Russell Alden* was on the brief, for petitioner.

Assistant Attorney General Galloway, with whom *Solicitor General Mitchell* was on the brief, for the United States, did not oppose the issuance of the writ, and submitted the case with some doubt as to the soundness of the result below.

Messrs. Ira Jewell Williams, John H. Stone, F. R. Foraker, Charles L. Guerin, and *Ira Jewell Williams, Jr.,* filed a brief as *amici curiae,* by special leave of Court.

Mr. Justice Butler delivered the opinion of the Court.

Plaintiffs were partners doing business as Phelps Brothers and Company; the petitioner is the survivor. They owned a lease on Pier No. 7 of the Bush Terminal in New York Harbor. December 31, 1917, pursuant to an Act of August 29, 1916, c. 418, 39 Stat. 619, 645, and an Act of August 10, 1917, § 10, c. 53, 40 Stat. 276, 279, the Secretary of War by direction of the President requisitioned that pier and other portions of the Bush Terminal for use in carrying on the war. Plaintiffs vacated, and the United States took possession of the property and continued to occupy it until May 14, 1919. The Secretary's order stated that steps would be taken to ascertain fair compensation for the temporary use of the property; and a board of appraisers was created for that purpose. The plaintiffs continued to pay rent to the lessor; and, in accordance with the finding of the board, the amount of such payments, $79,890.42, was repaid to plaintiffs by the United States. The board also found the value per month of the use of the plaintiffs' property less the monthly rents paid. The amount calculated on that basis was not satisfactory to plaintiffs; they elected to take 75 per cent. of the award and there was paid them

$44,733.79 on account. They sued to recover an amount sufficient to make up just compensation. The court found the value per day of the use of their property; the amount calculated on that basis was $254,175.79 over and above the sums paid; and that amount was included in the judgment entered March 8, 1926. Petitioner was granted a writ of certiorari. 273 U. S. 678.

He contends that there should be added such sums as will produce the equivalent of the value of the use of the leased property paid contemporaneously; and that interest at a reasonable rate from the date of the use to the time of payment is a good measure of the amount to be added in order to make just compensation.

This action was brought under § 145 of the Judicial Code. That section gives to the Court of Claims jurisdiction to hear and determine "all claims (except for pensions) founded upon the Constitution of the United States or . . . upon any contract, express or implied, with the Government of the United States . . ." Section 177 provides that no interest shall be allowed on any claim up to the time of the rendition of judgment unless upon a contract expressly stipulating for its payment. Under the Fifth Amendment plaintiffs were entitled to just compensation; and, within the meaning of § 145, the claim is one founded on the Constitution. Moreover, it has long been established that, where pursuant to an Act of Congress private property is taken for public use by officers or agents of the United States, the Government is under an implied obligation to make just compensation. That implication being consistent with the constitutional duty of the Government as well as with common justice, the owner's claim is one arising out of implied contract. *United States* v. *Great Falls Manufacturing Co.*, 112 U. S. 645, 656; *Duckett* v. *United States*, 266 U. S. 149, 151; *Campbell* v. *United States*, 266 U. S. 368, 370. The distinction between the cause

of action considered in *United States* v. *North American Co.*, 253 U. S. 330, and a taking under the power of eminent domain was pointed out in *Seaboard Air Line Ry.* v. *United States*, 261 U. S. 299. Plaintiffs' property was taken before its value was ascertained or paid. Judgment in 1926 for the value of the use of the property in 1918 and 1919, without more, is not sufficient to constitute just compensation. Section 177 does not prohibit the inclusion of the additional amount for which petitioner contends. It is not a claim for interest within the purpose or intention of that section. Acts of Congress are to be construed and applied in harmony with and not to thwart the purpose of the Constitution. The Government's obligation is to put the owners in as good position pecuniarily as if the use of their property had not been taken. They are entitled to have the full equivalent of the value of such use at the time of the taking paid contemporaneously with the taking. As such payment has not been made, petitioner is entitled to the additional amount claimed. *Seaboard Air Line Ry.* v. *United States, supra*, 304; *Brooks-Scanlon Corp.* v. *United States*, 265 U. S. 106, 123; *Liggett and Myers Tobacco Co.* v. *United States, ante*, p. 215.

Judgment reversed.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY ET AL. *v.* PUBLIC UTILITIES COMMISSION OF THE STATE OF IDAHO.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO.

No. 242. Argued March 17, 1927.—Decided May 16, 1927.

1. A State cannot require a railroad to accept confiscatory rates on saw logs hauled intrastate to the mill upon the ground that the revenue from the log haul combined with that received from the interstate haul of the manufactured products of the logs, is adequate. P. 350.

2. Where rates found by a regulatory body to be compensatory are attacked as being confiscatory, the courts may inquire into the method by which its conclusion was reached. P. 351.
3. Findings of the Interstate Commerce Commission that rates on certain commodities in a district embracing several States are unreasonable, and not expressly relating to intrastate rates, are to be construed as applying to interstate rates exclusively. P. 351.
4. Orders of the Director General of Railroads advancing interstate and intrastate rates and of the Interstate Commerce Commission authorizing a further advance, *held* not to affect the rights of carriers or the duties of a state public utilities commission in respect of subsequent rate reductions. P. 352.
5. The fact that the Interstate Commerce Commission found an interstate rate too high and authorized reduction is no basis for an order of a state commission reducing the intrastate rate on the same commodity, and an order requiring such reduction, on that basis alone, without a hearing or consideration of evidence offered to prove the inadequacy of the rate so fixed, is arbitrary and a denial of due process. P. 352.

41 Idaho 181, reversed.

CERTIORARI (269 U. S. 550) to a judgment of the Supreme Court of Idaho, which affirmed, on appeal of the above named and three other railroads, an order of the respondent commission reducing rates on transportation of saw-logs intrastate in Idaho.

Messrs. F. M. Dudley and *Thomas Balmer,* with whom *Messrs. L. B. DaPonte, O. W. Dynes, F. G. Dorety, D. F. Lyons,* and *Alex M. Winston* were on the brief, for petitioners.

Mr. Charles E. Elmquist, with whom *Mr. A. H. Connor,* Attorney General of Idaho, was on the brief, for respondent.

MR. JUSTICE BUTLER delivered the opinion of the Court.

August 20, 1923, respondent made an order reducing the Idaho intrastate rates for the transportation of saw logs by railroad. Petitioners appealed to the Supreme

Court of the State, and there the order was affirmed. 41 Idaho 181.

The Director General of Railroads by Order No. 28, effective June 25, 1918, advanced all rates. An addition of 25 per cent. was made to the interstate and intrastate rates on saw logs. In 1920 the Interstate Commerce Commission authorized the carriers further to increase rates. *Ex parte 74*, 58 I. C. C. 220, 246. The addition to freight rates in the mountain-Pacific group that includes Idaho was 25 per cent. The respondent authorized additions of 25 per cent. to rates on intrastate freight including saw logs. In 1922 the Interstate Commerce Commission found the freight rates unreasonable, on and after July 1, 1922, to the extent that the rates in effect immediately before the increases authorized in *Ex parte 74* were exceeded by more than specified percentages; and that stated for the mountain-Pacific group was 12½ per cent. The carriers were authorized to reduce rates in accordance with these findings. *Reduced Rates, 1922*, 68 I. C. C. 676, 734. As applied to interstate traffic in saw logs, such reduction was ten per cent. Respondent authorized corresponding reductions on Idaho intrastate freight. While the reductions were generally made by the railroads throughout the country and in Idaho, the petitioners did not make any reduction of interstate or intrastate rates on logs. And no reduction of the interstate rate has been ordered by the Interstate Commerce Commission.

September 28, 1922, the respondent ordered petitioners, by answer filed within a specified time, to show "compliance or non-compliance in the matter of reduction of rates on saw logs and other forest products intrastate within the State of Idaho in accordance with the findings of the Interstate Commerce Commission," and that they show cause why such reduction should not be made. The

Chicago, Milwaukee and Saint Paul, the Great Northern and the Northern Pacific answered. Each stated that it had put in effect the reduced rates on intrastate freight except saw logs, and that it had not reduced interstate or intrastate rates on saw logs because the existing rates were unreasonably low and confiscatory and should be increased. At the hearing the carriers offered evidence that the existing rates were unreasonably low and confiscatory. The Western Pine Manufacturers Association intervened to support the proposed reduction. It has about 59 members who manufacture annually about one and a half billion feet of lumber in the Inland Empire—eastern Washington and Oregon, Idaho and western Montana. The logs hauled intrastate in Idaho constitute a very small part of those sawed by the members of the association. The Chicago, Milwaukee and Saint Paul analyzed its Idaho intrastate log traffic in the first ten days of each month in 1921. It hauled 3,876 carloads an average distance of 36.2 miles for $68,174.17. It introduced evidence to show that taxes, operating expenses, rentals and interest on investment chargeable to that traffic amounted to $94,658.13, and that taxes and operating expenses alone amounted to $62,622.88. The Great Northern in 1921 hauled 2,620 carloads an average distance of 26.2 miles for $46,130.87, and offered evidence that operating expenses chargeable to that traffic exceeded revenue. The Northern Pacific in the year ending October 1, 1922, hauled 240 carloads. There was no evidence indicating revenue received from or operating expenses chargeable to that traffic. But the company called as a witness its special traffic representative, a man of long experience in its operating and traffic departments, who testified that in his opinion the rates were confiscatory. The Spokane and International in 1921 hauled 1,250 carloads for about $22,800. The witnesses

called by petitioners made comparisons of rates and testified that those on logs were relatively low. The Western Pine Manufacturers Association, by cross examination of carrier witnesses and by the testimony of its traffic manager, showed that in the Northwest the Northern Pacific originally established the rates on logs, and made them very low in order to move the logs to the mills for the manufacture of lumber to be shipped long distances to eastern markets; that carriers later building into that territory pursued the same policy and that the rates in Idaho were so made; that these rates remained until federal control; that some of the tariffs state that the rates are established to furnish logs to manufacturers who are to forward equivalent products over the carrier's railroad, and that, if the condition is not complied with, higher rates will be charged. It was not shown to what extent, if any, such higher rates were collected. The traffic manager of the association testified that practically all of the lumber moved long distances in interstate commerce; that freight on logs is a part of the manufacturer's operating cost while freight on lumber is borne by the consumer. By way of illustration, it was estimated that the logs hauled intrastate in Idaho by the Chicago, Milwaukee and Saint Paul in 1921 would produce lumber sufficient to yield freight revenue of $1,279,080 and that those hauled by the Great Northern would make lumber enough to produce $288,123.

The respondent found the existing rates on saw logs unreasonable and discriminatory and ordered the carriers to file tariffs "in compliance with the reductions in the findings of the Interstate Commerce Commission . . . applicable to shipments on saw logs intrastate. . . ." Respondent's opinion gives the following reasons. The existing relation between rates on logs and those on other commodities should be maintained. Hauling logs to the

mill is incident to the lumber traffic, which includes the transportation of the finished products from the mill. A branch line carrying logs may not of itself yield sufficient revenue to pay operating expenses, but, when it receives credits to which it is entitled as part of the system, it is generally a good revenue producer. As all freight rates had been twice advanced, it was just and reasonable that the reduction authorized should apply to all commodities. The evidence submitted "does not justify the contention of the carriers that the rates on saw logs are too low when compared to rates on other commodities, as the transportation of saw logs from the forest to the mill furnishes profitable business to the railroad system." The hearing was not a rate hearing, but was held for the purpose of giving the carriers an opportunity to show why they had not reduced rates on logs "in accordance with the findings of the Interstate Commerce Commission." Respondent had theretofore, "without hearing, adopted the findings of the Interstate Commerce Commission and made orders authorizing and permitting rate increases where the findings of the Interstate Commerce Commission determined that such rate increases were justifiable and reasonable;" and "now when the Interstate Commerce Commission . . . determines that certain rates are unjustifiable and unreasonable, this commission sees no reason why it should change its method of procedure and proceed to a hearing on rates affecting intrastate shipments". And it said: "This commission adopts the findings made by the Interstate Commerce Commission . . . and will order that tariffs be filed in accordance with said findings applicable to intrastate shipments on saw logs."

Following the state practice the case was heard in the Supreme Court on the record made before the respondent. The court held that the respondent was authorized to reduce the rates in question without finding them un-

just or unreasonable. And, as to petitioner's insistence that the rates prescribed by the order are confiscatory, it said (p. 197):

"If it were conceded, . . . that the evidence shows that the existing rates are already insufficient to pay such returns upon the capital . . . as the law prescribes to be a reasonable return upon the capital invested, it would not necessarily follow that the rates would be confiscatory for the reason that the evidence also tends to show that the rates paid the carriers for the hauling of logs from the forest to the mill is only one step in the process of reducing the lumber in the forest tree to the finished product and delivering the same to the ultimate consumer. . . . The revenue derived from the shipment of logs . . . is only an incident to the traffic, and should not be considered as an independent rate, but the rate must be considered in connection with the entire revenue earned" by transporting the logs and the lumber.

The evidence introduced by the carriers was sufficient to warrant, if not to require, a finding that, as to the lines of all the petitioners, the intrastate log rates in question are very low in comparison with the rates on other commodities, and that, as to the Chicago, Milwaukee and Saint Paul and the Great Northern, they are confiscatory. But, as appears from their opinions, the respondent and the court refused to consider and give weight to that evidence because, as they held, the intrastate log rates were not to be dealt with separately but were to be considered in connection with the interstate lumber rates, and because the carriers made no showing as to the gains or losses resulting from the interstate transportation. That cannot be sustained. The carriers cannot maintain interstate lumber rates higher than otherwise justified by showing that they suffer loss or have inadequate returns from the intrastate transportation of logs. The State has no power to require petitioners to haul the logs at a

loss or without compensation that is reasonable and just, even if they receive adequate revenues from the intrastate log haul and the interstate lumber haul taken together. *Northern Pacific Ry.* v. *North Dakota,* 236 U. S. 585, 595-596; *Norfolk & Western Ry.* v. *Conley,* 236 U. S. 605, 609; *Brooks-Scanlon Co.* v. *Railroad Commission,* 251 U. S. 396, 399; *Northern Pacific* v. *Dept. Public Works,* 268 U. S. 39, 43; *Banton* v. *Belt Line Ry.,* 268 U. S. 413, 421.

This case is in principle the same as *Northern Pacific* v. *Dept. Public Works, supra.* That case involved the validity of an order of the Washington Department of Public Works reducing the intrastate log rates. The carriers assailed them as confiscatory, and introduced persuasive evidence that the rates existing before the reduction were not sufficient to pay operating expenses and taxes. The Department, without attacking the proof or attempting to show by reasonably specific and direct evidence what the actual operating costs were, lowered the rates on the basis of a composite figure representing the weighted average operating cost per thousand gross ton miles on all revenue freight carried on the railroad systems. We applied the rule (p. 44) that, where rates found by a regulatory body to be compensatory are attacked as being confiscatory, the courts may inquire into the method by which its conclusion was reached. Cf. *United States* v. *Abilene & Southern Ry.,* 265 U. S. 274, 288; *The Chicago Junction Case,* 264 U. S. 258, 263; *Interstate Commerce Commission* v. *Union Pacific R. R.,* 222 U. S. 541, 547. And we held that the method pursued by the Department was fundamentally erroneous and constituted a denial of due process of law.

As the findings of the Interstate Commerce Commission in 1922 do not expressly relate to intrastate rates, they are to be deemed to apply exclusively to interstate commerce. Moreover, it appears from its report that

the Commission did not consider, or intend to make any findings as to, the Idaho intrastate rates on logs. The respondent misinterpreted the effect of the rate advances made in 1918 and 1920. The orders making them did not affect the rights of the carriers or the duties of respondent in respect of subsequent rate reductions. The findings of the Interstate Commerce Commission permitting reductions of interstate rates did not justify respondent in declining to proceed to a hearing or in adopting such findings as the basis of its order. And, as no reduction of the corresponding interstate log rates has been made by petitioners or ordered by the Interstate Commerce Commission, the respondent's order destroys the relation between the intrastate and the interstate log rates in the same territory. It is impossible to sustain the refusal to consider the evidence introduced by the carriers to show that the rates in question are too low and confiscatory. The commission and the court erred in holding that the reasonableness or validity of the intrastate log rates depends on the amounts received by petitioners for the interstate transportation of lumber. It is clear that the methods by which respondent reached its conclusion were arbitrary and constitute a denial of due process of law.

Judgment reversed.

HESS *v.* PAWLOSKI.

ERROR TO THE SUPERIOR COURT OF WORCESTER COUNTY, MASSACHUSETTS.

No. 263. Argued April 18, 1927.—Decided May 16, 1927.

Massachusetts Gen. Ls., c. 90, as amended by Stat. 1923, c. 431, § 2, which declares that use of the State's highways by a non-resident motorist shall be deemed equivalent to an appointment by him of the registrar as his attorney upon whom process may be served

in any action growing out of any accident or collision in which the non-resident may be involved while operating a motor vehicle upon such highways, and which provides for service in such case by leaving a copy of the process and a fee with the registrar or in his office, but conditions the sufficiency of the service upon the sending of notice of it forthwith and a copy of the process to the defendant by registered mail and upon his actually receiving and receipting for the same, and which allows the non-resident when so served such continuances as may be necessary to afford him a reasonable opportunity to defend the action,—*held* not in conflict with the Due Process Clause of the Fourteenth Amendment. *Kane* v. *New Jersey,* 242 U. S. 160. P. 355.

250 Mass. 22; 253 Mass. 478, affirmed.

ERROR to a judgment of the Superior Court of Worcester County, Massachusetts, entered on rescript from the Supreme Judicial Court, sustaining a verdict for damages in an action for personal injuries inflicted on Pawloski, the plaintiff, by the negligent driving of a motor vehicle, by Hess, non-resident defendant, on a Massachusetts highway.

Mr. George Gowen Parry for plaintiff in error.

Mr. Harry John Meleski was on the brief for defendant in error.

MR. JUSTICE BUTLER delivered the opinion of the Court.

This action was brought by defendant in error to recover damages for personal injuries. The declaration alleged that plaintiff in error negligently and wantonly drove a motor vehicle on a public highway in Massachusetts and that by reason thereof the vehicle struck and injured defendant in error. Plaintiff in error is a resident of Pennsylvania. No personal service was made on him and no property belonging to him was attached. The service of process was made in compliance with c.

90, General Laws of Massachusetts, as amended by Stat. 1923, c. 431, § 2, the material parts of which follow:

"The acceptance by a non-resident of the rights and privileges conferred by section three or four, as evidenced by his operating a motor vehicle thereunder, or the operation by a non-resident of a motor vehicle on a public way in the commonwealth other than under said sections, shall be deemed equivalent to an appointment by such non-resident of the registrar or his successor in office, to be his true and lawful attorney upon whom may be served all lawful processes in any action or proceeding against him, growing out of any accident or collision in which said non-resident may be involved while operating a motor vehicle on such a way, and said acceptance or operation shall be a signification of his agreement that any such process against him which is so served shall be of the same legal force and validity as if served on him personally. Service of such process shall be made by leaving a copy of the process with a fee of two dollars in the hands of the registrar, or in his office, and such service shall be sufficient service upon the said non-resident; provided, that notice of such service and a copy of the process are forthwith sent by registered mail by the plaintiff to the defendant, and the defendant's return receipt and the plaintiff's affidavit of compliance herewith are appended to the writ and entered with the declaration. The court in which the action is pending may order such continuances as may be necessary to afford the defendant reasonable opportunity to defend the action."

Plaintiff in error appeared specially for the purpose of contesting jurisdiction and filed an answer in abatement and moved to dismiss on the ground that the service of process, if sustained, would deprive him of his property without due process of law in violation of the Fourteenth Amendment. The court overruled the answer in abatement and denied the motion. The Supreme Judicial

Court held the statute to be a valid exercise of the police power, and affirmed the order. 250 Mass. 22. At the trial the contention was renewed and again denied. Plaintiff in error excepted. The jury returned a verdict for defendant in error. The exceptions were overruled by the Supreme Judicial Court. 253 Mass. 478. Thereupon the Superior Court entered judgment. The writ of error was allowed by the chief justice of that court.

The question is whether the Massachusetts enactment contravenes the due process clause of the Fourteenth Amendment.

The process of a court of one State cannot run into another and summon a party there domiciled to respond to proceedings against him. Notice sent outside the State to a non-resident is unavailing to give jurisdiction in an action against him personally for money recovery. *Pennoyer* v. *Neff,* 95 U. S. 714. There must be actual service within the State of notice upon him or upon some one authorized to accept service for him. *Goldey* v. *Morning News,* 156 U. S. 518. A personal judgment rendered against a non-resident who has neither been served with process nor appeared in the suit is without validity. *McDonald* v. *Mabee,* 243 U. S. 90. The mere transaction of business in a State by non-resident natural persons does not imply consent to be bound by the process of its courts. *Flexner* v. *Farson,* 248 U. S. 289. The power of a State to exclude foreign corporations, although not absolute but qualified, is the ground on which such an implication is supported as to them. *Pennsylvania Fire Insurance Co.* v. *Gold Issue Mining Co.,* 243 U. S. 93, 96. But a State may not withhold from non-resident individuals the right of doing business therein. The privileges and immunities clause of the Constitution, § 2, Art. IV, safeguards to the citizens of one State the right "to pass through, or to reside in any other state for purposes of trade, agriculture, professional pursuits, or otherwise."

And it prohibits state legislation discriminating against citizens of other States, *Corfield* v. *Coryell,* 4 Wash. C. C. 371, 381; *Ward* v. *Maryland,* 12 Wall. 418, 430; *Paul* v. *Virginia,* 8 Wall. 168, 180.

Motor vehicles are dangerous machines; and, even when skillfully and carefully operated, their use is attended by serious dangers to persons and property. In the public interest the State may make and enforce regulations reasonably calculated to promote care on the part of all, residents and non-residents alike, who use its highways. The measure in question operates to require a non-resident to answer for his conduct in the State where arise causes of action alleged against him, as well as to provide for a claimant a convenient method by which he may sue to enforce his rights. Under the statute the implied consent is limited to proceedings growing out of accidents or collisions on a highway in which the non-resident may be involved. It is required that he shall actually receive and receipt for notice of the service and a copy of the process. And it contemplates such continuances as may be found necessary to give reasonable time and opportunity for defense. It makes no hostile discrimination against non-residents but tends to put them on the same footing as residents. Literal and precise equality in respect of this matter is not attainable; it is not required. *Canadian Northern Ry. Co.* v. *Eggen,* 252 U. S. 553, 561–562. The State's power to regulate the use of its highways extends to their use by non-residents as well as by residents. *Hendrick* v. *Maryland,* 235 U. S. 610, 622. And, in advance of the operation of a motor vehicle on its highway by a non-resident, the State may require him to appoint one of its officials as his agent on whom process may be served in proceedings growing out of such use. *Kane* v. *New Jersey,* 242 U. S. 160, 167. That case recognizes power of the State to exclude a non-resident until the formal appointment is made. And, having the power so to exclude, the State

may declare that the use of the highway by the non-resident is the equivalent of the appointment of the registrar as agent on whom process may be served. Cf. *Pennsylvania Fire Insurance Co.* v. *Gold Issue Mining Co., supra,* 96; *Lafayette Ins. Co.* v. *French,* 18 How. 404, 407–408. The difference between the formal and implied appointment is not substantial so far as concerns the application of the due process clause of the Fourteenth Amendment.

Judgment affirmed.

WHITNEY *v.* CALIFORNIA.

ERROR TO THE DISTRICT COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION ONE, OF THE STATE OF CALIFORNIA.

No. 3. Argued October 6, 1925; reargued March 18, 1926.—Decided May 16, 1927.

1. This Court acquires no jurisdiction to review the judgment of a state court of last resort on a writ of error, unless it affirmatively appears on the face of the record that a federal question constituting an appropriate ground for such review was presented in and expressly or necessarily decided by such state court. P. 360.
2. Where the fact that a federal question was considered and passed upon by the state court does not appear by the record, it may be shown by a certified copy of an order of that court made after the return of the writ of error and brought here as an addition to the record. P. 361.
3. In reviewing the judgment of a state court this Court will consider only such federal questions as are shown to have been presented to the state court and expressly or necessarily decided by it. P. 362.
4. The question whether the petitioner, who joined and assisted in the organization of a Communist Labor Party contravening the California Criminal Syndicalism Act, did so with knowledge of its unlawful character and purpose, was a mere question of the weight of the evidence, foreclosed by the verdict of guilty approved by the state court, and not a question of the constitutionality of the Act, reviewable by this Court. P. 366.
5. The California Criminal Syndicalism Act, which defines "criminal syndicalism" as "any doctrine or precept advocating, teaching

or aiding and abetting the commission of crime, sabotage (which word is hereby defined as meaning wilful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change," and declares guilty of a felony any person who "organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism," is sufficiently clear and explicit to satisfy the requirement of due process of law. P. 368.

6. The statute does not violate the Equal Protection Clause of the Fourteenth Amendment in penalizing those who advocate a resort to violent and unlawful methods as a means of changing industrial and political conditions while not penalizing those who may advocate a resort to such methods for maintaining such conditions, since the distinction is not arbitrary but within the discretionary power of the State to direct its legislation against what it deems an evil without covering the whole field of possible abuses. P. 369.
7. Such a statute is not open to objection unless the classification on which it is based is so lacking in any adequate or reasonable basis as to preclude the assumption that it was made in the exercise of the legislative judgment and discretion. P. 369.
8. This Act is not class legislation; it affects all alike, no matter what their business associations or callings, who come within its terms and do the things prohibited. P. 370.
9. Nor is it repugnant to the Due Process Clause as a restraint of the rights of free speech, assembly, and association. P. 371.
10. The determination of the legislature that the acts defined involve such danger to the public peace and security of the State that they should be penalized in the exercise of the police power must be given great weight and every presumption be indulged in favor of the validity of the statute, which could be declared unconstitutional only if an attempt to exercise arbitrarily and unreasonably the authority vested in the State in the public interest. P. 371.

57 Cal. App. 449; *ib.* 453, affirmed.

ERROR to a judgment of the District Court of Appeal of California which affirmed a conviction of the petitioner under the state act against criminal syndicalism. The Supreme Court of California denied a petition for appeal. On the first hearing in this Court the writ of error was

dismissed for want of jurisdiction, but later a petition for rehearing was granted. 269 U. S. 530, 538.

Mr. Walter H. Pollak, with whom *Messrs. John F. Neylan, Thomas L. Lennon, Walter Nelles,* and *Ruth I. Wilson* were on the brief, for plaintiff in error.

Mr. John H. Riordan, Deputy Attorney General of California, with whom *Mr. U. S. Webb,* Attorney General, was on the brief, for the State of California.

MR. JUSTICE SANFORD delivered the opinion of the Court.

By a criminal information filed in the Superior Court of Alameda County, California, the plaintiff in error was charged, in five counts, with violations of the Criminal Syndicalism Act of that State. Statutes, 1919, c. 188, p. 281. She was tried, convicted on the first count, and sentenced to imprisonment. The judgment was affirmed by the District Court of Appeal. 57 Cal. App. 449. Her petition to have the case heard by the Supreme Court [1] was denied. *Ib.* 453. And the case was brought here on a writ of error which was allowed by the Presiding Justice of the Court of Appeal, the highest court of the State in which a decision could be had. Jud. Code, § 237.

On the first hearing in this Court, the writ of error was dismissed for want of jurisdiction. 269 U. S. 530. Thereafter, a petition for rehearing was granted, *Ib.* 538; and the case was again heard and reargued both as to the jurisdiction and the merits.

The pertinent provisions of the Criminal Syndicalism Act are:

"Section 1. The term 'criminal syndicalism' as used in this act is hereby defined as any doctrine or precept advocating, teaching or aiding and abetting the commis-

[1] Statutes, 1919, c. 58, p. 88.

sion of crime, sabotage (which word is hereby defined as meaning wilful and malicious physical damage or injury to physical property), or unlawful acts of force and violence or unlawful methods of terrorism as a means of accomplishing a change in industrial ownership or control, or effecting any political change.

"Sec. 2. Any person who: . . . 4. Organizes or assists in organizing, or is or knowingly becomes a member of, any organization, society, group or assemblage of persons organized or assembled to advocate, teach or aid and abet criminal syndicalism . . .

"Is guilty of a felony and punishable by imprisonment."

The first count of the information, on which the conviction was had, charged that on or about November 28, 1919, in Alameda County, the defendant, in violation of the Criminal Syndicalism Act, "did then and there unlawfully, wilfully, wrongfully, deliberately and feloniously organize and assist in organizing, and was, is, and knowingly became a member of an organization, society, group and assemblage of persons organized and assembled to advocate, teach, aid and abet criminal syndicalism."

It has long been settled that this Court acquires no jurisdiction to review the judgment of a state court of last resort on a writ of error, unless it affirmatively appears on the face of the record that a federal question constituting an appropriate ground for such review was presented in and expressly or necessarily decided by such state court. *Crowell* v. *Randell,* 10 Pet. 368, 392; *Railroad Co.* v. *Rock,* 4 Wall, 177, 180; *California Powder Works* v. *Davis,* 151 U. S. 389, 393; *Cincinnati, etc. Railway* v. *Slade,* 216 U. S. 78, 83; *Hiawassee Power Co.* v. *Carolina-Tenn. Co.,* 252 U. S. 341, 343; *New York* v. *Kleinert,* 268 U. S. 646, 650.

Here the record does not show that the defendant raised or that the State courts considered or decided any

Federal question whatever, excepting as appears in an order made and entered by the Court of Appeal after it had decided the case and the writ of error had issued and been returned to this Court. A certified copy of that order, brought here as an addition to the record, shows that it was made and entered pursuant to a stipulation of the parties, approved by the court, and that it contains the following statement:

"The question whether the California Criminal Syndicalism Act . . . and its application in this case is repugnant to the provisions of the Fourteenth Amendment to the Constitution of the United States, providing that no state shall deprive any person of life, liberty, or property, without due process of law, and that all persons shall be accorded the equal protection of the laws, was considered and passed upon by this Court."

In *Cincinnati Packet Co.* v. *Bay,* 200 U. S. 179, 182, where it appeared that a federal question had been presented in a petition in error to the State Supreme Court in a case in which the judgment was affirmed without opinion, it was held that the certificate of that court to the effect that it had considered and necessarily decided this question, was sufficient to show its existence. And see *Marvin* v. *Trout,* 199 U. S. 212, 217, *et seq.; Consolidated Turnpike* v. *Norfolk, etc. Railway,* 228 U. S. 596, 599.

So—while the unusual course here taken to show that federal questions were raised and decided below is not to be commended—we shall give effect to the order of the Court of Appeal as would be done if the statement had been made in the opinion of that court when delivered. See *Gross* v. *United States Mortgage Co.,* 108 U. S. 477, 484–486; *Philadelphia Fire Association* v. *New York,* 119 U. S. 110, 116; *Home for Incurables* v. *City of New York,* 187 U. S. 155, 157; *Land & Water Co.* v. *San Jose Ranch Co.,* 189 U. S. 177, 179–180; *Rector* v. *City Deposit Bank,*

200 U. S. 405, 412; *Haire* v. *Rice,* 204 U. S. 291, 299; *Chambers* v. *Baltimore, etc. Railroad,* 207 U. S. 142, 148; *Atchison, etc. Railway* v. *Sowers,* 213 U. S. 55, 62; *Consolidated Turnpike Co.* v. *Norfolk, etc. Railway,* 228 U. S. 596, 599; *Miedreich* v. *Lauenstein,* 232 U. S. 236, 242; *North Carolina Railroad* v. *Zachary,* 232 U. S. 248, 257; *Chicago, etc. Railway* v. *Perry,* 259 U. S. 548, 551.

And here, since it appears from the statement in the order of the Court of Appeal that the question whether the Syndicalism Act and its application in this case was repugnant to the due process and equal protection clauses of the Fourteenth Amendment, was considered and passed upon by that court—this being a federal question constituting an appropriate ground for a review of the judgment—we conclude that this Court has acquired jurisdiction under the writ of error. The order dismissing the writ for want of jurisdiction will accordingly be set aside.

We proceed to the determination, upon the merits, of the constitutional question considered and passed upon by the Court of Appeal. Of course our review is to be confined to that question, since it does not appear, either from the order of the Court of Appeal or from the record otherwise, that any other federal question was presented in and either expressly or necessarily decided by that court. *National Bank* v. *Commonwealth,* 9 Wall. 353, 363; *Edwards* v. *Elliott,* 21 Wall. 532, 557; *Dewey* v. *Des Moines,* 173 U. S. 193, 200; *Keokuk & Hamilton Bridge Co.* v. *Illinois,* 175 U. S. 626, 633; *Capital City Dairy Co.* v. *Ohio,* 183 U. S. 238, 248; *Haire* v. *Rice,* 204 U. S. 291, 301; *Selover, Bates & Co.* v. *Walsh,* 226 U. S. 112, 126. *Missouri Pacific Railway* v. *Coal Co.,* 256 U. S. 134, 135. It is not enough that there may be somewhere hidden in the record a question which, if it had been raised, would have been of a federal nature. *Dewey* v. *Des Moines, supra,* 199; *Keokuk & Hamilton Bridge Co.* v. *Illinois, supra,* 634. And this necessarily excludes from our con-

sideration a question sought to be raised for the first time by the assignments of error here—not presented in or passed upon by the Court of Appeal—whether apart from the constitutionality of the Syndicalism Act, the judgment of the Superior Court, by reason of the rulings of that court on questions of pleading, evidence and the like, operated as a denial to the defendant of due process of law. *See Oxley Stave Co.* v. *Butler County,* 166 U. S. 648, 660; *Capital City Dairy Co.* v. *Ohio, supra,* 248; *Manhattan Life Ins. Co.* v. *Cohen,* 234 U. S. 123, 134; *Bass, etc. Ltd.* v. *Tax Commission,* 266 U. S. 271, 283.

The following facts, among many others, were established on the trial by undisputed evidence: The defendant, a resident of Oakland, in Alameda County, California, had been a member of the Local Oakland branch of the Socialist Party. This Local sent delegates to the national convention of the Socialist Party held in Chicago in 1919, which resulted in a split between the "radical" group and the old-wing Socialists. The "radicals"—to whom the Oakland delegates adhered—being ejected, went to another hall, and formed the Communist Labor Party of America. Its Constitution provided for the membership of persons subscribing to the principles of the Party and pledging themselves to be guided by its Platform, and for the formation of state organizations conforming to its Platform as the supreme declaration of the Party. In its "Platform and Program" the Party declared that it was in full harmony with "the revolutionary working class parties of all countries" and adhered to the principles of Communism laid down in the Manifesto of the Third International at Moscow, and that its purpose was "to create a unified revolutionary working class movement in America," organizing the workers as a class, in a revolutionary class struggle to conquer the capitalist state, for the overthrow of capitalist rule, the conquest of political power and the establishment

of a working class government, the Dictatorship of the Proletariat, in place of the state machinery of the capitalists, which should make and enforce the laws, reorganize society on the basis of Communism and bring about the Communist Commonwealth—advocated, as the most important means of capturing state power, the action of the masses, proceeding from the shops and factories, the use of the political machinery of the capitalist state being only secondary; the organization of the workers into "revolutionary industrial unions"; propaganda pointing out their revolutionary nature and possibilities; and great industrial battles showing the value of the strike as a political weapon—commended the propaganda and example of the Industrial Workers of the World and their struggles and sacrifices in the class war—pledged support and cooperation to "the revolutionary industrial proletariat of America" in their struggles against the capitalist class—cited the Seattle and Winnipeg strikes and the numerous strikes all over the country "proceeding without the authority of the old reactionary Trade Union officials," as manifestations of the new tendency—and recommended that strikes of national importance be supported and given a political character, and that propagandists and organizers be mobilized "who can not only teach, but actually help to put in practice the principles of revolutionary industrial unionism and Communism."

Shortly thereafter the Local Oakland withdrew from the Socialist Party, and sent accredited delegates, including the defendant, to a convention held in Oakland in November, 1919, for the purpose of organizing a California branch of the Communist Labor Party. The defendant, after taking out a temporary membership in the Communist Labor Party, attended this convention as a delegate and took an active part in its proceedings. She was elected a member of the Credentials Committee, and, as its chairman, made a report to the convention upon

which the delegates were seated. She was also appointed a member of the Resolutions Committee, and as such signed the following resolution in reference to political action, among others proposed by the Committee: "The C. L. P. of California fully recognizes the value of political action as a means of spreading communist propaganda; it insists that in proportion to the development of the economic strength of the working class, it, the working class, must also develop its political power. The C. L. P. of California proclaims and insists that the capture of political power, locally or nationally by the revolutionary working class can be of tremendous assistance to the workers in their struggle of emancipation. Therefore, we again urge the workers who are possessed of the right of franchise to cast their votes for the party which represents their immediate and final interest—the C. L. P.—at all elections, being fully convinced of the utter futility of obtaining any real measure of justice or freedom under officials elected by parties owned and controlled by the capitalist class." The minutes show that this resolution, with the others proposed by the committee, was read by its chairman to the convention before the Committee on the Constitution had submitted its report. According to the recollection of the defendant, however, she herself read this resolution. Thereafter, before the report of the Committee on the Constitution had been acted upon, the defendant was elected an alternate member of the State Executive Committee. The Constitution, as finally read, was then adopted. This provided that the organization should be named the Communist Labor Party of California; that it should be "affiliated with" the Communist Labor Party of America, and subscribe to its Program, Platform and Constitution, and "through this affiliation" be "joined with the Communist International of Moscow;" and that the qualifications for membership should be those prescribed in the

National Constitution. The proposed resolutions were later taken up and all adopted, except that on political action, which caused a lengthy debate, resulting in its defeat and the acceptance of the National Program in its place. After this action, the defendant, without, so far as appears, making any protest, remained in the convention until it adjourned. She later attended as an alternate member one or two meetings of the State Executive Committee in San José and San Francisco, and stated, on the trial, that she was then a member of the Communist Labor Party. She also testified that it was not her intention that the Communist Labor Party of California should be an instrument of terrorism or violence, and that it was not her purpose or that of the Convention to violate any known law.

In the light of this preliminary statement, we now take up, in so far as they require specific consideration, the various grounds upon which it is here contended that the Syndicalism Act and its application in this case is repugnant to the due process and equal protection clauses of the Fourteenth Amendment.

1. While it is not denied that the evidence warranted the jury in finding that the defendant became a member of and assisted in organizing the Communist Labor Party of California, and that this was organized to advocate, teach, aid or abet criminal syndicalism as defined by the Act, it is urged that the Act, as here construed and applied, deprived the defendant of her liberty without due process of law in that it has made her action in attending the Oakland convention unlawful by reason of "a subsequent event brought about against her will, by the agency of others," with no showing of a specific intent on her part to join in the forbidden purpose of the association, and merely because, by reason of a lack of "prophetic" understanding she failed to foresee the quality that others would give to the convention. The argu-

ment is, in effect, that the character of the state organization could not be forecast when she attended the convention; that she had no purpose of helping to create an instrument of terrorism and violence; that she "took part in formulating and presenting to the convention a resolution which, if adopted, would have committed the new organization to a legitimate policy of political reform by the use of the ballot"; that it was not until after the majority of the convention turned out to be "contrary-minded, and other less temperate policies prevailed" that the convention could have taken on the character of criminal syndicalism; and that as this was done over her protest, her mere presence in the convention, however violent the opinions expressed therein, could not thereby become a crime. This contention, while advanced in the form of a constitutional objection to the Act, is in effect nothing more than an effort to review the weight of the evidence for the purpose of showing that the defendant did not join and assist in organizing the Communist Labor Party of California with a knowledge of its unlawful character and purpose. This question, which is foreclosed by the verdict of the jury—sustained by the Court of Appeal over the specific objection that it was not supported by the evidence—is one of fact merely which is not open to review in this Court, involving as it does no constitutional question whatever. And we may add that the argument entirely disregards the facts: that the defendant had previously taken out a membership card in the National Party, that the resolution which she supported did not advocate the use of the ballot to the exclusion of violent and unlawful means of bringing about the desired changes in industrial and political conditions; and that, after the constitution of the California Party had been adopted, and this resolution had been voted down and the National Program accepted, she not only remained in the convention, without

protest, until its close, but subsequently manifested her acquiescence by attending as an alternate member of the State Executive Committee and continuing as a member of the Communist Labor Party.

2. It is clear that the Syndicalism Act is not repugnant to the due process clause by reason of vagueness and uncertainty of definition. It has no substantial resemblance to the statutes held void for uncertainty under the Fourteenth and Fifth Amendments in *International Harvester Co.* v. *Kentucky,* 234 U. S. 216, 221; and *United States* v. *Cohen Grocery,* 255 U. S. 81, 89, because not fixing an ascertainable standard of guilt. The language of § 2, subd. 4, of the Act, under which the plaintiff in error was convicted, is clear; the definition of "criminal syndicalism" specific.

The Act, plainly, meets the essential requirement of due process that a penal statute be "sufficiently explicit to inform those who are subject to it, what conduct on their part will render them liable to its penalties," and be couched in terms that are not "so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally* v. *General Construction Co.,* 269 U. S. 385, 391. And see *United States* v. *Brewer,* 139 U. S. 278, 288; *Chicago, etc., Railway* v. *Dey,* (C. C.) 35 Fed. 866, 876; *Tozer* v. *United States,* (C. C.) 52 Fed. 917, 919. In *Omaechevarria* v. *Idaho,* 246 U. S. 343, 348, in which it was held that a criminal statute prohibiting the grazing of sheep on any "range" previously occupied by cattle "in the usual and customary use" thereof, was not void for indefiniteness because it failed to provide for the ascertainment of the boundaries of a "range" or to determine the length of time necessary to constitute a prior occupation a "usual" one, this Court said: "Men familiar with range conditions and desirous of observing the law will have little difficulty

in determining what is prohibited by it. Similar expressions are common in the criminal statutes of other States. This statute presents no greater uncertainty or difficulty, in application to necessarily varying facts, than has been repeatedly sanctioned by this court. *Nash* v. *United States,* 229 U. S. 373, 377; *Miller* v. *Strahl,* 239 U. S. 426, 434." So, as applied here, the Syndicalism Act required of the defendant no "prophetic" understanding of its meaning.

And similar Criminal Syndicalism statutes of other States, some less specific in their definitions, have been held by the State courts not to be void for indefiniteness. *State* v. *Hennessy,* 114 Wash. 351, 364; *State* v. *Laundy,* 103 Ore. 443, 460; *People* v. *Ruthenberg,* 229 Mich. 315, 325. And see *Fox* v. *Washington,* 236 U. S. 273, 277; *People* v. *Steelik,* 187 Cal. 361, 372; *People* v. *Lloyd,* 304 Ill. 23, 34.

3. Neither is the Syndicalism Act repugnant to the equal protection clause, on the ground that, as its penalties are confined to those who advocate a resort to violent and unlawful methods as a means of changing industrial and political conditions, it arbitrarily discriminates between such persons and those who may advocate a resort to these methods as a means of maintaining such conditions.

It is settled by repeated decisions of this Court that the equal protection clause does not take from a State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary; and that one who assails the classification must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. *Lindsley* v. *National Carbonic Gas Co.,* 220 U. S. 61, 78, and cases cited.

A statute does not violate the equal protection clause merely because it is not all-embracing. *Zucht* v. *King,* 260 U. S. 174, 177; *James-Dickinson Farm Mortgage Co.* v. *Harry,* 273 U. S. 119. A State may properly direct its legislation against what it deems an existing evil without covering the whole field of possible abuses. *Patsone* v. *Pennsylvania,* 232 U. S. 138, 144; *Farmers Bank* v. *Federal Reserve Bank,* 262 U. S. 649, 661; *James-Dickinson Mortgage Co.* v. *Harry, supra.* The statute must be presumed to be aimed at an evil where experience shows it to be most felt, and to be deemed by the legislature coextensive with the practical need; and is not to be overthrown merely because other instances may be suggested to which also it might have been applied; that being a matter for the legislature to determine unless the case is very clear. *Keokee Coke Co.* v. *Taylor,* 234 U. S. 224, 227. And it is not open to objection unless the classification is so lacking in any adequate or reasonable basis as to preclude the assumption that it was made in the exercise of the legislative judgment and discretion. *Stebbins* v. *Riley,* 268 U. S. 137, 143; *Graves* v. *Minnesota,* 272 U. S. 425; *Swiss Oil Corporation* v. *Shanks,* 273 U. S. 407.

The Syndicalism Act is not class legislation; it affects all alike, no matter what their business associations or callings, who come within its terms and do the things prohibited. See *State* v. *Hennessy, supra,* 361; *State* v. *Laundy, supra,* 460. And there is no substantial basis for the contention that the legislature has arbitrarily or unreasonably limited its application to those advocating the use of violent and unlawful methods to effect changes in industrial and political conditions; there being nothing indicating any ground to apprehend that those desiring to maintain existing industrial and political conditions did or would advocate such methods. That there is a wide-spread conviction of the necessity for legislation of

this character is indicated by the adoption of similar statutes in several other States.

4. Nor is the Syndicalism Act as applied in this case repugnant to the due process clause as a restraint of the rights of free speech, assembly, and association.

That the freedom of speech which is secured by the Constitution does not confer an absolute right to speak, without responsibility, whatever one may choose, or an unrestricted and unbridled license giving immunity for every possible use of language and preventing the punishment of those who abuse this freedom; and that a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to incite to crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow by unlawful means, is not open to question. *Gitlow* v. *New York,* 268 U. S. 652, 666-668, and cases cited.

By enacting the provisions of the Syndicalism Act the State has declared, through its legislative body, that to knowingly be or become a member of or assist in organizing an association to advocate, teach or aid and abet the commission of crimes or unlawful acts of force, violence or terrorism as a means of accomplishing industrial or political changes, involves such danger to the public peace and the security of the State, that these acts should be penalized in the exercise of its police power. That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute, *Mugler* v. *Kansas,* 123 U. S. 623, 661; and it may not be declared unconstitutional unless it is an arbitrary or unreasonable attempt to exercise the authority vested in the State in the public interest. *Great Northern Railway* v. *Clara City,* 246 U. S. 434, 439.

The essence of the offense denounced by the Act is the combining with others in an association for the ac-

complishment of the desired ends through the advocacy and use of criminal and unlawful methods. It partakes of the nature of a criminal conspiracy. See *People* v. *Steelik, supra,* 376. That such united and joint action involves even greater danger to the public peace and security than the isolated utterances and acts of individuals, is clear. We cannot hold that, as here applied, the Act is an unreasonable or arbitrary exercise of the police power of the State, unwarrantably infringing any right of free speech, assembly or association, or that those persons are protected from punishment by the due process clause who abuse such rights by joining and furthering an organization thus menacing the peace and welfare of the State.

We find no repugnancy in the Syndicalism Act as applied in this case to either the due process or equal protection clauses of the Fourteenth Amendment on any of the grounds upon which its validity has been here challenged.

The order dismissing the writ of error will be vacated and set aside, and the judgment of the Court of Appeal *Affirmed.*

MR. JUSTICE BRANDEIS, concurring.

Miss Whitney was convicted of the felony of assisting in organizing, in the year 1919, the Communist Labor Party of California, of being a member of it, and of assembling with it. These acts are held to constitute a crime, because the party was formed to teach criminal syndicalism. The statute which made these acts a crime restricted the right of free speech and of assembly theretofore existing. The claim is that the statute, as applied, denied to Miss Whitney the liberty guaranteed by the Fourteenth Amendment.

The felony which the statute created is a crime very unlike the old felony of conspiracy or the old misdemeanor

of unlawful assembly. The mere act of assisting in forming a society for teaching syndicalism, of becoming a member of it, or of assembling with others for that purpose is given the dynamic quality of crime. There is guilt although the society may not contemplate immediate promulgation of the doctrine. Thus the accused is to be punished, not for contempt, incitement or conspiracy, but for a step in preparation, which, if it threatens the public order at all, does so only remotely. The novelty in the prohibition introduced is that the statute aims, not at the practice of criminal syndicalism, nor even directly at the preaching of it, but at association with those who propose to preach it.

Despite arguments to the contrary which had seemed to me persuasive, it is settled that the due process clause of the Fourteenth Amendment applies to matters of substantive law as well as to matters of procedure. Thus all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States. The right of free speech, the right to teach and the right of assembly are, of course, fundamental rights. See *Meyer* v. *Nebraska,* 262 U. S. 390; *Pierce* v. *Society of Sisters,* 268 U. S. 510; *Gitlow* v. *New York,* 268 U. S. 652, 666; *Farrington* v. *Tokushige,* 273 U. S. 284. These may not be denied or abridged. But, although the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the State from destruction or from serious injury, political, economic or moral. That the necessity which is essential to a valid restriction does not exist unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the State constitutionally may seek to prevent has been settled. See *Schenck* v. *United States,* 249 U. S. 47, 52.

It is said to be the function of the legislature to determine whether at a particular time and under the particular circumstances the formation of, or assembly with, a society organized to advocate criminal syndicalism constitutes a clear and present danger of substantive evil; and that by enacting the law here in question the legislature of California determined that question in the affirmative. Compare *Gitlow* v. *New York,* 268 U. S. 652, 668–671. The legislature must obviously decide, in the first instance, whether a danger exists which calls for a particular protective measure. But where a statute is valid only in case certain conditions exist, the enactment of the statute cannot alone establish the facts which are essential to its validity. Prohibitory legislation has repeatedly been held invalid, because unnecessary, where the denial of liberty involved was that of engaging in a particular business.[1] The power of the courts to strike down an offending law is no less when the interests involved are not property rights, but the fundamental personal rights of free speech and assembly.

This Court has not yet fixed the standard by which to determine when a danger shall be deemed clear; how remote the danger may be and yet be deemed present; and what degree of evil shall be deemed sufficiently substantial to justify resort to abridgement of free speech and assembly as the means of protection. To reach sound conclusions on these matters, we must bear in mind why a State is, ordinarily, denied the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence.

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[1]Compare *Frost* v. *R. R. Comm. of California,* 271 U. S. 583; *Weaver* v. *Palmer Bros. Co.,* 270 U. S. 402; *Jay Burns Baking Co.* v. *Bryan,* 264 U. S. 504; *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393; *Adams* v. *Tanner,* 244 U. S. 590.

Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.[2] They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence

[2] Compare Thomas Jefferson: "We have nothing to fear from the demoralizing reasonings of some, if others are left free to demonstrate their errors and especially when the law stands ready to punish the first criminal act produced by the false reasonings; these are safer corrections than the conscience of the judge." Quoted by Charles A. Beard, The Nation, July 7, 1926, vol. 123, p. 8. Also in first Inaugural Address: "If there be any among us who would wish to dissolve this union or change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it."

coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. Every denunciation of existing law tends in some measure to increase the probability that there will be violation of it.[3] Condonation of a breach enhances the probability. Expressions of approval add to the probability. Propagation of the criminal state of mind by teaching syndicalism increases it. Advocacy of law-breaking heightens it still further. But even advocacy of violation, however reprehensible morally, is not a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on. The wide difference between advocacy and incitement, between preparation and attempt, between assembling and conspiracy, must be borne in mind. In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated.

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[3] Compare Judge Learned Hand in *Masses Publishing Co.* v. *Patten*, 244 Fed. 535, 540; Judge Amidon in *United States* v. *Fontana*, Bull. Dept. of Justice No. 148, pp. 4–5; Chafee, "Freedom of Speech," pp. 46–56, 174.

Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom.[4] Such, in my opinion, is the command of the Constitution. It is therefore always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it.

Moreover, even imminent danger cannot justify resort to prohibition of these functions essential to effective democracy, unless the evil apprehended is relatively serious. Prohibition of free speech and assembly is a measure so stringent that it would be inappropriate as the means for averting a relatively trivial harm to society. A police measure may be unconstitutional merely because the remedy, although effective as means of protection, is unduly harsh or oppressive. Thus, a State might, in the exercise of its police power, make any trespass upon the

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[4] Compare Z. Chafee, Jr., "Freedom of Speech", pp. 24–39, 207–221, 228, 262–265; H. J. Laski, "Grammar of Politics", pp. 120, 121; Lord Justice Scrutton in *Rex* v. *Secretary of Home Affairs, Ex parte O'Brien*, [1923] 2 K. B. 361, 382: "You really believe in freedom of speech, if you are willing to allow it to men whose opinions seem to you wrong and even dangerous; . . ." Compare Warren, "The New Liberty Under the Fourteenth Amendment," 39 Harvard Law Review, 431, 461.

land of another a crime, regardless of the results or of the intent or purpose of the trespasser. It might, also, punish an attempt, a conspiracy, or an incitement to commit the trespass. But it is hardly conceivable that this Court would hold constitutional a statute which punished as a felony the mere voluntary assembly with a society formed to teach that pedestrians had the moral right to cross unenclosed, unposted, waste lands and to advocate their doing so, even if there was imminent danger that advocacy would lead to a trespass. The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the State. Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech and assembly.

The California Syndicalism Act recites in § 4:

"Inasmuch as this act concerns and is necessary to the immediate preservation of the public peace and safety, for the reason that at the present time large numbers of persons are going from place to place in this state advocating, teaching and practicing criminal syndicalism, this act shall take effect upon approval by the Governor."

This legislative declaration satisfies the requirement of the constitution of the State concerning emergency legislation. *In re McDermott,* 180 Cal. 783. But it does not preclude enquiry into the question whether, at the time and under the circumstances, the conditions existed which are essential to validity under the Federal Constitution. As a statute, even if not void on its face, may be challenged because invalid as applied, *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282, the result of such an enquiry may depend upon the specific facts of the particular case. Whenever the fundamental rights of free speech and assembly are alleged to have been in-

vaded, it must remain open to a defendant to present the issue whether there actually did exist at the time a clear danger; whether the danger, if any, was imminent; and whether the evil apprehended was one so substantial as to justify the stringent restriction interposed by the legislature. The legislative declaration, like the fact that the statute was passed and was sustained by the highest court of the State, creates merely a rebuttable presumption that these conditions have been satisfied.

Whether in 1919, when Miss Whitney did the things complained of, there was in California such clear and present danger of serious evil, might have been made the important issue in the case. She might have required that the issue be determined either by the court or the jury. She claimed below that the statute as applied to her violated the Federal Constitution; but she did not claim that it was void because there was no clear and present danger of serious evil, nor did she request that the existence of these conditions of a valid measure thus restricting the rights of free speech and assembly be passed upon by the court or a jury. On the other hand, there was evidence on which the court or jury might have found that such danger existed. I am unable to assent to the suggestion in the opinion of the Court that assembling with a political party, formed to advocate the desirability of a proletarian revolution by mass action at some date necessarily far in the future, is not a right within the protection of the Fourteenth Amendment. In the present case, however, there was other testimony which tended to establish the existence of a conspiracy, on the part of members of the International Workers of the World, to commit present serious crimes; and likewise to show that such a conspiracy would be furthered by the activity of the society of which Miss Whitney was a member. Under these circumstances the judgment of the state court cannot be disturbed.

Our power of review in this case is limited not only to the question whether a right guaranteed by the Federal Constitution was denied, *Murdock* v. *City of Memphis,* 20 Wall. 590; *Haire* v. *Rice,* 204 U. S. 291, 301; but to the particular claims duly made below, and denied. *Seaboard Air Line Ry.* v. *Duvall,* 225 U. S. 477, 485–488. We lack here the power occasionally exercised on review of judgments of lower federal courts to correct in criminal cases vital errors, although the objection was not taken in the trial court. *Wiborg* v. *United States,* 163 U. S. 632, 658-660; *Clyatt* v. *United States,* 197 U. S. 207, 221-222. This is a writ of error to a state court. Because we may not enquire into the errors now alleged, I concur in affirming the judgment of the state court.

MR. JUSTICE HOLMES joins in this opinion.

FISKE *v.* KANSAS.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 48. Argued May 3, 1926.—Decided May 16, 1927.

1. A decision of a state court applying and enforcing a state statute of general scope against a particular transaction as to which there was a distinct and timely insistence that, if so applied, the statute was void under the Federal Constitution, necessarily affirms the validity of the statute as so applied, and the judgment is, therefore, reviewable by writ of error under § 237 of the Judicial Code. P. 385.
2. The inquiry then is whether the statute is constitutional as applied and enforced in respect of the situation presented. P. 385.
3. This Court will review the finding of facts by a state court where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a federal right, and a finding of fact, are so intermingled as to make it necessary, in order to pass upon the federal question, to analyze the facts. P. 385.
4. A Kansas statute defining "criminal syndicalism" as "the doctrine which advocates crime, physical violence, arson, destruction of property, sabotage, or other unlawful acts or methods, as a means of accomplishing or effecting industrial or political ends, or as a

means of effecting industrial or political revolution, or for profit . . ." and punishing any person who "advocates, affirmatively suggests or teaches the duty, necessity, propriety or expediency of crime, criminal syndicalism, or sabotage," was applied by the state court as covering a case where it was charged and proved merely that the defendant secured members in an organization whose constitution proclaimed: "That the working class and the employing class have nothing in common, and that there can be no peace so long as hunger and want are found among millions of working people and the few who make up the employing class have all the good things of life. Between these two classes a struggle must go on until the workers of the world organize as a class, take possession of the earth and the machinery of production and abolish the wage system. Instead of the conservative motto, 'A fair day's wages for a fair day's work,' we must inscribe on our banner the revolutionary watchword, 'Abolition of the wage system.' By organizing industrially we are forming the structure of the new society within the shell of the old." *Held*, that there being no charge or evidence that the organization advocated any crime, violence, or other unlawful acts or methods as a means of effecting industrial or political changes or revolution, thus applied the statute is a violation of the Due Process Clause of the Fourteenth Amendment. P. 386. 117 Kan. 69, reversed.

ERROR to a judgment of the Supreme Court of Kansas which affirmed a conviction of Fiske under the Kansas Criminal Syndicalism Act.

Mr. A. M. Harvey, with whom *Messrs. Randal C. Harvey* and *Charles L. Carroll* were on the brief, for plaintiff in error.

Mr. Charles B. Griffith, Attorney General of Kansas, with whom *Mr. Roland Boynton*, Assistant Attorney General, were on the brief, for defendant in error.

MR. JUSTICE SANFORD delivered the opinion of the Court.

The plaintiff in error was tried and convicted in the District Court of Rice County, Kansas, upon an information charging him with violating the Criminal Syndicalism Act of that State. Laws, Spec. Sess. 1920, c. 37. The judgment was affirmed by the Supreme Court of the

State, 117 Kan. 69; and this writ of error was allowed by the Chief Justice of that court.

The only substantial federal question presented to and decided by the state court, and which may therefore be re-examined by this Court, is whether the Syndicalism Act as applied in this case is repugnant to the due process clause of the Fourteenth Amendment.

The relevant provisions of the Act are:

"Section 1. 'Criminal Syndicalism' is hereby defined to be the doctrine which advocates crime, physical violence, arson, destruction of property, sabotage, or other unlawful acts or methods, as a means of accomplishing or effecting industrial or political ends, or as a means of effecting industrial or political revolution, or for profit. . . . Sec. 3. Any person who, by word of mouth, or writing, advocates, affirmatively suggests or teaches the duty, necessity, propriety or expediency of crime, criminal syndicalism, or sabotage . . . is guilty of a felony. . . ."

The information charged that the defendant did "by word of mouth and by publicly displaying and circulating certain books and pamphlets and written and printed matter, advocate, affirmatively suggest and teach the duty, necessity, propriety and expediency of crime, criminal syndicalism, and sabotage by . . . knowingly and feloniously persuading, inducing and securing" certain persons "to sign an application for membership in . . . and by issuing to" them "membership cards" in a certain Workers' Industrial Union, "a branch of and component part of the Industrial Workers of the World organization, said defendant then and there knowing that said organization unlawfully teaches, advocates and affirmatively suggests: 'That the working class and the employing class have nothing in common, and that there can be no peace so long as hunger and want are found among millions of working people and the few who make up the employing class have all the good things

of life.' And that, 'Between these two classes a struggle must go on until the workers of the World organize as a class, take possession of the earth, and the machinery of production and abolish the wage system.' And that: 'Instead of the conservative motto, "A fair day's wages for a fair day's work," we must inscribe on our banner the revolutionary watchword, "Abolition of the wage system." By organizing industrially we are forming the structure of the new society within the shell of the old.' "

The defendant moved to quash the information as insufficient, for the reason, among others, that it failed to specify the character of the organization in which he was alleged to have secured members. This was overruled.

On the trial the State offered no evidence as to the doctrines advocated, suggested or taught by the Industrial Workers of the World organization other than a copy of the preamble to the constitution of that organization containing the language set forth and quoted in the information. The defendant, who testified in his own behalf, stated that he was a member of that organization and understood what it taught; that while it taught the matters set forth in this preamble it did not teach or suggest that it would obtain industrial control in any criminal way or unlawful manner, but in a peaceful manner; that he did not believe in criminal syndicalism or sabotage, and had not at any time advocated, suggested or taught the duty, necessity, propriety and expediency of crime, criminal syndicalism or sabotage, and did not know that they were advocated, taught or suggested by the organization; and that in taking the applications for membership in the organization, which contained the preamble to the constitution, he had explained the principles of the organization so far as he knew them by letting the applicants read this preamble.

The jury was instructed that before the defendant could be convicted they must be satisfied from the evidence, beyond a reasonable doubt, that the Industrial Workers

of the World was an organization that taught criminal syndicalism as defined by the Syndicalism Act.

The defendant moved in arrest of judgment upon the ground, among others, that the evidence and the facts stated did not constitute a public offense and substantiate the charges alleged in the information. And he also moved for a new trial upon the grounds, among others, that the verdict was contrary to the law and the evidence and wholly unsupported by the evidence. Both of these motions were overruled.

On the appeal to the Supreme Court of the State, among the errors assigned were, generally, that the court erred in overruling his motions to quash the information, his demurrer to the evidence—which does not appear in the record—, and his motions in arrest of judgment and for a new trial; and specifically, that the "court erred in refusing to quash the information, in overruling the demurrer to the evidence, and in overruling the motion in arrest of judgment, because the information and the cause of action attempted to be proved were based upon" the Kansas Syndicalism Act, "which, insofar as it sustains this prosecution is in violation . . . of the Constitution of the United States and especially of the Fourteenth Amendment" including the due process clause thereof.

The Supreme Court of the State, in its opinion, said: The information "does not in set phrase allege that the association known as the Industrial Workers of the World advocates, affirmatively suggests or teaches criminal syndicalism, but when read as a whole it clearly signifies this, and also that the language quoted (which the evidence shows to be taken from the preamble of the constitution of that organization) was employed to express that doctrine. . . . The language quoted from the I. W. W. preamble need not—in order to sustain the judgment—be held, necessarily and as a matter of law, to advocate,

teach or even affirmatively suggest physical violence as a means of accomplishing industrial or political ends. It is open to that interpretation and is capable of use to convey that meaning. . . . The jury were not required to accept the defendant's testimony as a candid and accurate statement. There was room for them to find, as their verdict shows they did, that the equivocal language of the preamble and of the defendant in explaining it to his prospects was employed to convey and did convey the sinister meaning attributed to it by the state.

"7. A final contention is that the statute . . . is obnoxious to the due-process-of-law clause of the fourteenth amendment to the federal constitution. Statutes penalizing the advocacy of violence in bringing about governmental changes do not violate constitutional guarantees of freedom of speech."

A decision of a state court applying and enforcing a state statute of general scope against a particular transaction as to which there was a distinct and timely insistence that, if so applied, the statute was void under the Federal Constitution, necessarily affirms the validity of the statute as so applied, and the judgment is, therefore, reviewable by writ of error under § 237 of the Judicial Code. *Dahnke-Walker Co.* v. *Bondurant,* 257 U. S. 282, 288. The inquiry then is whether the statute is constitutional as applied and enforced in respect of the situation presented. *Ward & Gow* v. *Krinsky,* 259 U. S. 503, 510; *Cudahy Co.* v. *Parramore,* 263 U. S. 418, 422. And see *St. Louis, &c., Railway* v. *Wayne,* 224 U. S. 354, 359.

And this Court will review the finding of facts by a State court where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal

question, to analyze the facts. *Northern Pacific Railway* v. *North Dakota,* 236 U. S. 585, 593; *Aetna Life Ins. Co.* v. *Dunken,* 266 U. S. 389, 394; and cases cited.

Here the state court held the Syndicalism Act not to be repugnant to the due process clause as applied in a case in which the information in effect charged the defendant with violation of the Act in that he had secured members in an organization which taught, advocated and affirmatively suggested the doctrines set forth in the extracts from the preamble to its constitution, and in which there was no evidence that the organization, taught, advocated or suggested any other doctrines. No substantial inference can, in our judgment, be drawn from the language of this preamble, that the organization taught, advocated or suggested the duty, necessity, propriety, or expediency of crime, criminal syndicalism, sabotage, or other unlawful acts or methods. There is no suggestion in the preamble that the industrial organization of workers as a class for the purpose of getting possession of the machinery of production and abolishing the wage system, was to be accomplished by any other than lawful methods; nothing advocating the overthrow of the existing industrial or political conditions by force, violence or unlawful means. And standing alone, as it did in this case, there was nothing which warranted the court or jury in ascribing to this language, either as an inference of law or fact, "the sinister meaning attributed to it by the state." In this respect the language of the preamble is essentially different from that of the manifesto involved in *Gitlow* v. *New York,* 268 U. S. 652, 665, and lacks the essential elements which brought that document under the condemnation of the law. And it is not as if the preamble were shown to have been followed by further statements or declarations indicating that it was intended to mean, and to be understood as advocating, that the ends outlined therein would be accomplished or brought about

by violence or other related unlawful acts or methods. Compare *Whitney* v. *California* and *Burns* v. *United States, ante,* pp. 357, 328.

The result is that the Syndicalism Act has been applied in this case to sustain the conviction of the defendant, without any charge or evidence that the organization in which he secured members advocated any crime, violence or other unlawful acts or methods as a means of effecting industrial or political changes or revolution. Thus applied the Act is an arbitrary and unreasonable exercise of the police power of the State, unwarrantably infringing the liberty of the defendant in violation of the due process clause of the Fourteenth Amendment. The judgment is accordingly reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

Reversed.

FORT SMITH LIGHT AND TRACTION COMPANY *v.* BOARD OF IMPROVEMENT OF PAVING DISTRICT NO. 16 OF THE CITY OF FORT SMITH.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

No. 269. Submitted March 17, 1927.—Decided May 16, 1927.

1. Under the power reserved by the Arkansas Constitution to alter any corporate charter, the legislature may require a street railway which has surrendered its franchise for an indeterminate permit, to pave the streets between its rails. P. 389.
2. Such exercise of a reserved power to amend corporate charters by a requirement which might have been in the original charter and has some reasonable relation to the object of the grant and the duty of the State to maintain the highway is consistent with the Due Process Clause of the Fourteenth Amendment. P. 390.
3. The imposition of burdens, otherwise legitimate, upon a public service company cannot be held invalid as confiscatory because it is operating at rates which do not allow an adequate return. P. 390.

4. A state law requiring the street railway in a particular municipality to do paving not required of other street railways elsewhere in the State not shown to be similar to it with respect to the location, use and physical character of the streets occupied by them, is not a denial of the equal protection of the laws. P. 391.
5. The Fourteenth Amendment does not require the uniform application of legislation to objects that are different, where those differences may be made the rational basis of legislative discrimination. P. 391.

169 Ark. 690, affirmed.

ERROR to a judgment of the Supreme Court of Arkansas which affirmed a judgment recovered by the Improvement Paving District in its action against the Traction Company. The judgment was for the amount expended by the plaintiff for street paving which defendant had declined to perform though required by statute.

Messrs. Joseph M. Hill, Henry L. Fitzhugh, and *R. M. Campbell* for plaintiff in error.

Messrs. John P. Woods and *Harry P. Daily* for defendant in error.

MR. JUSTICE STONE delivered the opinion of the Court.

Defendant in error, a board of improvement incorporated by the State of Arkansas, brought suit in the Circuit Court of Sebastian County, to recover the cost of paving a part of certain streets in Fort Smith, Arkansas, occupied by the street railway of plaintiff in error. Plaintiff in error originally operated its railway under a franchise requiring it to do similar paving and limiting it to a maximum fare of five cents per passenger. Availing of the permission granted by No. 571 of the Acts of Arkansas, 1919, amended by No. 124 of 1921, the company had surrendered in that year its franchise for an indeterminate permit to operate its road. The permit did not fix a maximum fare or require the railway to pave

parts of the streets occupied by its tracks, but subjected it to the regulatory powers of a utilities commission.

In 1923 the legislature passed a statute, Acts of Arkansas, 1923, No. 680, requiring plaintiff in error under certain conditions which have occurred, to pave the streets between its rails to the end of the ties. In the event of its failure to do so, the improvement district was authorized to do the paving at the expense of the railway. The act is in form a general statute, but by reason of provisions making it applicable to street railways operating under indeterminate permits in cities of the first class other than in Miller County, it in fact applied to plaintiff in error alone.

Plaintiff in error having failed to do the required paving, the board completed the improvement and brought the present suit. The company by answer set up that the statutory requirements of paving impaired the obligation of its contract with the state, in violation of Art. I, § 10 of the Federal Constitution, and deprived it of property without due process of law and denied the equal protection of the laws guaranteed by the Fourteenth Amendment. The judgment of the circuit court for defendant in error was affirmed by the Supreme Court of the state. 169 Ark. 690. The case is here on writ of error. Jud. Code, § 237, as amended.

It is urged that the acceptance of the indeterminate permit under the Act of 1919 constituted a contract between the railway and the state by which the state bound itself not to impose any added burdens except in the exercise of its police power; that the requirement for street paving was not an exercise of the police power and was therefore a forbidden impairment of the contract. This contention assumes that the permit exempted the railway from paving costs. But no such exemption appears in the permit. Provisions of this character are not lightly to be read into a contract between a state and a

public utility. *Public Service Co.* v. *Durham,* 261 U. S. 149, 152. Even granting the assumption, the case of *Fair Haven R. R.* v. *New Haven,* 203 U. S. 379, is a complete answer. There this Court held that a general law imposing on a street railway the duty to repair so much of the streets as was occupied by its tracks was an exercise of the power reserved to the state to alter, amend or repeal the original charter and was not an impairment of the obligation of contract. That case controls here since § 6, Art. XII of the Constitution of Arkansas, in force at the time when plaintiff relinquished its franchise and accepted the permit, reserved to the legislature the power to alter any corporate charter. See also *Sioux City Street Ry.* v. *Sioux City,* 138 U. S. 98.

Assuming the exercise of the power of amendment is subject to the limitation of the due process clause of the Fourteenth Amendment, *Shields* v. *Ohio,* 95 U. S. 319, 324; *Stanislaus County* v. *San Joaquin Co.,* 192 U. S. 201, 213, that limitation, as was held in *Fair Haven R. R.* v. *New Haven, supra,* is not transcended by a requirement which might have been included in the original charter and which has some reasonable relation to the object of the grant and to the duty of the state to maintain its highways. Cf. *Southern Wisconsin Ry.* v. *Madison,* 240 U. S. 457; *Great Northern Ry.* v. *Clara City,* 246 U. S. 434.

It is said that the act in its application is confiscatory because plaintiff in error must bear this expense although it is losing money in the operation of its road at the rates for service now prevailing. But the imposition of burdens, otherwise legitimate, upon a public service company cannot be held invalid as confiscatory because the permitted rate does not allow an adequate return. *Woodhaven Gas Light Co.* v. *Public Service Commission,* 269 U. S. 244; *Milwaukee Elec. Ry.* v. *Milwaukee,* 252 U. S.

100, 105. Whether the rate is confiscatory is not before us.

It is also contended that as there are other street railways in the state, some operating under franchises and one under an indeterminate permit, which are not required to do street paving, the challenged act denies the equal protection of the laws. The Fourteenth Amendment does not prohibit legislation merely because it is special, or limited in its application to a particular geographical or political subdivision of the state. See *Missouri* v. *Lewis,* 101 U. S. 22, 31; *Missouri Ry.* v. *Mackey,* 127 U. S. 205, 209; *Mason* v. *Missouri,* 179 U. S. 328; *Mallett* v. *North Carolina,* 181 U. S. 589; *Hayes* v. *Missouri,* 120 U. S. 68; cf. *Walston* v. *Nevin,* 128 U. S. 578; *Williams* v. *Eggleston,* 170 U. S. 304; *Condon* v. *Maloney,* 108 Tenn. 82; *Owen* v. *Sioux City,* 91 Ia. 190; *Strange* v. *Board,* 173 Ind. 640; *Tenement House Dept.* v. *Moeschen,* 179 N. Y. 325; *People ex rel. Armstrong* v. *Warden,* 183 N. Y. 223; *State ex rel. Wixon* v. *Cleveland,* 164 Wis. 189; *Davis* v. *State,* 68 Ala. 58; but cf. *State ex rel. Johnson* v. *Chicago, Burlington & Quincy R. R.,* 195 Mo. 228. If a state may delegate to a municipality power to require paving by a street railway located within its limits, *Public Service Co.* v. *Durham, supra,* we perceive no reason why it may not, by a legislative act, make a like requirement limited to a single municipality.

Nor need we cite authority for the proposition that the Fourteenth Amendment does not require the uniform application of legislation to objects that are different, where those differences may be made the rational basis of legislative discrimination. There is nothing in the record now before us to show that there is any similarity of plaintiff's road to others in the state with respect to many considerations which might reasonably determine which roads should be required to do street paving. Differences

in location, use and physical character of the streets, the extent to which paving has been completed and local methods of assessing benefits for street paving, are some of the considerations which might reasonably move the legislature to require street paving of one road or several and not of others. Cf. *Metropolitan Street Ry.* v. *New York,* 199 U. S. 1, 46, 47; *N. Y., N. H. & H. R. R.* v. *New York,* 165 U. S. 628; *Erb* v. *Morasch,* 177 U. S. 584, 586; *Savannah, Thunderbolt Ry.* v. *Savannah,* 198 U. S. 392. We may not assume in the absence of proof that such differences do not exist. *Erb* v. *Morasch, supra; Middleton* v. *Texas Power & Light Co.,* 249 U. S. 152, 158; *Swiss Oil Corp.* v. *Shanks,* 273 U. S. 407.

There are no facts disclosed by the record which would enable us to say that the legislative action with which we are here concerned was necessarily arbitrary or unreasonable or justify us in overruling the judgment of the state court that it was reasonable. *Public Service Co.* v. *Durham, supra,* 154.

Judgment affirmed.

OHIO EX REL. CLARKE *v.* DECKEBACH, AUDITOR.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 272. Argued April 18, 19, 1927.—Decided May 16, 1927.

1. Construction of the pleadings by the state supreme court as sufficiently drawing in question the validity of an ordinance under a treaty will be followed by this Court on review of the judgment upholding the ordinance. P. 394.
2. The provision of the Treaty with Great Britain (July 3, 1815, August 6, 1827) that "the merchants and traders of each nation . . . shall enjoy the most complete protection and security for their commerce," does not apply to proprietors of places of amusement, like a billiard hall. P. 395.

3. A city ordinance prohibiting the issuance to aliens of licenses to conduct pool and billiard rooms, does not violate the rights of aliens under the equal protection clause of the Fourteenth Amendment. So *held* in view of the character of the business, and the absence of ground for concluding that the legislative council acted without a rational basis in determining that aliens as a class were disqualified by their associations, experiences and interests, from conducting the business, and in excluding the entire class rather than its objectionable members selected by more empirical methods. P. 396.

113 Oh. St. 347, affirmed.

ERROR to a judgment of the Supreme Court of Ohio dismissing a petition for a writ of mandamus to require the Auditor of Cincinnati to issue a license to Clarke, the petitioner.

Mr. George S. Hawke for plaintiff in error.

Mr. John D. Ellis, City Solicitor of Cincinnati, for defendant in error.

MR. JUSTICE STONE delivered the opinion of the Court.

An ordinance, No. 76-1918, of the City of Cincinnati, requires the licensing of pool and billiard rooms, and prohibits the issue of licenses to aliens. Plaintiff in error petitioned the Supreme Court of Ohio for a writ of mandamus commanding defendant in error, the auditor of Cincinnati, to grant him a license to conduct a billiard and pool room in that city. The petition alleged that plaintiff was a subject of the King of England and that he had been refused a license solely because he was not a citizen. It drew in question the validity of the ordinance as violating Art. I of the treaty between Great Britain and the United States of July 3, 1815, 8 Stat. 228; August 6, 1827, 8 Stat. 361; 1 Malloy, Treaties, 624, 645, and as denying the equal protection of the laws guaranteed by the Fourteenth Amendment.

Defendant answered, traversing the allegation of citizenship, and asserting that billiard and pool rooms in the City of Cincinnati are meeting places of idle and vicious persons; that they are frequented by lawbreakers and other undesirable persons, and contribute to juvenile delinquency; that numerous crimes and offenses have been committed in them and consequently they require strict police surveillance; that non-citizens as a class are less familiar with the laws and customs of this country than native born and naturalized citizens; that the maintenance of billiard and pool rooms by them is a menace to society and to the public welfare, and that the ordinance is a reasonable police regulation passed in the interest of and for the benefit of the public.

On plaintiff's motion, the Supreme Court of Ohio gave judgment on the pleadings, dismissing the petition. 113 Oh. St. 347. In an earlier case, *State ex rel Balli* v. *Carrel,* 99 Oh. St. 285, it had held that the ordinance in question did not deny any rights guaranteed by the Federal Constitution. The case comes here on writ of error, Jud. Code, § 237 as amended, the plaintiff renewing here the contentions made below.

At the outset defendant insists that plaintiff has not established that he is entitled to the benefit of the treaty since his allegation of citizenship is not admitted on the face of the pleadings. But the Supreme Court of Ohio has construed the pleadings as sufficient to draw in question the validity of the ordinance under the treaty. Hence we need not concern ourselves with those refinements of the local law of pleading which, it is said, enable defendant to justify his refusal to issue a license because of plaintiff's assertion of British citizenship, and at the same time deny that plaintiff has established citizenship entitling him to the protection of the treaty. See *Forsyth* v. *Vehmeyer,* 177 U. S. 177, 180; *Allen* v. *Alleghany Co.,* 196 U. S. 458, 465, 466; *Atlantic Coast Line R. R.*

v. *Mims,* 242 U. S. 532, 535; *Nevada-California-Oregon Ry.* v. *Burrus,* 244 U. S. 103; *Lee* v. *Central of Georgia Ry.,* 252 U. S. 109.

The application of the treaty to the present case requires but brief consideration. As stated in the title its purpose is "to regulate the commerce" between the two countries. Article I, which it is said affords the protection against the present discrimination, is printed in the margin.[1] It guarantees "reciprocal liberty of commerce" between the territories of the signatories. The privileges secured by it to the inhabitants of the two countries, so far as relevant to the present controversy, pertain to and are intended to facilitate commerce. The clause suggested as pertinent reads: "and, generally, the merchants and traders of each nation, respectively, shall enjoy the most complete protection and security for their commerce." Even if assumed, as argued, that the proprietor of a pool room may for some purposes be regarded as engaged in a trade, the word being used as synonymous with occupation or employment, he does not engage in commerce within the meaning of a treaty which merely extends to "merchants and traders" "protection and security for their commerce." See *Bobe* v. *Lloyds,* 10 Fed. (2d) 730, 734. It would be an extravagant applica-

[1] "Art. I. There shall be between the territories of the United States of America, and all the territories of his Britannick majesty in Europe, a reciprocal liberty of commerce. The inhabitants of the two countries, respectively, shall have liberty freely and securely to come with their ships and cargoes to all such places, ports, and rivers, in the territories aforesaid, to which other foreigners are permitted to come, to enter into the same, and to remain and reside in any parts of the said territories, respectively; also to hire and occupy houses and warehouses for the purposes of their commerce; and, generally, the merchants and traders of each nation, respectively, shall enjoy the most complete protection and security for their commerce, but subject always to the laws and statutes of the two countries, respectively."

tion of the language quoted to say that it could be extended to include the owner of a place of amusement who does not necessarily buy, sell or exchange merchandise or otherwise participate in commerce.

Asakura v. *Seattle,* 265 U. S. 332, relied on by plaintiff, does not support his contention. It was there held that the treaty with Japan of February 21, 1911, 37 Stat. 1504, was violated by a municipal ordinance prohibiting the granting of pawnbrokers' licenses to non-citizens. That treaty secured to the citizens of Japan the right to "enter, travel and reside" in the United States and "to carry on trade, wholesale and retail . . . and generally to do anything incident to or necessary for trade." This language, which is plainly broader in some respects than that of the British treaty, was held to embrace within its protection a Japanese pawnbroker whose business, in contrast to that of plaintiff, necessarily involved the lending of money on the security of merchandise and the sale of merchandise when necessary to realize on the security.

The objections to the constitutionality of the ordinance are not persuasive. Although the Fourteenth Amendment has been held to prohibit plainly irrational discrimination against aliens, *Yick Wo* v. *Hopkins,* 118 U. S. 356; *Truax* v. *Raich,* 239 U. S. 33; *In re Tiburcio Parrott,* 1 Fed. 481; *In re Ah Chong,* 2 Fed. 733; *Ho Ah Kow* v. *Nunan,* 5 Sawy. 552, 12 Fed. Cases, #6546; *Wong Wai* v. *Williamson,* 103 Fed. 1; *Fraser* v. *McConway & Torley Co.,* 82 Fed. 257, it does not follow that alien race and allegiance may not bear in some instances such a relation to a legitimate object of legislation as to be made the basis of a permitted classification. *Patsone* v. *Pennsylvania,* 232 U. S. 138; *Crane* v. *New York,* 239 U. S. 195, 198; *Terrace* v. *Thompson,* 263 U. S. 197; *Porterfield* v. *Webb,* 263 U. S. 225; *Webb* v. *O'Brien,* 263 U. S. 313;

Frick v. *Webb,* 263 U. S. 326; *Cockrill* v. *California,* 268 U. S. 258; cf. *McCready* v. *Virginia,* 94 U. S. 391.

The admitted allegations of the answer set up the harmful and vicious tendencies of public billiard and pool rooms, of which this Court took judicial notice in *Murphy* v. *California,* 225 U. S. 623. The regulation or even prohibition of the business is not forbidden. *Murphy* v. *California, supra.* The present regulation presupposes that aliens in Cincinnati are not as well qualified as citizens to engage in this business. It is not necessary that we be satisfied that this premise is well founded in experience. We cannot say that the city council gave unreasonable weight to the view admitted by the pleadings that the associations, experiences and interests of members of the class disqualified the class as a whole from conducting a business of dangerous tendencies.

It is enough for present purposes that the ordinance, in the light of facts admitted or generally assumed, does not preclude the possibility of a rational basis for the legislative judgment and that we have no such knowledge of local conditions as would enable us to say that it is clearly wrong. *Fort Smith Light & Traction Co.* v. *Board of Improvement, ante,* p. 387.

Some latitude must be allowed for the legislative appraisement of local conditions, *Patsone* v. *Pennsylvania, supra,* 144; *Adams* v. *Milwaukee,* 228 U. S. 572, 583, and for the legislative choice of methods for controlling an apprehended evil. It was competent for the city to make such a choice, not shown to be irrational, by excluding from the conduct of a dubious business an entire class rather than its objectionable members selected by more empirical methods. See *Westfall* v. *United States, ante,* p. 256.

Judgment affirmed.

UNITED STATES *v.* S. S. WHITE DENTAL MANUFACTURING COMPANY.

CERTIORARI TO THE COURT OF CLAIMS.

No. 291. Argued April 22, 1927.—Decided May 16, 1927.

1. Under § 234 of the Revenue Act of 1918 which authorizes the deduction from gross income in the computation of income taxes of "Losses sustained during the taxable year not compensated by insurance or otherwise," and Treasury regulations providing that losses deducted "must usually be evidenced by closed or completed transactions," but specifically authorizing deduction of worthless debts and corporate stock, the American creditor, and owner of the stock, of a corporation in Germany, was entitled to deduct the entire amount of such investment from gross income when the assets and business of the corporation were sequestered by the German Government during the war. P. 400.
2. Such sequestration of enemy property was within the rights of the German Government as a belligerant power and when effected left the corporation without right to demand its release or compensation for its seizure, at least until the declaration of peace. P. 402.
3. The transaction—the sequestration—causing the loss was "closed and completed" when the seizure was made, and the loss was then deductible although later the German Government bound itself to repay and an award was made by the Mixed Claims Commission which may result in recovery. P. 403.

61 Ct. Cls. 143, affirmed.

CERTIORARI (271 U. S. 651) to a judgment of the Court of Claims allowing a recovery of income taxes paid for the year 1918.

Assistant Attorney General Galloway, with whom *Solicitor General Mitchell,* and *Messrs. A. W. Gregg,* General Counsel, Bureau of Internal Revenue, and *Frederick W. Dewart,* Special Attorney, Bureau of Internal Revenue, were on the brief, for the United States.

Messrs. John Hampton Barnes and *John F. McCarron* for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

This case comes here on writ of certiorari to the Court of Claims, § 240, § 3 (b) Jud. Code, as amended, to review a judgment of that court allowing recovery by respondent of income taxes paid for the year 1918. The sole question presented is the right of the respondent, upheld below, to deduct from its gross income for 1918, the amount of its investment in a subsidiary German corporation whose entire property was seized in that year by the German government as enemy property.

Respondent is a Pennsylvania corporation, engaged in the manufacture and sale of dental supplies. Before 1918 it had organized and controlled, by ownership of all the capital stock, the S. S. White Dental Manufacturing Company, m. b. h. of Berlin, Germany, a German corporation. Its investment in the German corporation in 1918, as carried on its books, aggregated more than $130,000.

The agreed statement of facts adopted as findings by the court below are so vague as to leave it uncertain whether this investment was represented on the books of respondent by the capital stock alone, or in part by the capital stock and in part by an open account between it and the German corporation. The case was argued on the assumption, which we make, that the investment was represented by both the capital stock and an open account, due to respondent from the German company. The total is conceded to be no more than the fair value of the net assets of the German corporation.

In March, 1918, the sequestrator appointed by the German government took over the property of the German corporation and the management of its business. It is inferable from the findings, as the government concedes, that the sequestration was similar in purpose and legal effect to that authorized under the Trading with the Enemy Act of the United States, Oct. 6, 1917, c. 106,

40 Stat. 411; March 28, 1918, c. 28, 40 Stat. 459; July 11, 1919, c. 6, 41 Stat. 35; June 5, 1920, c. 241, 41 Stat. 977; March 4, 1923, c. 285, 42 Stat. 1511; May 7, 1926, c. 252, 44 Stat. 406, and we shall deal with the case on that basis.

In March, 1920, the possession of the seized assets and business was relinquished to the German corporation by the sequestrator. As a result of the mismanagement of its affairs while in his custody, and investments of its funds by him in German war loans, the value of its assets was seriously impaired. In 1922 its tangible assets and its lease were sold for $6,000. This sum was included in respondent's income tax return for that year. Later respondent filed a claim with the Mixed Claims Commission which was allowed in 1924 to the extent of $70,000. What if anything may ultimately be realized from this award remains uncertain.

In 1918 the respondent charged off as a loss the entire amount of its investment in the German corporation as shown by its books, and in July of that year passed a resolution authorizing the establishment of a reserve against this loss at the rate of $15,000 quarterly, beginning March, 1918. In making its income tax return for 1918 respondent deducted from gross income the amount of its investment in the German corporation. The deduction was disallowed by the Commissioner of Internal Revenue, on the sole ground that the loss was not evidenced by a closed and completed transaction in the year for which it was deducted. The tax so assessed was paid under protest and this suit followed.

Section 234 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1077, 1078, authorizes the deduction in the computation of income taxes of " Losses sustained during the taxable year and not compensated for by insurance or otherwise; ". In explaining this section, Article 141 of Treasury Regulations, 45, provides that losses incurred in

the taxpayer's trade or business or in any transaction entered into for profit may be deducted but such losses "must usually be evidenced by closed and completed transactions." Article 151 provides in part: "Where all the surrounding and attendant circumstances indicate that a debt is worthless and uncollectible and that legal action to enforce payment would in all probability not result in the satisfaction of execution on a judgment, a showing of these facts will be sufficient evidence of the worthlessness of the debt for the purpose of deduction." And Art. 144 reads in part: "if stock of a corporation becomes worthless, its cost or its fair market value as of March 1, 1913, if acquired prior thereto, may be deducted by the owner in the taxable year in which the stock became worthless, provided a satisfactory showing of its worthlessness be made as in the case of bad debts." See Art. 561, making these provisions applicable to corporations.

The case turns upon the question whether the loss, concededly sustained by the respondent through the seizure of the assets of the German company in 1918, was so evidenced by a closed transaction within the meaning of the quoted statute and treasury regulations as to authorize its deduction from gross income of that year. The statute obviously does not contemplate and the regulations (Art. 144) forbid the deduction of losses resulting from the mere fluctuation in value of property owned by the taxpayer. *New York Ins. Co.* v. *Edwards*, 271 U. S. 109, 116; cf. *Miles* v. *Safe Deposit Co.*, 259 U. S. 247. But with equal certainty they do contemplate the deduction from gross income of losses, which are fixed by identifiable events, such as the sale of property (Art. 141, 144), or caused by its destruction or physical injury (Art. 141, 142, 143) or, in the case of debts, by the occurrence of such events as prevent their collection (Art. 151).

The transaction evidencing the loss here was the seizure of the property of the German company. The loss resulted to the respondent because it was a creditor and stockholder of that company which, as a result of the sequestration, was left without property or assets of any kind. The sequestration of enemy property was within the rights of the German government as a belligerent power and when effected left the corporation without right to demand its release or compensation for its seizure, at least until the declaration of peace. See *Littlejohn & Co.* v. *United States,* 270 U. S. 215; *White* v. *Mechanics Securities Corp.,* 269 U. S. 283, 300, 301; *Swiss Insurance Co.* v. *Miller,* 267 U. S. 42; *Stoehr* v. *Wallace,* 255 U. S. 239, 242–244; *Central Trust Co.* v. *Garvan,* 254 U. S. 554; *Brown* v. *United States,* 8 Cranch. 110, 122. What would ultimately come back to it, as the event proved, might be secured not as a matter of right, but as a matter either of grace to the vanquished or exaction by the victor. In any case the amount realized would be dependent upon the hazards of the war then in progress.

That legal action by respondent upon its open accounts against a corporation thus despoiled would have been fruitless within the meaning of Art. 151 seems not open to question. No distinction is urged by the government between respondent's investment in the stock of the German company and in its open accounts. It is equally apparent that the stock after the seizure was as worthless as the obligations of the German company and was deductible under Art. 144 on the same basis as bad debts.

If the seized assets are viewed as the property of respondent, ignoring the entity of the German company, the result is the same. The quoted regulations, consistently with the statute, contemplate that a loss may become complete enough for deduction without the tax-

payer's establishing that there is no possibility of an eventual recoupment. It would require a high degree of optimism to discern in the seizure of enemy property by the German government in 1918 more than a remote hope of ultimate salvage from the wreck of the war. The Taxing Act does not require the taxpayer to be an incorrigible optimist.

We need not attempt to say what constitutes a closed transaction evidencing loss in other situations. It is enough to justify the deduction here that the transaction causing the loss was completed when the seizure was made. It was none the less a deductible loss then, although later the German government bound itself to repay and an award was made by the Mixed Claims Commission which may result in a recovery.

Judgment affirmed.

SEEMAN ET AL. *v.* PHILADELPHIA WAREHOUSE COMPANY.

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

No. 198. Argued March 8, 1927.—Decided May 16, 1927.

1. A corporation engaged in lending money or credit, may legitimately stipulate for repayment in the State in which it is organized and conducts its business, in accordance with its laws and at the interest rate there allowable, even though the agreement for the loan was entered into in another State where a different law and a lower rate of interest prevail. P. 407.
2. The *bona fides* of a written agreement between the parties to a loan for repayment in the State of the lender is not impeached, nor a waiver established, by proof of other instances in which the repayments under similar agreements between them were made in the borrower's State where the legal interest rate was lower. P. 409.

7 Fed. (2d) 999, affirmed.

CERTIORARI (269 U. S. 543) to a judgment of the Circuit Court of Appeals which reversed a judgment of the District Court recovered by Seeman et al. in an action against the Warehouse Company for conversion of pledged goods.

Mr. Samuel F. Frank, with whom *Messrs. Harry J. Leffert, William N. Cohen,* and *Arthur W. Weil* were on the brief, for petitioners.

Mr. Owen J. Roberts, with whom *Mr. Charles A. Riegelman* was on the brief, for respondent.

MR. JUSTICE STONE delivered the opinion of the court.

Respondent brought suit in the district court for Southern New York to recover for the conversion of a quantity of canned salmon pledged to it as security for a loan. The pledgor, who had fraudulently regained possession, sold the salmon to petitioners. The defense set up was that the transaction between respondent and the pledgor was usurious and therefore void under the law of New York, where the pledgor conducted its business and where petitioners contend the pledge agreement was made.

The trial court charged the jury that the New York law was applicable. The jury returned a verdict for petitioners. The judgment on the verdict was reversed by the court of appeals for the second circuit. 7 Fed. (2d) 999. This Court granted certiorari. 269 U. S. 543.

Respondent is a Pennsylvania corporation having its only office or place of business in Philadelphia. It has an established credit and for many years has engaged in a business which is carried on according to the routine followed in the present case, which respondent contends, results in loans of credit and not of money. To applicants in need of funds it delivers its promissory note, payable to its own order and then endorsed. The applicant in exchange gives the required security—here ware-

house receipts for the salmon—and a pledge agreement by which he undertakes to pay the amount of the note at maturity to respondent at its office in Philadelphia, and agrees that the collateral pledged shall be security for all obligations present and prospective. At the same time the applicant pays to respondent a "commission" for its "services" and for the "advance of its credit" computed at the rate of 3 per cent. per annum on the face of the note. He is then free to discount the note and to use the proceeds. In practice, as in the present case, respondent usually, with the consent of the borrower, delivers the note to its own note broker in Philadelphia, receives from him the proceeds of the note less discount and brokerage, and pays or forwards the amount so received to the borrower. At maturity he must pay the face value of the note to respondent or, as was the case here, renew the note by paying a new commission and the amount of the discount on the matured note. On each transaction the applicant thus pays, in addition to the amount of the proceeds of the note, the commission and the discount. Respondent, after taking up its note, retains the commission alone as the net compensation for its part in the transaction. In addition, the applicant may, as was the case here, pay the fees of the note broker and the fee or compensation of a loan broker, acting as intermediary in securing the accommodation by respondent, a total amount far exceeding 6 per cent., the legal rate of interest in New York. The commission and discount paid here varied from 8½ to 10½ per cent. per annum of the face amount of the notes, taking no account of fees paid to brokers.

In Pennsylvania, the exaction of interest on loans of money in excess of 6 per cent., the lawful rate, does not invalidate the entire transaction, but excess interest may be recovered by the borrower. Penn. Stat. 1920, §§ 12491, 12492; *Montague* v. *McDowell,* 99 Pa. St. 265, 269; *Stay-*

ton v. *Riddle,* 114 Pa. St. 464, 469; *Marr* v. *Marr,* 110 Pa. St. 60. The business carried on by respondent as described, was considered and upheld by the Supreme Court of Pennsylvania as not usurious in *Righter, Cowgill & Co.* v. *Philadelphia Warehouse Co.,* 99 Pa. St. 289.

To avoid the application of the Pennsylvania law to the present transaction and others for which the salmon was held as security, and to bring them within the prohibition of the New York law, petitioners at the trial relied on evidence that preliminary negotiations were had in New York City between the pledgor and the agent of respondent from which it might be inferred that the agreement was in fact made there, although the formal documents were dated at Philadelphia and respondent actually executed its note and delivered it to the note broker there. Petitioners also relied on the special circumstances of the case, particularly the fact that respondent itself procured the proceeds of the note in Philadelphia and forwarded them to the borrower in New York, as ground for the inference by the jury that the real transaction was a loan of money thinly disguised as a loan or sale of credit. As the total amount paid to respondent included both the discount and the commission, aggregating more than the legal rate of interest, it is insisted that these charges, if for a loan of money, were usurious, even though respondent retained only the commission after satisfying the demands of the discounting banks.

The court below held that there was no evidence that the transaction was other than that of its form, a loan of credit; that the agreement between the lender and the borrower was completed only when the respondent delivered its note to the broker in Philadelphia and that the agreement must therefore be regarded as a Pennsylvania contract valid under the law of that state; and that in

any case, as Philadelphia, by the express terms of the contract, was made the place of payment by the borrower, the legality of the transaction must be determined by the law of Pennsylvania and not of New York.

But in the view we take, we think it immaterial whether the contract was entered into in New York or Pennsylvania, and it may be assumed for the purposes of our decision that the jury might have found that in fact the parties stipulated for a loan of money rather than of credit.[1] Respondent, a Pennsylvania corporation having its place of business in Philadelphia, could legitimately lend funds outside the state and stipulate for repayment in Pennsylvania in accordance with its laws and at the rate of interest there lawful, even though the agreement for the loan were entered into in another state where a different law and a different rate of interest prevailed. In the federal courts, as was said in *Andrews* v. *Pond,* 13 Pet. 65, 77–78, " The general principle in relation to contracts made in one place, to be executed in another, is well settled. They are to be governed by the law of the place of performance, and if the interest allowed by the laws of the place of performance, is higher than that permitted at the place of contract, the parties may stipulate for the higher interest, without incurring the penalties of usury." *Miller* v. *Tiffany,* 1 Wall. 298; *Bedford* v. *Eastern Building & Loan Association,* 181 U. S. 227, 242, 243; see *Junction R. R.* v. *Ban of Ashland,* 12 Wall. 226, 229; *Peyton* v. *Heinekin,* 131 U. S. Appendix, ci; cf. *Cromwell* v. *County of Sac.,* 96 U. S. 51, 52.

In support of a policy of upholding contractual obligations assumed in good faith, this Court has adopted the

[1] See *Forgotston* v. *McKeon,* 14 App. Div. (N. Y.) 342; *Gilbert* v. *Warren,* 56 App. Div. 289; *In re Samuel Wildes' Sons,* 133 Fed. 562; *Dry Dock Bank* v. *American Life Ins. & Trust Co.,* 3 N. Y. 344; *Williams* v. *Fowler,* 22 How. Prac. 4.

converse of the rule quoted from *Andrews* v. *Pond, supra.* "If the rate of interest be higher at the place of contract than at the place of performance, the parties may lawfully contract in that case also for the higher rate." See *Miller* v. *Tiffany, supra,* 310; *Junction R. R.* v. *Bank of Ashland, supra,* 229; *Cromwell* v. *County of Sac., supra,* 62; *Wharton, Conflict of Laws,* § 510 h; cf. *Tilden* v. *Blair,* 21 Wall. 241; and see *Cockle* v. *Flack,* 93 U. S. 344, 347.

A qualification of these rules, as sometimes stated, is that the parties must act in good faith, and that the form of the transaction must not "disguise its real character." See *Miller* v. *Tiffany, supra,* 310. As thus stated, the qualification, if taken too literally, would destroy the rules themselves for they obviously are to be invoked only to save the contract from the operation of the usury laws of the one jurisdiction or the other. The effect of the qualification is merely to prevent the evasion or avoidance at will of the usury law otherwise applicable, by the parties' entering into the contract or stipulating for its performance at a place which has no normal relation to the transaction and to whose law they would not otherwise be subject. Wharton, in his Conflict of Laws, § 510 o, in discussing this qualification, says: "Assuming that their real, *bona fide* intention was to fix the situs of the contract at a certain place which has a natural and vital connection with the transaction, the fact that they were actuated in so doing by an intention to obtain a higher rate of interest than is allowable by the situs of some of the other elements of the transaction does not prevent the application of the law allowing the higher rate." See *Van Vleet* v. *Sledge,* 45 Fed. 743, 752; *Goodrich* v. *Williams,* 50 Ga. 425, 435; *U. S. Savings & Loan Co.* v. *Harris,* 113 Fed. 27, 32.

Here respondent, organized and conducting its business in Pennsylvania, was subject to laws of that state and

had a legitimate interest in seeking their benefit. The loan contract which stipulated for repayment there and which thus chose that law as governing its validity cannot be condemned as an evasion of the law of New York which might otherwise be deemed applicable.

Petitioners rely upon the fact that in some instances, in connection with other transactions between respondent and the pledgor, payments on account of amounts due were made by deposits in respondent's account in a New York bank, although the other payments were made in Philadelphia. But we do not think this circumstance standing alone is sufficient to vary the application of the rule. There is no suggestion to be found in the record that in the negotiations preliminary to the signing of the contract or at any other time there was any agreement by the parties that payment should be made other than in accordance with the tenor of the written agreement. The pledgor never did pay the amount of the note involved in the present transaction. It was three times renewed and on each renewal the discount on the maturing note and the commission on the renewal were either paid by the pledgor by check in Philadelphia or deducted there by his authority from the proceeds of the renewal note. The fact that in some instances wholly unexplained such payments were received elsewhere affords no basis for the contention that the written stipulation for payment in Philadelphia was not the real one or that its obligation was waived. If the creditor might have compelled payment in the federal courts in New York, see *Bedford* v. *Eastern Building & Loan Association, supra,* he could receive payment there of a part of the debt without forfeiting the balance.

Judgment affirmed.

POSADOS, COLLECTOR, ET AL. *v.* CITY OF MANILA.

CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 363. Argued April 28, 1927.—Decided May 31, 1927.

1. The duty of the Collector of Internal Revenue of the Philippines to issue, and of the Insular Auditor to countersign, a warrant to the City of Manila for the share of internal revenue receipts assigned to it by the Administrative Act of 1917, is mandatory and (in the absence of any uncertainty as to the amount of the collections,) ministerial, and enforceable by mandamus. P. 415.
2. Whatever the powers of the Auditor over settlement of accounts between the City and the Metropolitan Water Board, they do not authorize him to direct that the Collector withhold money from the City's share of internal revenue collections, to pay a claim of the Board for water used by the city government. P. 416.

—— P. I. ——, affirmed.

CERTIORARI (271 U. S. 658) to a judgment of the Supreme Court of the Philippine Islands, in an original proceeding, granting a writ of mandamus requiring the Collector of Internal Revenue to issue, and the Insular Auditor to countersign, warrants for moneys due the City out of receipts from internal revenue taxes.

Messrs. O. R. McGuire, pro hac vice, and *William C. Rigby,* with whom *Messrs. L. Hedrick* and *Delfin Jaranilla* were on the brief, for petitioners.

Mr. Guillermo B. Guevara, with whom *Messrs. F. W. Clements, Lawrence H. Cake,* and *Alexander Britton* were on the brief, for respondent.

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

This was a suit begun by an original petition in the Supreme Court of the Philippine Islands under § 2947

of the Compiled Acts of the Philippine Commission, 1907, praying for an original writ of mandamus directed to Juan Posados, Jr., Collector of Internal Revenue of the Islands and of Manila, and to Benjamin F. Wright, Insular Auditor, requiring the Collector to issue warrants payable to the City of Manila for the share of the internal revenue taxes collected by him due to the City under the statutory law, and requiring the Auditor to countersign those warrants. In furtherance of the main prayer there was a prayer for a temporary injunction against the issue and countersigning of warrants for a part of such receipts in favor of the Metropolitan Water District. The Metropolitan Water District and the Insular Treasurer were also made parties. The Supreme Court, after answers and hearing, granted the prayer for mandamus against the Collector and Auditor.

The substance of the controversy is this: The City of Manila under Spain owned the water works furnishing water to the city for a great many years; and, since the United States became the sovereign in the Islands, the City, created a municipal corporation by the present Philippine government, chapter 60, Title X of the Philippine Administrative Code No. 2711, was authorized to issue bonds for $2,000,000 to enlarge and improve them. March 6, 1919, the Legislature of the Philippine Islands passed a law creating a Metropolitan Water District for the City and neighboring territory (Act No. 2832), made it a corporation governed by directors and turned over the works to its management. A dispute has arisen as to whether the City of Manila should pay to the Metropolitan Water District compensation for water used by the city government. The authorities of the City of Manila contend that the City is not liable, because the water works are and have been its property for centuries. The issue was considered by the Metropolitan Water District Board and a majority of the Board reached the conclu-

sion that there was no money due from the City for the water paid. The Governor General has appellate administrative jurisdiction over the decisions and resolutions of the Board—Act 3109—and he took the view of the minority of the Board and held that the City did owe the Metropolitan District for the water furnished it. The City was not a party to this proceeding. In accord with the conclusion of the Governor General, the Insular Auditor directed the Collector of Internal Revenue to withhold from the City's share of the internal revenue collections money enough to pay what was due for the water, and directed the Collector to issue his warrant for that amount from the share of the City in the internal revenue collections in enforcement of the claim of the Metropolitan Board for the amount due.

Section 3 of the Organic Act of the Philippine Islands, known as the Jones Law, 39 Stat. 545, c. 416, directs that no money shall be paid out of the treasury except in pursuance of an appropriation by law; that all money collected on any tax levied or assessed for a special purpose shall be treated as a special fund in the treasury and paid out for such purpose only.

By § 8 of the same act the general legislative power, except as therein otherwise provided, was granted to the Philippine Legislature, authorized by the Act.

The Jones Act describes the duties of the Insular Auditor as follows:

Section 24. "That there shall be appointed by the President an auditor, who shall examine, audit, and settle all accounts pertaining to the revenues and receipts from whatever source of the Philippine government and of the provincial and municipal governments of the Philippines, including trust funds and funds derived from bond issues; and audit, in accordance with law and administrative regulations, all expenditures of funds or property pertaining to or held in trust by the government or the Provinces

or municipalities thereof. He shall perform a like duty with respect to all government branches. . . .

"The decisions of the auditor shall be final and conclusive upon the executive branches of the government, except that appeal therefrom may be taken by the party aggrieved or the head of the department concerned within one year, in the manner hereinafter prescribed."

Section 25 of the same Act provides:

"That any person aggrieved by the action or decision of the auditor in the settlement of his account or claim may, within one year, take an appeal in writing to the Governor General. . . . If the Governor General shall confirm the action of the auditor, he shall so indorse the appeal and transmit it to the auditor, and the action shall thereupon be final and conclusive. Should the Governor General fail to sustain the action of the auditor, he shall forthwith transmit his grounds of disapproval to the Secretary of War, . . . [whose] decision is final and conclusive."

By § 588 of the Administration Act of 1917, as amended by Act No. 3066 adopted after the passage of the Jones Act, it is provided that the Insular Auditor shall have the power to authorize and enforce the settlement of accounts subsisting between the different bureaus or offices of the Insular service; between such bureau or office and any provincial, municipal, or city government; between provincial governments; between municipal or city governments and between any such provincial and municipal or city governments.

The contention on behalf of the Insular Auditor is that the City of Manila, on the one hand, and the Metropolitan Water Board, on the other, are branches of the Insular Government, and that by virtue of the foregoing statutes he is given authority to settle accounts between them, and that his decision is final and conclusive upon such executive branches, with the appeal provided as

above stated. He maintains that this gives him the authority to decide as between the Metropolitan Water Board and the City of Manila, whether the city should pay the water board for the water furnished it because it is necessarily involved in the settlement of accounts between the two corporations and branches of the insular government, that having decided that the money was due for the water furnished from the City to the Metropolitan Board, he is further charged by § 588 of the Administrative Code with the duty of enforcing that decision and settlement. He may, therefore, he says, direct the Collector of Internal Revenue to issue a warrant for such share of the City in the internal revenue collections as may be enough to pay the debt owing from the City to the Water Board, and that this is a necessary implication from his power by law to enforce such settlement.

The disposition of the internal revenue receipts is provided by the Administrative Act in the following sections:

"SEC. 490. *Disposition of internal revenue in general.*—Internal revenue collected under the laws of the Philippine Islands and not applied as hereinabove provided or otherwise specially disposed of by law shall accrue to the Insular Treasury and shall be available for the general purposes of the Government, with the exception of the amounts set apart by way of allotment under the next succeeding section.

"SEC. 491. *Allotments of internal revenue for special purposes.*—Of the internal revenue accruing to the Insular Treasury under the preceding section there shall be set apart ten per centum as a provincial allotment, ten per centum as a road and bridge allotment, and twenty per centum as a municipal allotment, but the amounts allotted to said several purposes during any year shall not be greater than the amount allotted for the same purposes during the fiscal year nineteen hundred and nine.

"SEC. 492. *Appointments and use of provincial allotment.*—The provincial allotment shall be apportioned to the treasuries of the several respective provinces and shall there accrue to their general funds, respectively.

. . .

"SEC. 494. *Apportionment and use of municipal allotment.*—The municipal allotment shall be for the benefit of the inhabitants of the Islands in the purview of their community requirements, being available for municipal or other use as hereinbelow provided. . . .

"SEC. 495. . . . The city of Manila shall receive the shares which it would receive if it were both a municipality and a regularly organized province, and for the purposes hereof shall be deemed to be both the one and the other.

. . .

"SEC. 497. *Warrants for quarterly payments of allotments.*—The payment of the internal-revenue allotments shall be made from the Insular Treasury quarterly upon warrants drawn by the Collector of Internal Revenue."

It is apparent from reading the foregoing sections that they are directions by statutory law as to the distribution of the collections made by the Internal Revenue Collector, and that the share to be paid to the City of Manila is fixed thereby and the exact figure can be ascertained mathematically. This requires no exercise of discretion, judicial or otherwise, after the total amount of the internal revenue receipts are known; and in this case there is no dispute as to that amount. It becomes the ministerial duty of the Internal Revenue Collector to draw his warrant for the share of the City thus fixed by statute. It becomes the duty of the Insular Auditor, when such a warrant of the Internal Revenue Collector is presented to him, after ascertaining that the amount for which it is drawn is in accord with the directions of the statute, to

countersign the same. *Kendall* v. *United States,* 12 Pet. 524; *Wright* v. *Ynchausti,* 272 U. S. 640, 651, 652.

No matter what the power of the Auditor may prove to be with reference to the settlement of accounts as between the City of Manila and the Metropolitan Water Board, or what his power with reference to enforcing the settlement so reached by him, nothing in the laws of the Islands is disclosed to us which enables the Auditor in the enforcement of such settlements to dispense with or to suspend the operation of positive law in reference to the course which shall be followed in the disposition by the Internal Revenue Collector of the receipts from internal revenue collections which he is directed by the statute to pay to the City. His duty is clearly set forth and he has nothing to do but to comply with it, having ascertained exactly what the share of the City is under the foregoing provisions.

When this share comes to the City under the warrant to be drawn in its favor by the Collector, the question of what shall thereafter be done in respect to it is not a matter that we are called upon to consider. Whether the issue between the Metropolitan Water Board and the City of Manila, in the absence of agreement, is one that must then be decided by a suit in court brought by the Metropolitan Water Board against the City, asking for a judgment for the water used, or whether the issue is to be determined by the Insular Auditor in his asserted power of settling and enforcing accounts between the two branches of the Government, are issues not before us. The only question here is what should be done with the share of the collections made by the Internal Revenue Collector under the sections of the Administrative Code already quoted. By § 2442 of the Laws of the Philippines relating to the City of Manila, there is a provision for a permanent continuing appropriation during the time the City remains the capital of the Islands from any

funds in the Insular Treasury, not otherwise appropriated, equal to 30 per cent. of the expenses of the City government, within certain other limitations, and the Insular Auditor is to ascertain the amount thus appropriated and transfer it to the City. How far this would involve quasi-judicial or administrative discretion not to be controlled by mandamus, it is not necessary for us to consider or decide; because this case relates only to internal revenue receipts and their distribution, in respect of which the provisions of law are specific and mandatory as we have seen. The conclusion of the Supreme Court of the Philippines in directing a mandamus to issue against the Internal Revenue Collector and the Insular Auditor was in accordance with the statutory law of the Philippines and was right.

A majority of the Supreme Court of the Philippines reached this conclusion. That Court further expressed an opinion as to the relation of the City to the Insular Auditor and his functions, which was not necessary, it seems to us, to decide this case. We desire therefore to limit our opinion to the mere question whether the City's share of the internal revenue collections must be paid to the City by the Collector.

The judgment of the Supreme Court of the Philippines is

Affirmed.

OVERLAND MOTOR COMPANY *v.* PACKARD MOTOR COMPANY ET AL.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 285. Argued April 21, 1927.—Decided May 31, 1927.

1. An applicant for patent who cancels one of his claims without appealing, after a ruling finally rejecting it as unpatentable, announcing at the time his intention to file a divisional application

covering the same subject matter, does not abandon it nor estop himself from so renewing it with the consent of the Patent Office. P. 420.

2. Granting of patent upon such new application imports a waiver by the Office of objection based on the previous rejection. P. 421.

3. A bill to enjoin infringement of a patent can not be dismissed upon the ground of laches because the pendency of the application in the Patent Office was protracted by the applicant's delays in responding to Patent Office action, where such delays in no instance exceeded the period allowed by statute. Rev. Stats. § 4894. P. 422.

RESPONSE to questions certified by the Circuit Court of Appeals upon an appeal from a decree enjoining alleged infringements of a patent.

Mr. Melville Church, with whom *Mr. Clarence B. Des Jardins* was on the brief, for the Overland Motor Company.

Mr. Frank Parker Davis, with whom *Messrs. Philip Mauro, Clarence S. Walker,* and *Reeve Lewis* were on the brief, for the Packard Motor Company et al.

Mr. Donald M. Carter filed a brief as *amicus curiae* by special leave of Court.

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

This case comes from the Circuit Court of Appeals of the Seventh Circuit, upon a certificate of two questions for our consideration and answer. Section 239 of the Judicial Code, as amended by Act of February 13, 1925, c. 229, 43 Stat. 936. The suit is one in which the Packard Motor Car Company and the Wire Wheel Corporation seek to enjoin an alleged infringement by the Overland Motor Company of the Cowles Patent, No. 1,103,567, issued to Cowles on July 14, 1914, and owned by them. On August 25, 1899, Cowles filed an application which was duly granted July 13, 1900. His application disclosed the matter in suit. The Patent Office, however, required a division of claims, and he canceled all claims

as well as the description and drawing in the specification that supported such claims, bearing upon the subject matter of the present controversy. In that case the patent as granted covered merely the remaining claims. September 6, 1901, he filed another application, not a divisional application, disclosing and claiming, among other things, the subject matter in suit. This was pending in the Patent Office until January 21, 1913, when a patent issued for it. Certain claims made by him were repeatedly rejected by the Patent Office. Cowles complied with the requirements of § 4894, Rev. Stats., requiring an applicant to reply to the action of the Patent Office within a year, but on seven different occasions he delayed more than eleven months before filing his response to the Patent Office ruling. On May 20, 1911, the Patent Office finally rejected the only claim remaining in the application which was directed to the subject matter in issue, holding that it was unpatentable on certain references. On May 17, 1912, Cowles canceled this finally rejected claim from his application, stating his intention to file a divisional application covering the subject matter of this claim. No such divisional application had ever been directed or suggested by the Patent Office. A patent was then (January 21, 1913) issued on other claims without any claim to the subject matter in issue. On August 6, 1912, Cowles filed an application for a patent which he stated was a division of the application filed September 6, 1901, and which disclosed and sought the claims in issue. The patent in suit was then issued on this application on July 14, 1914. During its pendency in the Patent Office, Cowles complied with the requirements of § 4894, Rev. Stats., although on one occasion he delayed over eleven months before responding to the Patent Office action. During the period from 1905 to 1912, trade journals of the United States and Great Britain published articles disclosing the subject matter in issue, and certain

British patents were granted, on subjects relating to such subject matter. The publications and patents represented independent work in Great Britain, and, as a result thereof, there was actual use of the subject matter in suit abroad during the pendency of the original and divisional applications above referred to. No product embodying the subject matter of the claims in suit appeared upon the market in the United States prior to the issuing of the patent in suit. Upon these facts, the first question certified is as follows:

"Did the applicant, in canceling the claim which was finally rejected on May 20, 1911, abandon such claim or estop himself from thereafter seeking it through a new application?"

We do not find in the statement of facts any circumstances which can be held to be an abandonment by Cowles of his claim for which he subsequently secured this patent. On May 20, 1911, the claim was rejected on account of its non-patentability in view of certain references. On May 17, 1912, he canceled the claim, stating at the time that it was his intention to file a divisional application covering this subject matter. After he had done this, on August 6th, less than four months after the cancellation, he filed the claim as a divisional application under the earlier case, and this new application, with the renewed claim, went to patent on July 14, 1914. We can not see why he was estopped by his failure to appeal from the final rejection. It is quite true that, after such rejection, the Commissioner of Patents might have refused to consider his divisional application, as he made it without suggestion or consent by the Patent Office. In a qualified and limited sense, a claim rejected as this was constitutes *res judicata* in favor of the Government and against the applicant. This is fully explained by Judge Morris in *In re Barratt's Appeal*, 14 App. D. C. 255, in speaking of a case presenting a similar question:

"While the rules that govern the finality and conclusiveness of adjudications at the common law do not apply, in the strict sense, to administrative or quasi-judicial action in the Executive Departments of Government, yet in administrative action, as well as in judicial proceeding, it is both expedient and necessary that there should be an end of controversy. Sometimes, the element of finality is inherent in the nature of the action taken; as, for example, when letters patent have been granted, they may not be recalled, and the rights of the parties holding them again investigated. Where rights have become vested as the result of legitimate executive action, such action is necessarily final, and it is not competent thereafter for executive action to divest them, either by way of a review of the proceedings or by any new proceedings instituted with that view. Especially is this principle applicable to the proceedings of the Patent Office, which are so nearly akin to judicial proceedings as to be most appropriately designated as quasi-judicial."

Following then the analogy, he finds that such a case as this may constitute *res judicata* in a sense; but he qualifies the statement in this important way:

"In what we have said we do not desire it to be understood that the Patent Office may not, if it thinks proper so to do, entertain and adjudicate a second application for a patent after the first application has been rejected. What we decide is, that it is not incumbent upon the office as a duty to entertain such applications, and that, if it refuses to entertain them, it has a perfect legal right so to do. An applicant is not legally aggrieved by such refusal."

This qualification is approved in the case of *In re Fay,* 15 App. D. C. 515; *In re Edison,* 30 App. D. C. 321, 323; and in *Gold* v. *Gold,* 34 App. D. C. 229.

As the Patent Office by granting the patent must be held to have waived any objection to the application

on the ground that the claim allowed had been rejected before by that Office, there is no reason why the appellees below should not be allowed to avail themselves of the waiver. We answer the first question in the negative.

Second: The second question was as follows:

"In the absence of any other excuse for lapse of time between Patent Office actions and responses thereto, than that the applicant was exercising a statutory right (R. S. Sec. 4894 as amended setting limit of one year for response), may the bill of complaint be dismissed for want of equity because of long pendency in the Patent Office?"

We think that under the decision of this Court in *United States* v. *American Bell Telephone Company,* 167 U. S. 224, and *Chapman* v. *Wintroath,* 252 U. S. 126, this question must also be answered in the negative.

By § 12 of the Act of 1861 (12 Stat. 246), it was required that all applications for patent should be completed and prepared for examination within two years after the filing of the petition, and, in default thereof, were to be regarded as abandoned by the parties thereto, unless shown to the satisfaction of the Commissioner of Patents that such delay was unavoidable. There was no provision limiting the time of the prosecution of the application in this section. By the Act of 1870 (16 Stat. 198), it was provided, in § 32, that all applications for patent should be completed and prepared for examination within two years after the filing of the petition, and in default thereof, or upon failure of the applicant to prosecute the same within two years after any action therein, of which notice shall have been given to the applicant, they should be regarded as abandoned by the parties thereto, unless shown to the satisfaction of the Commissioner that such delay was unavoidable. This provision of the Act of 1870 was carried into the Revised Statutes as § 4894, and so the statute stood until 1897, when, by 29 Stat. 692, § 4894 was amended as follows:

"All applications for patents shall be completed and prepared for examination within one year after the filing of the application, and in default thereof, or upon failure of the applicant to prosecute the same within one year after any action therein, of which notice shall have been given to the applicant, they shall be regarded as abandoned by the parties thereto, unless it be shown to the satisfaction of the Commissioner of Patents that such delay was unavoidable."

Counsel for the alleged infringer says, that even with the time limit for action on the part of the applicant thus reduced to one year, it becomes easily possible for an applicant, after an action by the Patent Office upon his application, to delay for the full period of a year his response to such action, and however promptly the Patent Office may again act, he can delay another full year before replying to it, and thus, by waiting a year after each official action, (1) keep his application pending so as to enable him to withhold, indefinitely, his invention from the public, (2) add claims to his application covering the independent intervening developments of others, and (3) postpone the time when the public may enjoy the free use of the invention—all contrary to sound public policy.

The answer to this argument is that the matter is entirely within the control of Congress, and, in order to avoid the evil suggested, Congress may reduce the time within which one who is seeking an adjustment with the Patent Office, in order to obtain a patent, shall act upon receipt of notice of a decision of the Patent Office in the course of the application through that office. Congress, as we have seen by the history of the statute, reduced this time from an indefinite period in 1861 to two years in 1870, and to one year in 1897, and, as provided in the last Congress, to six months. Act of March 2, 1927, c. 273, 44 Stat. 1335.

During the pendency of the application in this case, the period allowed was one year. We do not know on what principle we could apply the equitable doctrine of abandonment by laches, in a case where the measure of reasonable promptness is fixed by statute, and no other ground appears by reason of which laches could be imputed to the applicant.

In *United States* v. *American Bell Telephone Company,* 167 U. S. 224, the Government brought a proceeding in equity to cancel a patent on the ground that it had been fraudulently secured, and part of the fraud of the patentee was that he had unreasonably delayed the obtaining of the patent, by collusion with officials of the Department, through their non-action, and thus postponed the period during which the monopoly of the patent was to continue. The court found no evidence of any collusion or fraud by the officials of the Department or undue or improper influence exerted or attempted to be exerted upon them. It said that Congress had established a department with officials selected by the Government, to whom all applications for patents must be made, had prescribed the terms and conditions of such applications and entrusted the entire management of affairs of the department to those officials, and that when an applicant for a patent complied with the terms and conditions prescribed and filed his application with the officers of the department, he must abide their action and could not be held to suffer or lose rights by reason of any delay on the part of those officials. The court said:

"Neither can a party pursuing a strictly legal remedy be adjudged in the wrong if he acts within the time allowed, and pursues the method prescribed by the statute. . . . Under section 4886, Rev. Stat., an inventor has two years from the time his invention is disclosed to the

public within which to make his application, and unless an abandonment is shown during that time he is entitled to a patent, and the patent runs as any other patent for seventeen years from its date. He cannot be deprived of this right by proof that if he had filed his application immediately after the invention the patent would have been issued two years earlier than it was, and the public therefore would have come into possession of the free use of the invention two years sooner. The statute has given this right, and no consideration of public benefit can take it from him. His right exists because Congress has declared that it should. . . . A party seeking a right under the patent statutes may avail himself of all their provisions, and the courts may not deny him the benefit of a single one. These are questions not of natural but of purely statutory right. Congress, instead of fixing seventeen had the power to fix thirty years as the life of a patent. No court can disregard any statutory provisions in respect to these matters on the ground that in its judgment they are unwise or prejudicial to the interests of the public."

The case of *Chapman* v. *Wintroath,* 252 U. S. 126, was an attempt in an interference suit to defeat a patent granted to the Chapmans on a divisional application, for an improvement in deep well pumps, in which the claims were the same as the claims of a patent to Wintroath, the divisional application having been made twenty months later than the date of the issue of the patent to Wintroath. It was conceded that the claims had been disclosed in the Chapman patent, which had been applied for in 1909 but which had met unusual difficulties in the Patent Office and, though regularly prosecuted as required by law and the rules of the office, was still pending without having been passed to patent in 1915, when the controversy arose. It was admitted that the inven-

tion was clearly disclosed in the parent application of the Chapmans, but it was contended that their divisional application claiming the discovery should be denied, because of their delay of nearly twenty months in filing it after the publication of Wintroath's patent, when they had by law only one year. It was held by the Court of Appeals of the District (*Wintroath* v. *Chapman,* 47 App. D. C. 428) that the delay of more than a year constituted equitable laches and estopped the Chapmans from making their divisional claim. That holding had rested on a previous decision by the Court of Appeals in *Rowntree* v. *Sloan,* 45 App. D. C. 207. This Court held that under § 4886 of the Revised Statutes, as amended March 3, 1897, two years was granted in such a case before the right to file a divisional application had been lost. The Court based its decision that the statutory period could not be reduced by equitable considerations or those of public policy on the language which we have just quoted from Mr. Justice Brewer in his opinion in the *Telephone* case. The same doctrine is to be found in *Crown Cork & Seal Company* v. *Aluminum Company,* 108 Fed. 845, and *Columbia Motor Car Company* v. *Duerr & Company,* 184 Fed. 893.

The case of *Woodbridge* v. *United States,* 263 U. S. 50, is cited by counsel for the defendant to sustain their view that this is a case in which the doctrine of laches and abandonment may be enforced. The *Woodbridge* case was an exceptional one. Woodbridge had deliberately delayed the issue of the patent, which he could have had for the asking, for nine years. He had directed the Patent Office to keep the papers upon which such issue might have been granted in the secret archives of the Patent Office, there to remain for one year, a privilege which was given him under the law as it then existed. He failed after the one year to apply for the patent because, as he avowed in a subsequent application, he wished there-

by to postpone the period of its monopoly until a national emergency might arise in which his invention, which was for rifling cannon, should be more in demand than it then was. He was denied a patent, for failure to comply with the statute. Subsequently he secured special legislation imposing the condition that he should be granted the patent, provided the court should first be satisfied that he had not forfeited or abandoned his right to a patent by publication, delay, laches or otherwise. This Court held that the delay of nine years for the avowed purpose of postponing the period of the monopoly was laches and a breach of the condition upon which he might avail himself of the special congressional privilege granted him. Such a case has certainly no application here. The answer to the question should be in the negative.

Questions answered "No."

MESSEL *v.* FOUNDATION COMPANY.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

No. 202. Argued March 9, 1927.—Decided May 31, 1927.

1. Art. 2315, Rev. Code of Louisiana, providing: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it," applies to personal injuries suffered by a workman while engaged in repairing a vessel afloat on waters of the United States and due to the negligence of his employer. P. 432.
2. Such cause of action, under Art. 2315, is not barred by the Louisiana Workmen's Compensation Act which provides special means and measures for adjusting claims for personal injuries in certain occupations, including repair of vessels, and declares its remedies exclusive, but does not by its terms include maritime injuries or torts under federal law. P. 432.
3. Art. 2315, Louisiana Rev. Code, *supra*, furnishes the equivalent of a "common law remedy," saved to suitors in the state court by § 9, Judiciary Act of 1789, § 256 Jud. Code. P. 433.

4. The right of action under this section, in the state court, in a case of maritime tort, is governed by the federal admiralty law, including the applicable section of the Federal Employers' Liability Act incorporated in that law by the Merchant Marine Act, of June 5, 1920, § 33, c. 250, 41 Stat. 1007. P. 434.
5. In an action under Art. 2315, *supra*, for personal injuries in performance of a marine contract, an amendment to the complaint claiming in the alternative under the Workmen's Compensation Act, is surplusage, and does not subject the plaintiff to the prescription of one year provided by the latter statute. P. 433.
6. A denial by a state court of its jurisdiction, is reviewable here, when based on an erroneous view of the federal law. P. 432.

Reversed.

CERTIORARI (269 U. S. 544) to a judgment of the Supreme Court of Louisiana which refused to review a judgment of the state Court of Appeals affirming the dismissal of an action for damages resulting from personal injuries. The action of the state Supreme Court was based on the ground that the judgment of the intermediate court was correct.

Mr. Claude L. Johnson, with whom *Messrs. Charles L. Denechaud* and *James F. Pierson* were on the brief, for petitioner.

Mr. Purnell M. Milner for respondent.

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

On December 20, 1920, Robert L. Messel filed a suit in the Civil District Court for the Parish of Orleans, State of Louisiana, to recover $10,000, as for damages for personal injuries, from the Foundation Company, a corporation of the State of New York doing business in Louisiana as a ship builder and repairer of sea-going steamships. The facts as averred in his petition were as follows: He was employed by the Foundation Company in

September, 1919, as a helper to a boilermaker. He was sent with the boilermaker on board the steamship *La-Grange,* then afloat on the Mississippi River at New Orleans. The task to be performed was to add eight feet to the smokestack of the steamer. The two men were furnished ladders to ascend to the top of the stack and, while engaged in the work, Messel was brought directly over the mouth of the steam escape pipe running from the engine room. While he was so engaged, scalding steam was allowed to escape from the pipe. It overcame him, and inflicted serious injuries.

The 14th paragraph of his petition is:

" Petitioner represents that he is entitled to claim and recover under Civil Code Article 2315 of this State all the damages sustained by him arising from the casualties aforesaid and to have the amount of the reparations fixed and determined before the Court after due trial and hearing had, and as provided by Article 6 of the Constitution of 1913 of this State; and not by the amount of sums provided for " and not by Act No. 20, of 1914, and its amendments.

In his petition he attacks the Louisiana Workman's Compensation Act known as Act No. 20 of 1914, as invalid under the state constitution. He says that when injured he was engaged in marine work in admiralty on the steamship on the navigable waters of the United States, and that this entitled him to an action *in personam* against the owner and master of the vessel, but that, as the owner and master had departed from the port for a foreign port before he was able to bring his action in admiralty, and as the Foundation Company holds indemnity against any loss to it on account of the damage claimed, he prays for judgment against his employer.

The Foundation Company excepted to the petition on the ground that it disclosed no legal cause of action; but in the event that the exception should be overruled, the

company admitted the averments of the petition, save that it charged that the petitioner was guilty of gross negligence, and assumed the risk, and that the injuries received were due to his own fault or were caused by the negligence of a fellow servant. It denied the extent of the damage; said that the petitioner was precluded from bringing his action under Art. 2315 of the Civil Code, but must bring it under the State Workman's Compensation act.

Messel amended his petition, reaffirming the averments of his original petition, but in the alternative asked, if it should be held that the Workman's Compensation Act of Louisiana was not unconstitutional and did apply, that he have compensation under that act in $4,000, or in $10 a week for four hundred weeks provided in the act. This amendment was filed May 22, 1922, by order of court. An exception by respondent was taken on the ground that the amended petition had changed the issue and was an attempt, after the lapse of more than one year from the date of the injuries, to bring the suit under the Workman's Compensation Act, while the original action was brought under Civil Code 2315 for damages for a tort, that the claim was therefore prescribed under Art. 31 of Act No. 20 of 1914. By a judgment of July 19, 1922, the exceptions filed by the Foundation Company were sustained and the suit against it was dismissed.

The Court of Appeals of the Parish of Orleans, to which the case was then taken on appeal, held that the objections to the constitutionality of the Workman's Compensation Act could not be sustained. It further decided that, if the petitioner's right of action was not under the Workman's Compensation Act, the state courts had no jurisdiction of such demands *ratione materiae;* that it had twice decided that the state court was without jurisdiction in an action brought under the Workman's Compensation Act where the plaintiffs sustained injuries while aboard a ship under a maritime contract; that these decisions were in accord with the opinion of the Supreme

Court of Louisiana in *Lawson* v. *New York Steamship Company,* 148 La. 290, and with the decisions of this Court in *Southern Pacific* v. *Jensen,* 244 U. S. 205, affirmed in *Knickerbocker* v. *Stewart,* 253 U. S. 149, and *State* v. *Dawson,* 264 U. S. 219, and in *Peters* v. *Veasey,* 251 U. S. 121; and that an employee like Messel, who suffered injury upon a vessel under a maritime contract of employment, could not obtain compensation in a state court of Louisiana.

Application was then made to the Supreme Court of Louisiana for a writ of certiorari to review the decree of dismissal by the Court of Appeals. The writ was refused by the Supreme Court on the ground that the judgment was correct, May 25, 1925.

Art. 2315 of the Revised Code of Louisiana under which Messel sought recovery is as follows: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."

The Workman's Compensation Act, No. 20 of the Acts of 1914, as amended in subsequent acts, provides for the prosecution of claims for personal injuries in certain hazardous trades, businesses, and occupations, includes the operation, construction, repair, removal, maintenance, and demolition of vessels, boats and other water craft, and provides certain payments for such injuries. Section 34 of the act provides that the rights and remedies therein granted to an employee on account of personal injury, for which he is entitled to compensation under the act, shall be exclusive of all other rights and remedies of such employee, his personal representative, dependents, relations or otherwise, on account of such injury.

The argument of the Court of Appeals in reaching its conclusion in this case was that, because it had been held in *Peters* v. *Veasey, Southern Pacific Company* v. *Jensen, Knickerbocker Ice Company* v. *Stewart,* and in *State* v. *Dawson,* that a Workman's Compensation Act could have no application to an injury to one working as an employee on a vessel afloat on the waters of the United States,

where his work was upon a maritime contract and the rights and liabilities of the parties were matters clearly within the admiralty jurisdiction, a state court had no power to consider and decide a claim that must rest on the maritime law, because the Workman's Compensation Act was made exclusive by its terms and prevented the operation and application of § 2315 granting what was equivalent to a common law remedy in the enforcement of such a maritime claim. At first this decision would seem to be conclusive upon us, because it would seem to be a construction by the Louisiana state court of the jurisdiction conferred by its own statute upon its own courts. But this is a misconception of what the court actually decided in respect of the statute. The Workman's Compensation Act did not by its terms include a maritime injury or tort under the federal law such as is the basis of this suit. The state court's ruling, as we conceive it, was not that § 2315 was not broad enough to include a suit for a maritime tort as between master and servant if the federal law permitted it, but that the federal law does not permit it and, therefore, such a suit can only be maintained in a federal admiralty court. That is an erroneous view of the rulings of our Court as to the application of workmen's compensation acts. Section 2315 offers a remedy in the state court for any act whatever of man that causes damage to another and obliges him by whose fault it happened to repair it. That includes everything except what the Workman's Compensation Act bars from recovery under this general section. The Workman's Compensation Act does not bar from recovery suit for damages against another for a maritime tort. Clearly therefore suit for such a tort is not excluded from the jurisdiction of the state court under § 2315 unless the federal law forbids. To hold that the federal law forbids would be to deprive the petitioner in this case of the right secured to him under the Judiciary Act of 1789, § 9, as now contained

in paragraph third of § 256 of the Judicial Code, which gives exclusive jurisdiction in courts of the United States of all civil causes of admiralty and maritime jurisdiction, "saving to suitors in all cases the right of a common law remedy where the common law is competent to give it."

Section 2315 has been held by the Supreme Court of Louisiana to furnish the equivalent of the common law. In *Gray* v. *New Orleans Dry Dock and Shipping Company,* 146 La. 826, a case very much like this, a workman was injured while engaged in maritime employment. His action invoked Art. 2315 of the Civil Code. The respondent in the case pleaded that the petitioner's right of action, if any, was governed by the Workman's Compensation Act No. 20 of 1914, and not by the provisions of Art. 2315 of the Revised Civil Code of Louisiana, as pleaded by the plaintiffs. The Supreme Court of Louisiana said:

"The work in which plaintiff was engaged at the time he was injured was maritime in its nature; his employment was a maritime contract, and his claim for damages was enforceable in the admiralty and maritime jurisdiction. For that reason, before the passage of the act of Congress of October 6, 1917, the Employers' Liability Act was not pertinent, and did not deprive the plaintiff of the right of a common-law remedy. We say 'common-law remedy' because article 2315 of the Civil Code of this state is only an embodiment of the common-law right of action for tort, viz: 'Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.'"

The fact that Messel in the alternative asked for a recovery under the Workman's Compensation Act could not defeat him in his continuous request to proceed under Art. 2315; and, as the original action invoked Art. 2315, and he is still invoking the remedy provided by that Article, there would seem to be no opportunity for the

operation of the prescription of one year provided by the Louisiana Workman's Compensation Act. Messel's attack upon the Workman's Compensation Act as unconstitutional under the constitution of Louisiana was entirely irrelevant and should be rejected as surplusage.

As Messel has resorted to the state court, and there is nothing to prevent his recovery in the state court except the Workman's Compensation Act, which is inapplicable to his case in view of our decisions, the judgment of the Supreme Court of Louisiana must be reversed and the case remanded for further proceedings not inconsistent with this opinion.

The principles applicable to Messel's recovery, should he have one, must be limited to those which the admiralty law of the United States prescribes, including the applicable section of the Federal Employers Liability Act, incorporated in the maritime law by § 33, c. 250, 41 Stat. 988, 1007. *Robins Dry Dock & Repair Company* v. *Dahl,* 266 U. S. 449; *Great Lakes Dredge & Dock Co.* v. *Kierejewski,* 261 U. S. 479, 480; *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149; *The Osceola,* 189 U. S. 158; *Panama R. R. Co.* v. *Johnson,* 264 U. S. 375; *Baltimore S. S. Co.* v. *Phillips, ante,* p. 316; *Engel* v. *Davenport,* 271 U. S. 33; *Panama R. R. Co.* v. *Vasquez,* 271 U. S. 557.

Judgment reversed.

RHEA *v.* SMITH.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

No. 199. Submitted March 4, 1927.—Decided May 31, 1927.

1. In the absence of a state law providing conformity between liens of judgments of the federal District Court and of judgments of the state courts of general jurisdiction of the first instance, as contemplated by the Act of Congress of August 1, 1888, a judgment of the federal District Court is a lien on all lands of the judgment debtor within that court's territorial jurisdiction. P. 441.

2. A Missouri statute by which the judgment of a state circuit, county, or probate court is a lien upon the real estate of the judgment debtor in the county for which the court is held, but by which a judgment of the federal District Court is a lien on property in the county in which it is rendered only if a transcript thereof be filed in the office of the clerk of the state circuit court, does not comply with the Act of Congress of August 1, 1888, *supra*, even though the lien of the federal judgment, upon the filing of the transcript, relate back to the date of rendition, and notwithstanding that the condition as to filing transcripts applies also to the judgments of the supreme and other appellate courts of the State. PP. 441, 444.

308 Mo. 422, reversed.

CERTIORARI (269 U. S. 544) to a judgment of the Supreme Court of Missouri, which affirmed a judgment in favor of Smith, defendant in a suit brought by Rhea to determine title and in ejectment, concerning land which Rhea claimed under sales made in execution of a money judgment recovered in the federal court against a former owner from whom Smith also claimed title through a conveyance made after that judgment but before the execution sales.

Mr. Thomas Hackney for petitioner.

Mr. W. R. Robertson for respondent.

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

This case involves the validity of a lien of a judgment of the Federal District Court of the Western District of Missouri, sitting at Joplin, upon land of the judgment debtor in Jasper County in that district, of which Joplin is the county seat. It turns on the question whether the law of Missouri providing for the registration, recording, docketing and indexing of judgments of the United States district courts for the purpose of making them liens upon land in that State, conforms to the provisions of the state law upon the same subject in refer-

ence to liens of judgments of the courts of record of the State. If it does, the lien and the title of the petitioner fail, and the judgment of the Supreme Court of Missouri must be affirmed. If not, then the case must be reversed.

The suit herein was brought in Jasper County by William A. Rhea, in one count, to determine title to certain real estate in that county, and in another by ejectment to recover its possession. There was a judgment for the defendant in the trial court, and Rhea appealed. The facts were as follows:

Blanche H. Whitlock was the common source of title of the plaintiff and the defendant, and in 1921 owned the property in dispute. As plaintiff, she had brought a suit in the United States District Court for the Southern Division of the Western District of Missouri, at Joplin, in Jasper County. On January 10, 1921, the suit was dismissed and the costs of the case were adjudged against her in the sum of $8,890.20. On April 5, 1921, she conveyed the property in dispute to the defendant, Thomas C. Smith, for a consideration of $5,000. On July 22, 1921, execution was issued upon the judgment in the federal court, and under it the marshal sold part of the land and conveyed it by his deed to the plaintiff Rhea for $200. In December, 1921, another execution was issued under which the marshal sold and conveyed to Rhea the remainder of the land in dispute for $25. The contention of Rhea is that the judgment of the Federal court is a lien on the real estate from its rendition, that he acquired title to the fee through the execution sales, and that it was superior to any title acquired by subsequent conveyance of the judgment debtor. Smith, the respondent, contended that in the absence of a transcript of the judgment of the federal court filed in the office of the Clerk of the Circuit Court of Jasper County as required by the Missouri law, the judgment was not a lien, and the conveyance to Smith, the respondent, by the

judgment debtor was free from its encumbrance. The case was appealed to the Supreme Court of Missouri and heard by the Second Division. One of the judges having been absent and the two judges constituting the division differing in opinion, the case was heard *en banc,* and a majority of the court affirmed the judgment below, two of the judges dissenting.

In *Wayman* v. *Southard,* 10 Wheat. 1, 22, this Court said through Chief Justice Marshall, referring to the effect of the last clause of § 8 of Art. I of the Constitution, authorizing Congress to make laws necessary and proper for carrying into execution powers vested in any department of the Government:

"That a power to make laws for carrying into execution all the judgments which the judicial department has power to pronounce, is expressly conferred by this clause, seems to be one of those plain propositions which reasoning cannot render plainer. The terms of the clause neither require nor admit of elucidation. The Court, therefore, will only say, that no doubt whatever is entertained, on the power of Congress over the subject."

By § 37 of the Process Act of May 19, 1828, c. 68, 4 Stat. 278, 281, writs of execution and other final process issued on judgments and decrees, rendered in any of the courts of the United States, were to be the same as those used in the courts of the State, provided, that it should be in the power of the courts, if they saw fit in their discretion, by rules of court, so far to alter final process in said courts as to conform the same to any change which might be adopted by the legislatures of the respective States for the state courts.

The effect of this statute was considered in *Massingill* v. *Downs,* 7 How. 760, in which the question was of the validity of a lien of a judgment obtained in the Circuit Court of the United States for the District of Mississippi in 1839. In 1841 the State of Mississippi had passed a

law requiring judgments to be recorded in a particular way in order to make them a lien upon property. It was held that the statute did not abrogate the lien which had been acquired under the judgment of 1839, although the latter had not been recorded in the manner required by the State. Mr. Justice McLean, speaking for the Court, said:

"In those States where the judgment on the execution of a State court creates a lien only within the county in which the judgment is entered, it has not been doubted that a similar proceeding in the Circuit Court of the United States would create a lien to the extent of its jurisdiction. This has been the practical construction of the power of the courts of the United States, whether the lien was held to be created by the issuing of process or by express statute. Any other construction would materially affect, and in some degree subvert, the judicial power of the Union. It would place suitors in the State courts in a much better condition than in the federal courts."

It was held, therefore, in that case that the plaintiffs in the judgment had acquired a right under the authority of the United States and that that right could not be affected by subsequent act of the State. This principle was affirmed in *Brown* v. *Pierce,* 7 Wall. 205, and *Williams* v. *Benedict,* 8 How. 107.

Such was the state of the law until the passage of the Act of August 1, 1888, c. 729, 25 Stat. 357, which was the first formal act to regulate fully the liens of judgments and decrees of the courts of the United States. The whole Act was as follows:

"An act to regulate the liens of judgments and decrees of the courts of the United States.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That judgments and decrees rendered in a circuit

or district court of the United States within any State, shall be liens on property throughout such State in the same manner and to the same extent and under the same conditions only as if such judgments and decrees had been rendered by a court of general jurisdiction of such State: *Provided,* That whenever the laws of any State require a judgment or decree of a State court to be registered, recorded, docketed, indexed, or any other thing to be done, in a particular manner, or in a certain office or county, or parish in the State of Louisiana before a lien shall attach, this act shall be applicable therein whenever and only whenever the laws of such State shall authorize the judgments and decrees of the United States courts to be registered, recorded, docketed, indexed, or otherwise conformed to the rules and requirements relating to the judgments and decrees of the courts of the State.

"Sec. 2. That the clerks of the several courts of the United States shall prepare and keep in their respective offices complete and convenient indices and cross-indices of the judgment records of said courts, and such indices and records shall at all times be open to the inspection and examination of the public.

"Sec. 3. Nothing herein shall be construed to require the docketing of a judgment or decree of a United States court, or the filing of a transcript thereof, in any State office within the same county or parish in the State of Louisiana in which the judgment or decree is rendered, in order that such judgment or decree may be a lien on any property within such county."

The third section was amended by the Act of March 2, 1895, c. 180, 28 Stat. 813, to read as follows:

"Nothing herein shall be construed to require the docketing of a judgment or decree of a United States court, or the filing of a transcript thereof, in any State office within the same county or the same parish in the State of Louisiana in which the judgment or decree is rendered,

in order that such judgment or decree may be a lien on any property within such county, if the clerk of the United States court be required by law to have a permanent office and a judgment record open at all times for public inspection in such county or parish."

By the Act of August 23, 1916, the amending act of 1895 was repealed, c. 397, 39 Stat. 531.

The legislation of Missouri (Mo. Rev. Statutes 1919) adopted in an effort to comply with the requirement of § 1 of the Congressional act of 1888 was as follows:

"Sec. 1554. Lien of judgment in Supreme Court, Courts of Appeals, and Federal Courts in This State.—Judgments and decrees obtained in the supreme court, in any United States district or circuit court held within this state, in the Kansas City court of appeals, or the St. Louis court of appeals, shall, upon the filing of a transcript thereof in the office of the clerk of any circuit court, be a lien on the real estate of the person against whom such judgment or decree is rendered, situate in the county in which such transcript is filed.

"Sec. 1555. Lien in Courts of Record, Generally.—Judgments and decrees rendered by any court of record shall be a lien on the real estate of the person against whom they are rendered, situate in the county for which the court is held.

"Sec. 1556. The Commencement, Extent, and Duration of Lien.—The lien of a judgment or decree shall extend as well to the real estate acquired after the rendition thereof as to that which was owned when the judgment or decree was rendered. Such liens shall commence on the day of the rendition of the judgment, and shall continue for three years, subject to be revived as hereinafter provided; but when two or more judgments or decrees are rendered at the same term, as between the parties entitled to such judgments or decrees, the lien

shall commence on the last day of the term at which they are rendered."

It is clear that Congress by the first section of the Act of August 1, 1888, quoted above, intended to change and limit the existing rule, as stated by this Court, through Justice McLean, in *Massingill* v. *Jones, supra,* that federal court judgments were a lien upon lands throughout the territorial jurisdictions of the respective federal courts, but intended to do this only in those States which passed laws making the conditions of creation, scope and territorial application of the liens of federal court judgments the same as state court judgments, so that where any State has not passed such laws, the rule that federal judgments are liens throughout the territorial jurisdiction of such courts must still be in force. *Dartmouth Savings Bank* v. *Bates,* 44 Fed. 546; *Shrew* v. *Jones,* 2 McLean 78—Fed. Cases No. 12818, 22 Fed. Cases 40.

The Missouri Statutes prescribe that judgments rendered by any state court of record shall be a lien on the real estate of the person against whom they are rendered, situate in the county for which the court is held, and the lien shall commence on the day of the rendition of the judgment and shall continue for three years. They further provide that judgments obtained in the Supreme Court of the State, in any federal court held within the State, and in the Court of Appeals of either Kansas City or St. Louis, shall, upon the filing of a transcript in the office of the clerk of any circuit court, be a lien on the real estate of the person against whom such judgment or decree is rendered, situate in the county in which such transcript is filed.

It is very clear from this recital that a judgment of the federal court upon lands in the county in which it sits, if we give effect to the state statute, can not be a lien unless a transcript of the judgment shall be

made and filed in the office of the clerk of the circuit court of the State in that county, whereas no such transcript of a judgment in the state circuit court is required to create a lien for its judgment, but the lien takes effect the minute that it is entered on its record. Not only is this true with respect to the state circuit court of the county, a court of general jurisdiction, but it is also true of judgments in the county court and in the probate court of that county, which are courts of record.

The majority opinion of the state Supreme Court in this case expresses the view that the difference is of so slight a character that it ought not to be regarded as a failure to conform to the federal statute. The opinion further points out that judgments of the Supreme Court of the State and of the courts of appeals of St. Louis and Kansas City can only become a lien upon the real estate of a judgment defendant in a particular county upon the filing of a transcript of them in the clerk's office of the circuit court where the land lies. Thus, it is said, the United States District and Circuit Courts are put on the same basis as these appellate state courts having like the Federal District Court a larger jurisdiction than a county.

It is obvious, however, that the District Court of the United States is a court of first instance of general jurisdiction, just as the circuit courts of the various counties in Missouri are courts of general jurisdiction of the first instance. The conformity required should obtain as between them, and not as between the federal court and the state appellate courts.

We are dealing here with a question necessarily of great nicety in determining the effect and the priority of liens upon real estate, and the subject requires exactness. Merely approximate conformity with reference to such a subject matter will not do, especially where complete conformity is entirely possible. The Supreme Court of

Missouri in its opinion says it would take but a short time and very little trouble to transcribe a judgment of the federal court sitting in a county seat and to file it in the office of the clerk of the state circuit court in the same place, on the day of its rendition, and thus put it on par with the lien of any judgment of the state circuit court rendered on the same day. It may be that the transcript of the judgment if properly filed, even if the transcribing be delayed, as in usual course it is likely to be for several days, would not prejudice the holder of a judgment in the federal court, because its lien would date from its rendition in the federal court. The risk to be run, however, is in the danger that the agent or attorney of a judgment creditor in the federal court may forget to have the judgment transcribed and filed in the clerk's office of the circuit court of the county. Such forgetfulness by those charged with the duty is a factor to be considered, and makes a real difference between the provision for the lien of the federal court judgment and the instant attaching of a lien upon the entry of the state court judgment without further action.

Reference is made by the state Supreme Court to *Re Jackson Light and Traction Company* v. *Newton,* 269 Fed. 223, a decision of the Circuit Court of Appeals of the Fifth Circuit concerning a judgment rendered in Mississippi, holding that the required conformity was furnished by the state statute. The statute required the enrollment of a judgment in the state court of general jurisdiction in order that it might become a lien upon the property in the county of its jurisdiction, only if enrolled twenty days after the term of entry of the judgment. The judgments of the federal court, the state Supreme Court and the chancery courts also became liens from the time they were enrolled in the county where the land lay. We think that case may well be distinguished from this one because necessity of enrollment was exacted as to every court.

The majority opinion of the Supreme Court of Missouri further dwells upon a significance thought to attach to the purpose of Congress in repealing § 3 of the statute of 1888, as amended by the statute of 1895. That section, thus amended, specifically forbade any state statute seeking conformity to require the docketing of a judgment or decree of a federal court, or the filing of a transcript thereof in any state office within the same county in which the federal judgment or decree was rendered, in order to be a lien on the property in that county, if the clerk of the federal court had a permanent office and a judgment record open at all times for public inspection in such county. It is said that the repeal of that section indicates Congress's intention to permit the requirement in the state statute that there should be some additional record in the state court, in the county where the federal court sits, of the federal judgment, without destroying the required conformity. Even if this be conceded, it does not show that in order to secure conformity, there must not be a similar requirement for a formal record in the state court of the county of its judgment to create a lien. It is the inequality which permits a lien instantly to attach to the rendition of the judgment, without more, in the state court which does not so attach in the federal court in that same county that prevents compliance with the requirement of § 1 of the Act of 1888. In the Mississippi case, above referred to, there was the same formality of enrollment within twenty days after the judgment in order to secure a lien in both the state court and the federal court in the county where both sat.

We think that the three sections, 1555, 1556 and 1554, do not secure the needed conformity in the creation, extent and operation of the resulting liens upon land as between federal and state court judgments. The lien of federal court judgments in Missouri therefore attaches to

all lands of the judgment debtor lying in the counties within the respective jurisdictions of the two federal district courts in that State. This requires a reversal in this case of the judgment of the Supreme Court of Missouri. The cause is remanded for further proceedings not inconsistent with this opinion.

Reversed.

CLINE, DISTRICT ATTORNEY, *v.* FRINK DAIRY COMPANY ET AL.

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

No. 304. Argued April 29, 1927.—Decided May 31, 1927.

1. A federal court of equity may enjoin state criminal proceedings under a statute alleged to be unconstitutional when their prevention is essential to the safeguarding of rights of property, and when the circumstances are exceptional and the danger of irreparable loss is both great and immediate. P. 451.
2. The injunction can not be supported, however, in so far as it embraces proceedings pending in the state criminal court which were instituted before the suit was begun. P. 452.
3. The Due Process Clause of the Fourteenth Amendment imposes upon the States the obligation of so framing their criminal statutes that those to whom they are addressed may know what standard of conduct is intended to be required. P. 458.
4. The Colorado Anti-Trust Law denounces and punishes conspiracies and combinations, in restraint of trade; to fix prices; prevent competition, etc.; except when necessary in order to enable participants to obtain a reasonable profit from products dealt in, etc. *Held* that the exception leaves the statute without a fixed standard of guilt rendering it void. P. 453.

Reversed in part; affirmed in part.

APPEAL from a decree of the District Court, three judges sitting, permanently enjoining the appellant District Attorney from enforcing the Colorado Anti-Trust Law against the plaintiff dairy corporations and individuals.

Mr. Jean S. Breitenstein, with whom *Messrs. William L. Boatright, Paul M. Segal,* and *A. L. Betke* were on the brief, for appellant.

Federal courts do not enjoin the further prosecution of pending criminal cases in state courts. Rev. Stats., § 720; Jud. Code, § 265. It is contrary to the rules of equity. *Essanay Mfg. Co.* v. *Kane,* 258 U. S. 358, and cases cited. The proceeding in the Colorado court was pending and set for trial at the time the suit was instituted in the court below. See *Ex parte Sawyer,* 124 U. S. 200; Story, Eq. Jurisprudence, § 893; *Harkrader* v. *Wadley,* 172 U. S. 148; *Fitts* v. *McGee,* 172 U. S. 516; *Ex parte Young,* 209 U. S. 123, 162; *Davis Mfg. Co.* v. *Los Angeles,* 189 U. S. 207.

The Colorado Anti-Trust Law does not violate the equal protection of the laws clause of the Fourteenth Amendment by exempting labor and agricultural products. *Int. Harvester Co.* v. *Missouri,* 234 U. S. 199, 210; *Duplex Co.* v. *Deering,* 254 U. S. 443, 469.

Public policy requires the exemption of coöperative marketing associations from anti-trust laws. *Rifle Potato Growers* v. *Smith,* 78 Colo. 171; *Nor. Wis. Tobacco Pool* v. *Bekkedal,* 182 Wis. 571.

Neither does it violate the Fourteenth Amendment on the ground that it fails to establish an ascertainable standard of guilt. A state statute is not unconstitutional because wanting in certainty when the provisions complained of as uncertain employ words or phrases having a well settled common-law meaning, notwithstanding an element of degree in the definition as to which estimates might differ. *Connally* v. *Gen. Const. Co.,* 269 U. S. 385; *Hygrade Prov. Co.* v. *Sherman,* 266 U. S. 497; *Nash* v. *United States,* 229 U. S. 373. The proviso here complained of is merely a legislative declaration of the rule of reason laid down by Chief Justice White in the *Standard Oil Co.,* case, 221 U. S. 1, 60–65, for the interpretation

and application of the Sherman Anti-Trust Law. It is plain that combinations which come within this proviso would not be against a public policy or in restraint of trade and hence would not be indictable either under the common law or under the Sherman Act, while combinations which do not come within this exception are illegal because in restraint of trade and against public policy.

The Colorado legislature has merely attempted to incorporate the standard laid down by the common law, and established by this Court to guide prosecutions under the Sherman Act. The Colorado Supreme Court has so interpreted this law. *Campbell* v. *People,* 72 Colo. 213. It is settled that an anti-trust law dependent upon such rule of reason can be the basis of a criminal prosecution. *Nash* v. *United States,* 229 U. S. 373; *Waters Oil Co.* v. *Texas,* 212 U. S. 86, 109. Distinguishing, *United States* v. *Cohen Grocery Co.,* 255 U. S. 81; *Int. Harvester Co.* v. *Kentucky,* 234 U. S. 216.

Messrs. Hudson Moore and *Ernest B. Fowler,* with whom *Mr. A. J. Fowler* was on the brief, for appellees.

A criminal statute must define the crime with certainty and furnish an ascertainable standard of guilt to guide and inform the public what it is their duty to avoid, and if the statute fails to do this, and delegates to a jury the fixing of the test or standard, it is lacking in due process, unconstitutional, and void. *Connally* v. *Gen. Const. Co.,* 269 U. S. 385; *United States* v. *Trenton Potteries Co.,* 273 U. S. 392; *Yu Cong Eng* v. *Trinidad,* 271 U. S. 500; *United States* v. *Cohen Grocery Co.,* 255 U. S. 81; *Int. Harvester Co.* v. *Kentucky,* 234 U. S. 216; *Collins* v. *Kentucky,* 234 U. S. 634; *United States* v. *Reese,* 92 U. S. 214; *United States* v. *Brewer,* 139 U. S. 278; *Tozer* v. *United States,* 52 Fed. 917; *L. & N. Ry. Co.* v. *R. R. Comm.,* 19 Fed. 679; *Railway Co.* v. *Dey,* 35 Fed. 866; *L. & N. Ry.*

Co. v. *Commonwealth,* 99 Ky. 132; *Hayes* v. *State,* 11 Ga. App. 371. Distinguishing, *Nash* v. *United States,* 229 U. S. 373; *Waters Oil Co.* v. *Texas,* 212 U. S. 86.

The Colorado Anti-Trust Act sets up a new test or standard of criminality which was unknown to the common law. There are no decisions furnishing any standard or test to determine what is a reasonable profit. It is one thing to determine whether a given course of action constitutes a reasonable restraint of trade, while it is quite another thing to determine whether or not a reasonable profit has been made.

The act denies appellees the equal protection of the laws. *Connolly* v. *Union Pipe Co.,* 183 U. S. 540. The holding in this case has been repeatedly approved in subsequent decisions of this court. *Cox* v. *Texas,* 202 U. S. 446; *Ozan Lumber Co.* v. *Bank,* 207 U. S. 251; *Int. Harvester Co.* v. *Missouri,* 234 U. S. 199; *Otis* v. *Gassman,* 187 U. S. 606; *Billings v. Illinois,* 188 U. S. 97; *Missouri* v. *Dockery,* 191 U. S. 165; *Dobbins* v. *Los Angeles,* 195 U. S. 223; *Cook* v. *Marshall Co.,* 196 U. S. 261; *Halter* v. *Nebraska,* 205 U. S. 34; *Cont. Paper Co.* v. *Voight,* 212 U. S. 227; *Singer Co.* v. *Brickell,* 233 U. S. 305; *Truax* v. *Corrigan,* 257 U. S. 312; *Radice* v. *New York,* 264 U. S. 292.

A federal court will enjoin the enforcement of an unconstitutional state statute where property rights are invaded. *Tyson* v. *Banton,* 273 U. S. 418; *Packard* v. *Banton,* 264 U. S. 140; *Terrace* v. *Thompson,* 263 U. S. 197; *Truax* v. *Raich,* 239 U. S. 33; *Philadelphia* v. *Stimson,* 223 U. S. 605; *Ex parte Young,* 209 U. S. 123; *Dobbins.* v. *Los Angeles,* 195 U. S. 223; *Davis* v. *Los Angeles,* 189 U. S. 207; *Reagan* v. *Farmers L. & T. Co.,* 154 U. S. 362. Distinguishing, *Essanay Mfg. Co.* v. *Kane,* 258 U. S. 358; *Fenner* v. *Boykin,* 271 U. S. 240; *Harkrader* v. *Wadley,* 172 U. S. 148; *Ex parte Young,* 209 U. S. 123.

Under the issues made by the pleadings, the right to enjoin the pending proceeding is not before the court. *Connally* v. *Gen. Const. Co.*, 269 U. S. 385; *Gen. Inv. Co.* v. *Lake Shore Ry.*, 250 Fed. 160; *Livingston* v. *Storey*, 9 Pet. 632; *Pacific R. R. Co.* v. *Mo. Pacific R. R.*, 111 U. S. 509; *Stewart* v. *Masterson*, 131 U. S. 151. As the bill stated a cause of action for relief against the threatened activities of appellant, there was no error in the lower court's denial of the motion to dismiss. The further question of whether or not the lower court should enjoin him from prosecuting the pending criminal proceeding was not an issue raised by the general motion to dismiss and is not a question to be determined by this Court, upon appeal.

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

This is a direct appeal under § 238 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, from a final decree of the United States District Court of Colorado, three Judges sitting, granting a permanent injunction against the enforcement by a state officer of a state law, on the ground of its unconstitutionality. The bill was brought by the Frink Dairy Company, the Windsor Farm Dairy Company and the Climax Dairy Company, corporations of Colorado, and H. Brown Cannon, Clarence Frink, A. T. McClintock and Morris Robinson, citizens and residents of the same State, against Foster Cline, the District Attorney for the City and County of Denver, Colorado.

The bill alleges that the suit involves for decision the question of the validity under the Constitution of the United States of what is known as the Colorado Anti-Trust Act, being chapter 161 of the Session Laws of the State of Colorado, for 1913, approved April 17th of that

year. It avers that the three dairy companies have been separately conducting for years, in Denver, Colorado, and its vicinity, the sale and distribution of milk, butter and all manner of dairy products; that each has invested in its business more than $100,000; that they are also engaged in interstate commerce, buying and selling from without the limits of the State; that the individual plaintiffs, Cannon, Frink and Morrison, are respectively officers and stockholders of the three plaintiff companies; that McClintock, the other individual plaintiff, is an officer and stockholder of the Beatrice Creamery Company, a corporation of Delaware, also in the dairy business in Denver; that the individual plaintiffs, experienced dairymen, by painstaking effort, fair dealing, and careful management, have gained thousands of customers, and a well-established trade, and that their companies, in addition to their tangible property and assets, have good wills of great value. The bill sets out in full the Colorado Anti-Trust law, which punishes as a crime combinations of persons and corporations to restrain trade or commerce, with certain exceptions, and makes it the duty of the defendant, the District Attorney, to prosecute alleged violations thereof and to institute actions for forfeiture of charters of associations engaged therein. All contracts violating the act are avoided; violation of the act is made a good defense to a suit for merchandise that was sold in pursuance of a combination under it; and a right of action for damages against the combiners is given to any one injured by the combination. One charge of the bill, among others, is that the act violates the Fourteenth Amendment of the Constitution, in that it deprives the plaintiffs of their liberty without due process of law, because it is indefinite and uncertain and fails to fix any informing standard of criminality.

The bill alleges that Foster Cline, the defendant, in his capacity as district attorney of Denver City and

County, has been, and still is, claiming that the plaintiffs and their competitors have been and now are acting in violation of the Anti-Trust law; that he has caused an information to be filed in the criminal division of the District Court of the City and County of Denver, in which the plaintiffs and the Beatrice Creamery Company, a Delaware corporation, are charged with conspiracy to violate the Anti-Trust Act; that he expects to press the case to trial; that, since the case was instituted, the grand jury has been in session and many witnesses summoned and questioned about the plaintiffs' milk business; that the defendant Cline has threatened, and unless restrained by the court will institute, further prosecutions, file further informations and attempt to procure indictments of the plaintiffs by the grand jury; and that Cline, by this multiplicity of criminal suits and prosecutions, as well as by the civil suits for forfeiture of the corporate plaintiffs' charters he has threatened to bring, has already inflicted serious loss to the businesses and properties of the plaintiffs, and that they will be irreparably and immeasurably damaged thereby unless he is restrained.

A motion to dismiss was made by the defendant, on the ground that the bill presented no case for equitable relief. On the hearing before the three judges, a preliminary injunction was issued and the motion to dismiss was denied. The defendant standing upon his motion to dismiss, and declining to plead further, a decree for a permanent injunction was entered, and this is an appeal from that decree.

The first question is whether the practice and precedents in equity justified the granting of relief by injunction, where one criminal prosecution had been begun and where many others, together with suits for forfeiture of corporate franchises, were threatened. The general rule is that a court of equity is without jurisdiction to restrain criminal proceedings to try the same right that is in issue

before it; but an exception to this rule exists when the prevention of such prosecutions under alleged unconstitutional enactments is essential to the safeguarding of rights of property, and when the circumstances are exceptional and the danger of irreparable loss is both great and immediate. *Fenner* v. *Boykin,* 271 U. S. 240, 243; *Packard* v. *Banton,* 264 U. S. 140; *Hygrade Provision Co.* v. *Sherman,* 266 U. S. 497, 502; *Terrace* v. *Thompson,* 263 U. S. 197, 214; *Ex parte Young,* 209 U. S. 123; *Davis & Farnum Mfg. Co.* v. *Los Angeles,* 189 U. S. 207, 218; *Dobbins* v. *Los Angeles,* 195 U. S. 223, 236, 241; *In re Sawyer,* 124 U. S. 200, 209, 211.

The affidavits in support of the bill were very full in their showing that the District Attorney, by his action and threats, had already greatly injured the plaintiffs' properties and their businesses. They present a case in which the question of the validity of the Act under which, if invalid, great injuries to properties and businesses are being unjustly inflicted, should be promptly settled. We think the basis for equitable jurisdiction is made sufficiently clear.

It is objected, however, that the injunction can not be supported under the authorities, in so far as it is directed against actual proceedings pending in the criminal court. One of the District Judges below dissented from this part of the decree. Of course the injunction is not only against actual prosecution but is also against a multiplicity of future suits and the threatened proceedings for forfeiture, by which the District Attorney proposes to end the businesses of all the plaintiffs, and the objection would only lead to a narrowing of the decree. The majority in the District Court were influenced by a remark of this Court in *Davis & Farnum Company* v. *Los Angeles, supra,* in speaking of a bill to restrain invasion of rights of property by the enforcement of an unconstitutional law, in which the Court said:

"It would seem that, if there were jurisdiction in a court of equity to enjoin the invasion of property rights through the instrumentality of an unconstitutional law, that jurisdiction would not be ousted by the fact that the State had chosen to assert its power to enforce such law by indictment or other criminal proceeding."

This *semble* does not seem to have received the approval of the Court in *Ex parte Young*, 209 U. S. 123, where it was said:

"It is further objected (and the objection really forms part of the contention that the State cannot be sued) that a court of equity has no jurisdiction to enjoin criminal proceedings, by indictment or otherwise, under the state law. This, as a general rule, is true. But there are exceptions. When such indictment or proceeding is brought to enforce an alleged unconstitutional statute, which is the subject matter of inquiry in a suit already pending in a Federal court, the latter court having first obtained jurisdiction over the subject matter, has the right, in both civil and criminal cases, to hold and maintain such jurisdiction, to the exclusion of all other courts, until its duty is fully performed. *Prout* v. *Starr*, 188 U. S. 537, 544. But the Federal court cannot, of course, interfere in a case where the proceedings were already pending in a state court. *Taylor* v. *Taintor*, 16 Wall. 366, 370; *Harkrader* v. *Wadley*, 172 U. S. 148."

We, therefore, agree with the view of the dissenting Judge that the injunction is too broad, in so far as it restrains proceedings actually pending, and that it must be accordingly modified.

This brings us to the consideration of the constitutionality of the Anti-Trust Act. We think that the act is so vague and uncertain in its description of what shall constitute its criminal violations that it is invalid under the Fourteenth Amendment. It in this respect violates due process and can not be distinguished from the case

of *United States* v. *Cohen Grocery Company*, 255 U. S. 81. The law there under consideration was the fourth section of the Lever Act, re-enacted in 1919, Act of October 22, 1919, c. 80, § 2, 41 Stat. 297. It provided as follows:

"That it is hereby made unlawful for any person willfully . . . to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries; to conspire, combine, agree, or arrange with any other person . . . to exact excessive prices for any necessaries . . . Any person violating any of the provisions of this section upon conviction thereof shall be fined not exceeding $5,000 or be imprisoned for not more than two years, or both."

This Court said:

"The sole remaining inquiry, therefore, is the certainty or uncertainty of the text in question, that is, whether the words 'That it is hereby made unlawful for any person willfully . . . to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries,' constituted a fixing by Congress of an ascertainable standard of guilt and are adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them. That they are not, we are of opinion, so clearly results from their mere statement as to render elaboration on the subject wholly unnecessary. Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against. In fact, we see no reason to doubt the soundness of the observation of the court below, in its opinion, to the effect

that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury."

The opinion cites in support of its conclusion, *United States* v. *Reese,* 92 U. S. 214, 219–220; *United States* v. *Brewer,* 139 U. S. 278, 288; *Todd* v. *United States,* 158 U. S. 278, 282; *United States* v. *Sharp,* 27 Fed. Cases, 1041, 1043; *Chicago & Northwestern Ry. Co.* v. *Dey,* 35 Fed. 866, 876; *Tozer* v. *United States,* 52 Fed. 917, 919–920; *United States* v. *Capital Traction Co.,* 34 App. D. C. 592; *United States* v. *Pennsylvania R. R. Co.,* 242 U. S. 208, 237–238; also *International Harvester Company* v. *Kentucky,* 234 U. S. 216, 221; *Collins* v. *Kentucky,* 234 U. S. 634, 637; *American Seeding Machine Company* v. *Kentucky,* 236 U. S. 660, 662.

The Colorado Anti-Trust law denounces conspiracies and combinations of persons and corporations, 1st, to create and carry out restrictions in trade or commerce preventing the full and free pursuit of any lawful business in the State; 2d, to increase or reduce the price of merchandise, products or commodities; 3rd, to prevent competition in the making, transportation, sale or purchase of commodities or merchandise; 4th, to fix any standard of figures whereby the price shall be controlled or established; 5th, to make or execute any contract or agreement to bind the participants not to sell below a common standard, or to keep the price of the article at a fixed or graded figure, or establish or settle the price between themselves so as to preclude a free and unrestricted competition among themselves, or to pool, combine or unite any interest they may have in such business of making, selling or transporting that the price of the article may be affected. The foregoing language sufficiently describes

for purposes of a criminal statute the acts which it intends to punish; but the Colorado law does not stop with that: it is accompanied by two provisos which materially affect its purport and effect. They are as follows:

"And all such combinations are hereby declared to be against public policy, unlawful and void; provided that no agreement or association shall be deemed to be unlawful or within the provisions of this act, the object and purposes of which are to conduct operations at a reasonable profit or to market at a reasonable profit those products which can not otherwise be so marketed; provided further that it shall not be deemed to be unlawful, or within the provisions of this act, for persons, firms, or corporations engaged in the business of selling or manufacturing commodities of a similar or like character to employ, form, organize or own any interest in any association, firm, or corporation having as its object or purpose the transportation, marketing or delivering of such commodities; . . . "

The effect of the first proviso is that combinations, with the purposes defined in the 1st, 2nd, 3rd, 4th and 5th paragraphs of § 1, and declared thereby to be unlawful and void, are not to be regarded as unlawful if their purpose shall be to obtain only a reasonable profit in such products or merchandise as can not yield a reasonable profit except by marketing them under the combinations previously condemned. The second is like the first in declaring that it shall not be unlawful or within the condemnatory provisions of the Act for persons engaged in the business of selling or manufacturing commodities of a class that can only be dealt with at a reasonable profit by such previously condemned trust methods, to employ or own interests in an association having as its object the transportation, marketing or delivering of such commodities at a reasonable profit. These provisos make the line

between lawfulness and criminality to depend upon, first what commodities need to be handled according to the trust methods condemned in the first part of the Act to enable those engaged in dealing in them to secure a reasonable profit therefrom; second, to determine what generally would be a reasonable profit for such a business; and third, what would be a reasonable profit for the defendant under the circumstances of his particular business. It would, therefore, be a complete defense for the defendant to prove in this case that it is impossible to sell milk or milk products, except by trust methods and make a reasonable profit, if he also showed that by such methods he had in fact only made a reasonable profit.

We have examined the opinions of the Supreme Court of Colorado in reference to the construction and operation of these provisos in the Colorado Anti-Trust law. *Campbell* v. *The People,* 72 Colo., 213; *Johnson* v. *The People, Id.,* 218; *People* v. *Apostolos,* 73 Colo., 71; and we find nothing there which is in conflict with our construction of them. Such an exception in the statute leaves the whole statute without a fixed standard of guilt in an adjudication affecting the liberty of the one accused. An attempt to enforce the section will be to penalize and punish all combinations in restraint of trade in a commodity when in the judgment of the court and jury they are not necessary to enable those engaged in it to make it reasonably profitable, but not otherwise. Such a basis for judgment of a crime would be more impracticable and complicated than the much simpler question in the *Cohen Grocery* case, whether a price charged was unreasonable or excessive. The real issue which the proviso would submit to the jury would be legislative, not judicial. To compel defendants to guess on the peril of an indictment whether one or more of the restrictions of the statute will destroy all profit or

reduce it below what would be reasonable, would tax the human ingenuity in much the same way as that which this Court refused to allow as a proper standard of criminality in *International Harvester Company* v. *Kentucky,* 234 U. S. 216, 232, 233.

The *Cohen* case was a violation of a federal law and involved the Fifth and Sixth Amendments, the first providing that no person shall be deprived of life, liberty or property without due process of law, and the second that in all criminal prosecutions the accused shall enjoy the right to be informed of the nature and cause of the accusation. We are now considering a case of state legislation and threatened prosecutions in a state court where only the Fourteenth Amendment applies; but that amendment requires that there should be due process of law, and this certainly imposes upon a State an obligation to frame its criminal statutes so that those to whom they are addressed may know what standard of conduct is intended to be required. And such is the effect of our cases. *Connally* v. *General Construction Company,* 269 U. S. 385; *International Harvester Company* v. *Kentucky,* 234 U. S. 216; *Collins* v. *Kentucky,* 234 U. S. 634; *American Seeding Machine Company* v. *Kentucky,* 236 U. S. 660; *Waters-Pierce Oil Company* v. *Texas,* 212 U. S. 86; *Fox* v. *Washington,* 236 U. S. 273; *Omaechevarria* v. *Idaho,* 246 U. S. 343; *Miller* v. *Strahl,* 239 U. S. 426; *Tedrow* v. *Lewis & Son. Co.,* 255 U. S. 98; *Weeds, Inc.* v. *United States,* 255 U. S. 109, and *Kinnane* v. *Detroit Creamery Co.,* 255 U. S. 102.

In the latest of the foregoing cases, *Connally* v. *General Construction Company,* 269 U. S. 385, 391, the validity of a statute of Oklahoma providing that not more than the current rate of per diem wages in the locality where the work was performed should be paid to laborers, workmen, mechanics, prison guards, janitors in public institutions or other persons so employed by and on behalf

of the State, was before us. We held that the provision contained no ascertainable standard of guilt—that it could not be determined with any degree of certainty what sum constituted a current wage in such locality because the term locality under the circumstances of that case was fatally vague and uncertain. We said (p. 391):

"That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law. . . .

"The question whether given legislative enactments have been thus wanting in certainty has frequently been before this court. In some of the cases the statutes involved were upheld; in others, declared invalid. The precise point of differentiation in some instances is not easy of statement. But it will be enough for present purposes to say generally that the decisions of the court upholding statutes as sufficiently certain, rested upon the conclusion that they employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them, *Hygrade Provision Co.* v. *Sherman,* 266 U. S. 497, 502; *Omaechevarria* v. *Idaho,* 246 U. S. 343, 348, or a well-settled common law meaning, notwithstanding an element of degree in the definition as to which estimates might differ, *Nash* v. *United States,* 229 U. S. 373, 376; *International Harvester Co.* v. *Kentucky, supra,* p. 223, or, as broadly stated by Mr. Chief Justice White in *United States* v. *Cohen Grocery Co.,* 255 U. S. 81, 92, 'that, for reasons found to result either from the text

of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded.' "

The chief authority upon which counsel for the appellant rely is the case of *Nash* v. *United States,* 229 U. S. 373, 376. That case involved the question whether the Sherman Anti-Trust law, in making criminal every contract and all monopolies in restraint of interstate trade or commerce, fixed a permissible and ascertainable standard of guilt. It was held that it did. Because this Colorado act is an anti-trust law punishing with even more detail of description all combinations in restraint of trade in Colorado, with the excepting provisos, it is supposed that the *Nash* case has direct application and supports the claim of validity for the Act. It is first to be noted that the Court, in its consideration of the *Cohen* case, had before it the *Nash* case, and found nothing in that case inconsistent with its *Cohen* case ruling.

In the *Nash* case we held that the common law precedents as to what constituted an undue restraint of trade were quite specific enough to advise one engaged in interstate trade and commerce what he could and could not do under the statute. In commenting on and affirming the *Nash* case, this Court said in *International Harvester Company* v. *Kentucky,* 234 U. S. 216, 223:

" The conditions are as permanent as anything human, and a great body of precedents on the civil side coupled with familiar practice make it comparatively easy . . . to keep to what is safe."

The common law precedents as to forbidden and permissible restraints of trade were reviewed at great length by the Circuit Court of Appeals of the Sixth Circuit in a case under the federal Anti-Trust Act, in *United States* v. *Addyston Pipe Company,* 85 Fed. 271. It subsequently came to this Court, and is reported in the 175th United States, 211. The Federal Anti-Trust Act declares every contract, combination in the form of trust or other-

wise, or conspiracy in restraint of interstate trade to be illegal and every one taking part in it to be guilty of a misdemeanor. In *United States* v. *Trans-Missouri Freight Association,* 166 U. S. 290 and *United States* v. *Joint Traffic Association,* 171 U. S. 505, the opinions of the Court left the impression among many that every contract in restraint of trade, no matter whether lawful and reasonable or void and unenforceable at common law, was within the penalty of the statute. Such a conclusion was not necessary to the decision, and it was quite evident when the opinions were analyzed that it was recognized in their text that there were incidental restraints of trade that the statute was not intended to cover. This was made clear by the later decision in *Cincinnati Packet Company* v. *Bay,* 200 U. S. 179. The view was fully confirmed in *Standard Oil Company* v. *United States,* 221 U. S. 1, and *United States* v. *American Tobacco Company,* 221 U. S. 106, where the language of the Federal statute was read in the light of the common law, and in accordance with its reason, and was construed not to penalize such partial restraints of trade as at common law were not only permitted but were promoted in the interest of the freedom of trade itself.

The review of the many common law precedents as to due and undue restraints of trade shows that in only one or two cases, and those not well considered, was there left to the court or jury as a criterion of the validity of a restraint of trade the reasonableness of the prices fixed or the profit realized under it.

In the *Addyston* case, *supra,* which involved 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 impor-

tant 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."

In the same case the Circuit Court of Appeals, referring to cases in restraint of trade, said (pp. 283 and 284):

"But these cases all involved contracts in which the covenant in restraint of trade was ancillary to the main and lawful purpose of the contract, and was necessary to the protection of the covenantee in the carrying out of that main purpose. They do not manifest any general disposition on the part of the courts to be more liberal in supporting contracts having for their sole object the restraint of trade than did the courts of an earlier time. It is true that there are some cases in which the courts, mistaking, as we conceive, the proper limits of the relaxation of the rules for determining the unreasonableness of restraints of trade, have set sail on a sea of doubt, and have assumed the power to say, in respect to contracts which have no other purpose and no other consideration on either side than the mutual restraint of the parties, how much restraint of competition is in the public interest, and how much is not.

"The manifest danger in the administration of justice according to so shifting, vague, and indeterminate a standard would seem to be a strong reason against adopting it."

This same view, when directed to the question of judging restraints of trade by reference to reasonableness of prices effected by the restraint is confirmed by the latest decision of this Court on the subject in *United States* v. *Trenton Potteries Company*, 273 U. S. 392, where it was said:

"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."

This review, showing what was the standard of criminality in the Federal Anti-Trust law, indicates clearly that the decision in the *Cohen Grocery* case was not inconsistent with the *Nash* case, because the latter did not relate to the reasonableness or excessiveness of prices charged for necessaries, without more, as a basis for criminality, while the former plainly did. The same reasons show that there is nothing inconsistent between the *Cohen* case and that of *Waters-Pierce Oil Company* v. *Texas,* 212 U. S. 86.

The principle of due process of law requiring reasonable certainty of description in fixing a standard for exacting obedience from a person in advance has application as well in civil as in criminal legislation, *Small Company* v. *American Sugar Refining Company,* 267 U. S. 233, 238, *et seq.;* but the fact that it is often necessary to investi-

gate and decide certain questions in civil cases is not controlling or persuasive as to whether persons may be held to civil or criminal liability for not deciding them rightly in advance. On questions of confiscatory rates for public utilities, for instance, courts must examine in great detail the circumstances and reach a conclusion as to a reasonable profit. But this does not justify in such a case holding the average member of society in advance to a rule of conduct measured by his judgment and action in respect to what is a reasonable price or a reasonable profit. It is true that, on an issue like negligence, i. e., a rule of conduct for the average man in the avoidance of injury to his neighbors, every one may be held to observe it either on the civil or criminal side of the court. It is a standard of human conduct which all are reasonably charged with knowing and which must be enforced against every one in order that society can safely exist. We said in the *Nash* case (p. 377), " But apart from the common law as to restraint of trade thus taken up by the statute the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death. 'An act causing death may be murder, manslaughter, or misadventure according to the degree of danger attending it ' by common experience in the circumstances known to the actor. . . . ' The criterion in such cases is to examine whether common social duty would, under the circumstances, have suggested a more circumspect conduct.' 1 East P. C. 262 ". Following the authority in the *Nash* case, we sustained in *Miller* v. *Oregon, per curiam,* 273 U. S. 657, a conviction of manslaughter under a statute of Oregon, which made the following rule of conduct a standard of criminality:

"Every person operating a motor vehicle on the public highways of this state shall drive the same in a careful and prudent manner, not to exceed thirty miles per hour, and within the limit of incorporated cities and towns not to exceed twenty miles per hour, and at intersections and schoolhouses not to exceed twelve miles per hour, and in no case at a rate of speed that will endanger the property of another, or the life or limb of any person." (Ch. 371, General Laws of Oregon, 1921, § 2, sub-division 16.)

The indictment was framed under the last clause of this statute. Such standard for the driver of an automobile on a highway is one to which it is neither harsh nor arbitrary to hold those criminally who operate such a possibly dangerous instrument of locomotion, and who are or ought to be aware of what degree of care is necessary to avoid injury to others under the conditions that prevail on a highway. See *Hess* v. *Pawloski, ante,* p. 352.

But it will not do to hold an average man to the peril of an indictment for the unwise exercise of his economic or business knowledge involving so many factors of varying effect that neither the person to decide in advance nor the jury to try him after the fact can safely and certainly judge the result. When to a decision whether a certain amount of profit in a complicated business is reasonable is added that of determining whether detailed restriction of particular anti-trust legislation will prevent a reasonable profit in the case of a given commodity, we have an utterly impracticable standard for a jury's decision. A legislature must fix the standard more simply and more definitely before a person must conform or a jury can act.

We conclude that the Anti-Trust statute of Colorado is void in that those who are prosecuted and convicted under it will be denied due process of law.

The decree of the District Court to enjoin proceedings which the defendant threatens to bring under the Act against the plaintiffs should be affirmed, but the decree below is modified and reversed so far as it purports to enjoin the defendant from proceeding further in prosecuting the information under that Act against the plaintiffs now pending in the state criminal court.

The decree is in part reversed and in part affirmed.

UNITED STATES *v.* FREIGHTS, ETC., OF S. S. MOUNT SHASTA.

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

No. 267. Argued April 14, 1927.—Decided May 31, 1927.

1. A decree of the District Court dismissing a suit for want of admiralty jurisdiction was appealable to this Court under Jud. Code § 238. P. 469.
2. A suit in admiralty to enforce a shipowner's lien on sub-freights of the ship may be brought *in rem* against such freights, in the district where the debtor resides. P. 470.
3. The jurisdiction is not ousted by an answer denying that such freights are due. P. 471.
4. Jurisdiction *in rem* in admiralty is determined by the allegations of the libel. It may be defeated upon the trial by proof that the *res* does not exist. P. 471.

291 Fed. 92, reversed.

APPEAL from a decree of the District Court dismissing a libel in admiralty for want of jurisdiction.

Assistant Attorney General Farnum, with whom *Solicitor General Mitchell* and *Messrs. Clinton M. Hester* and *W. Clifton Stone,* Special Assistants to the Attorney General, were on the brief, for the United States.

The provisions of the charter gave the shipowner a valid lien upon subfreights which could be enforced by an admiralty proceeding *in rem.* Once the existence of

the lien is conceded, the right to a remedy *in rem* is a necessary corollary upon familiar admiralty principles. *Amer. Barge Co.* v. *C. & O. Coal Co.,* 115 Fed. 669. The refusal of a cargo owner to comply with the directions in the monition and to cover the unpaid part of the freight into the registry of the court can not affect the jurisdiction of the court which had attached at the time of the filing of the libel. *Snow* v. *180 Tons of Iron,* 11 Fed. 517; Carver, Carriage by Sea, 7th ed., p. 930; *Freights of the Kate,* 63 Fed. 707; *Bank of Br. N. Amer.* v. *Freights of Ansgar,* 127 Fed. 859; aff. 137 Fed. 534; *Larsen* v. *150 Bales of Sisal Grass,* 147 Fed. 783; *Actieselskabet Dampsk. Thorbjorn* v. *Harrison & Co.,* 260 Fed. 287; *Tagart* v. *Fisher,* 9 Asp. 381 (Court of Appeal). The loss of the lien on the cargo as result of its delivery to the consignee does not affect the lien upon the subfreights, which persists as long as such freights or any part thereof remain unpaid. *The Sarpfos,* 1925 A. M. C. 137.

The jurisdiction of the court attached upon the filing of the libel containing the requisite jurisdictional allegations and was perfected upon the issuance of a monition and its service upon the cargo owner. Thereafter, the right of the court to proceed and hear the case on the merits was not defeated by the mere filing of the defensive pleadings, although presented with the utmost good faith.

The authorities dealing with the character of recoupment or set-off in admiralty proceedings clearly oppose themselves to any such results as have been reached in the court below. Parsons, Maritime Law, vol. 2, p. 717; *Snow* v. *Carruth,* 1 Sprague 324; *Wash.-Sou. Nav. Co.* v. *B. & P. S. S. Co.,* 263 U. S. 629; *Thatcher* v. *McCulloh,* Olcott's Reps. 365; *Kennedy* v. *Dodge,* 1 Benedict 311; *Amer. Barge Co.* v. *C. & O. Coal Co.,* 115 Fed. 669, and cases cited, *supra.*

Quaere whether the question as to the existence of a *res* upon which a maritime lien could attach raised any

jurisdictional issue at all in a strict sense. *Sperry Gyroscope Co.* v. *Arma Eng. Co.*, 271 U. S. 232; *The Resolute*, 168 U. S. 437; *Hazelwood Dock Co.* v. *Palmer*, 228 Fed. 325; Benedict, Admiralty, 5th ed., § 434, and cases cited.

Messrs. Thomas Hunt and *John H. Lowrance*, with whom *Mr. Robert H. Holt* was on the brief, for appellee.

The jurisdiction *in rem* of the admiralty is founded upon physical power over the *res*, and upon the theory that the *res* proceeded against is "a contracting or offending entity," either a "debtor or offending thing,"—a thing which can be arrested and taken into custody, which can be fairly designated as tangible property, or the proceeds of tangible property, and is physically within the territorial jurisdiction of the court—in the case of the District Courts of the United States, "within the district." *The Robert W. Parsons*, 191 U. S. 17; *The Sabine*, 101 U. S. 384; *Cooper* v. *Reynolds*, 10 Wall. 308; *Ex parte Indiana Transp. Co.*, 244 U. S. 456; Benedict, Admiralty, 5th ed., vol. I, §§ 11, 297; Hughes, Admiralty, 2d ed., pp. 400–401.

This claim against Palmer & Parker Co., a disputed chose in action, falls far short of fulfilling these requirements. It is a pure abstraction, a mere intellectual concept. It cannot possibly be regarded as a "contracting entity"; such terms as "arrest" and "take into custody" can have no proper application to it; it is certainly not tangible property or its proceeds; and it cannot properly be described as being "within the district" of the court. It is no more a *res* than would be a pending claim to recover damages, or compensation, for a tort. No decision of this Court, and no decision of any Circuit Court of Appeals, holds that a claim such as this can be proceeded against in the admiralty by means of a libel *in rem*, at least as the sole *res*. Distinguishing, *Amer. Barge Co.* v. *C. & O. Coal Co.*, 115 Fed. 669; *Frontier S. S. Co.* v. *Central Coal Co.*, 234 Fed. 30; *Vane* v. *Wood Co.*, 231 Fed.

353; *Bank of Br. N. Amer.* v. *Freights of the Ansgar,* 137 Fed. 534; *Freights of the Kate,* 63 Fed. 707; *The Giles Loring,* 48 Fed. 463; *The Conveyor,* 147 Fed. 586.

Even if there were such a *res,* it was never within the lawful custody of the court. The custody of property is a physical matter, and implies immediate physical control.

MR. JUSTICE HOLMES delivered the opinion of the Court.

This is a libel in admiralty against sub-freight alleged to be in the hands of the Palmer and Parker Company of Boston in the District of Massachusetts. It was dismissed by the District Court for lack of jurisdiction, 291 Fed. 92, and the decree having been entered on March 17, 1925, before the Act of February 13, 1925, c. 229, §§ 1, 14; 43 Stat. 936, 938, 942, went into effect, a direct appeal was taken to this Court under § 238 of the Judicial Code. *The Ira M. Hedges,* 218 U. S. 264, 270.

The United States, owner of the Steamship Mount Shasta, in May, 1920, made a bare boat charter of the vessel to the Mount Shasta Steamship Company through Victor S. Fox and Company, Inc., an agent of that company, stipulating for a lien upon all cargoes and all sub-freights for any amounts due under the charter party. Victor S. Fox and Company in July, 1920, made a sub-charter to Palmer and Parker Company for a voyage to bring a cargo of mahogany logs from the Gold Coast, Africa, to Boston. The vessel arrived in Boston with its cargo on February 19, 1921. There is due to the libellant $289,680 for the hire of the steamship, and the libel alleges that there is due and unpaid freight on the cargo of logs, $100,000, more or less, in the hands of Palmer and Parker Company, on which this libel seeks to establish a lien. It prays a monition against Palmer and Parker Company and all persons interested, commanding payment of the freight money into Court, &c. Palmer and

Parker Company was served. That Company filed exceptions to the libel, denied the jurisdiction of the Court and answered alleging ignorance of the original charter party and of the relations of the United States and the Mount Shasta S. S. Company to the vessel, and setting up counterclaims more than sufficient to exhaust the freight. The cargo had been delivered. The District Court assumed that a libel *in rem* could be maintained against freight money admitted to be due and payable, but was of opinion that the fund must exist when the suit is begun, or that the jurisdiction fails. The Court held that where, as here, the liability was denied in good faith, it did not appear that there was any *res* to be proceeded against and that the suit must be dismissed. The counsel for Palmer and Parker Company pressed the same considerations here in a somewhat more extreme form.

By the general logic of the law a debt may be treated as a *res* as easily as a ship. It is true that it is not tangible, but it is a right of the creditor's, capable of being attached and appropriated by the law to the creditor's duties. The ship is a *res* not because it is tangible but because it is a focus of rights that in like manner may be dealt with by the law. It is no more a *res* than a copyright. How far in fact the admiralty has carried its proceeding *in rem* is a question of tradition. We are not disposed to disturb what we take to have been the understanding of the Circuit Courts for a good many years, and what the District Court assumed. *American Steel Barge Co.* v. *Chesapeake & Ohio Coal Agency Co.,* 115 Fed. 669; *Bank of British North America* v. *Freights of the Hutton,* 137 Fed. 534, 538; *Larsen* v. *150 Bales of Sisal Grass,* 147 Fed. 783, 785; *Freights of the Kate,* 63 Fed. 707.

But if it be conceded that the Admiralty Court has jurisdiction to enforce a lien on sub-freights by a proceeding *in rem,* and a libel is filed alleging such sub-freights

to be outstanding, we do not perceive how the Court can be deprived of jurisdiction merely by an answer denying that such freights are due. The jurisdiction is determined by the allegations of the libel. *Louisville & Nashville R. R. Co.* v. *Rice,* 247 U. S. 201, 203. It may be defeated upon the trial by proof that *res* does not exist. But the allegation of facts that if true make out a case entitles the party making them to have the facts tried. It is said that the Court derives its jurisdiction from its power, and no doubt its jurisdiction ultimately depends on that. But the jurisdiction begins before actual seizure, and authorizes a warrant to arrest, which may or may not be successful. Here the debtor is within the power of the Court and therefore the debt, if there is one, is also within it. The Court has the same jurisdiction to try the existence of the debt that it has to try the claim of the libellant for the hire of the Mount Shasta. If the proof that there is freight due shall fail it does not matter very much whether it be called proof that the Court had no jurisdiction or proof that the plaintiff had no case. Either way the libel will be dismissed. See *Ira M. Hedges,* 218 U. S. 264, 270; *Lamar* v. *United States,* 240 U. S. 60, 64.

Decree reversed.

The separate opinion of Mr. JUSTICE McREYNOLDS.

I am unable to accept the view that an admiralty court may entertain an action *in rem* when there is nothing which the marshal can take into custody. The technical term *in rem* is used to designate a proceeding against some thing. This court and text writers again and again have pointed out the essential nature of such thing. The jurisdiction is founded upon physical power over a *res* within the district upon the theory that it is "a contracting or offending entity," a "debtor" or "offending

thing," something that can be arrested or taken into custody, or which can be fairly designated as tangible property. *The Sabine,* 101 U. S. 384, 388; *The Robert W. Parsons,* 191 U. S. 17, 37; Benedict on Admiralty, 5th ed., §§ 11, 297; Hughes on Admiralty, 2d ed., 400, 401; Admiralty Rules 10, 22.

Here the thing supposed to be within the district and proceeded against was an unliquidated, uncertain and disputed claim for freight, which manifestly could not be arrested or taken into custody. To base jurisdiction for an action *in rem* upon this intangible claim would amount to a denial of the essential nature of the proceeding.

Of course, jurisdiction of an admiralty court—that is, power to hear and adjudge the issues, not merely to send out a monition—is not finally to be determined by mere allegations of the libel any more than jurisdiction of a court of law ultimately depends upon the plaintiff's allegation that the defendant is alive and within the district. If it appear that the defendant has never been there or was dead when the action began, certainly the court can go no further.

An examination of *Freights of the Kate,* 63 Fed. 707; *American Steel Barge Co.* v. *Chesapeake & Ohio Coal Agency Co.,* 115 Fed. 669; *Bank of British North America* v. *Freights of the Hutton,* 137 Fed. 534, 538; and *Larsen* v. *150 Bales of Sisal Grass,* 147 Fed. 783, 785, I think, will fail to disclose any adequate support for the theory repudiated by the court below. Some language of *American Steel Barge Co.* v. *Chesapeake & Ohio Coal Agency Co.,* taken alone, seems to favor that view; but, in fact, the libel there was against "the cargo of coal" "and the freight on said cargo of coal." The prayer asked for process against "said cargo of coal and against said sub-freight thereon," and "that said cargo may be ordered by the court to be sold and the proceeds thereof applied to said payment."

The decree below should be affirmed.

EMPIRE TRUST COMPANY *v.* CAHAN.

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

No. 318. Argued April 29, 1927.—Decided May 31, 1927.

Where an adult son, under an unlimited power of attorney given by his father, drew checks on his father's accounts in two banks, to his own order or the order of a third bank, signing them with his father's name by himself as attorney, and deposited them to his own private account in the third bank, and subsequently (the checks having been honored by the drawee banks) drew out the funds from the third bank and applied them to his own use, and these transactions went on for over two years, the notice gained from the form of his checks was not sufficient to charge that bank with knowledge of the misappropriations. P. 479.

9 F. (2d) 713, reversed.

CERTIORARI (271 U. S. 653) to a judgment of the Circuit Court of Appeals which affirmed a judgment of the District Court, recovered from the petitioner by the respondent.

Mr. Van Vechten Veeder, with whom *Messrs. William Lee Woodward* and *William J. Dean* were on the brief, for petitioner.

The fact that an agent acts for his own benefit without actual authority is immaterial as against a third person who deals with the agent on the face of his apparent authority. *North River Bank* v. *Aymar,* 3 Hill (N. Y.) 262; *Hambro* v. *Burnand,* [1904] 2 K. B. 10; *Lloyd* v. *Grace & Co.,* [1912] A. C. 716; *Nat. Safe Deposit Co.* v. *Hibbs,* 229 U. S. 391; *Warren-Scharf Co.* v. *Comm. Nat. Bank,* 97 Fed. 181.

A fiduciary having general authority to draw funds must necessarily have power to direct their disposition. The deposit with the bank did not operate to take the funds out of the fiduciary's control. So long as the funds remained in his control they were not diverted. Accord-

ingly, it is almost universally held that a fiduciary, of whatsoever kind, may deposit the funds of his principal in a bank to his individual credit. *Whiting* v. *Hudson Trust Co.*, 234 N. Y. 394; *Kendall* v. *Fidelity Trust Co.*, 230 Mass. 238; *Santa Marina Co.* v. *Canadian Bank*, 254 Fed. 391. Knowledge on the part of the bank of the nature of the funds received does not affect the character of the act. The bank has the right to assume that a fiduciary will apply the funds to their proper use under the trust. *Bischoff* v. *Yorkville Bank*, 218 N. Y. 106; *Eastchester* v. *Mt. Vernon Trust Co.*, 173 App. Div. 482; *Newburyport* v. *First Nat. Bank*, 216 Mass. 304; *Safe Deposit Co.* v. *Bank*, 194 Penn. St. 334; *Munnerlyn* v. *Bank*, 88 Ga. 333; *Martin* v. *Bank*, 66 Kan. 655; *State* v. *Farmers Bank*, 112 Neb. 840; *Charleston Co.* v. *Exch. Banking Co.*, 129 S. C. 290; *Whiting* v. *Hudson Trust Co.*, 234 N. Y. 394; *Kendall* v. *Fidelity Trust Co.*, 230 Mass. 238; *Goodwin* v. *Amer. Nat. Bank*, 48 Conn. 550; *Mott Iron Works* v. *Metropolitan Bank*, 78 Wash. 294; *Gray* v. *Johnston*, L. R. 3 Eng. & Ir. App. 1. The case of *Corporation Agencies, Ltd.*, v. *Home Bank of Canada*, [1927] A. C. 318, is applied to the precise issue now in question, and arises out of the activities of this same fiduciary. The Privy Council held that the defendant was not put on notice.

If the respondent could deposit the funds in his own account, he could draw them out. If the former constituted no notice of diversion, neither would the latter. The law does not require the bank to assume the hazard of correctly reading in each check the purpose of the drawer. *Bischoff* v. *Yorkville Bank, supra; Kendall* v. *Fidelity Trust Co., supra; Newburyport* v. *First Nat. Bank, supra; Goodwin* v. *Amer. Nat. Bank, supra; Havana Central R. R.* v. *Knickerbocker Trust Co.*, 198 N. Y. 422; *Gate City Assn.* v. *Nat. Bank of Comm.*, 126 Mo. 82; *McCullam* v. *Third Nat. Bank*, 209 Mo. App. 266.

The petitioner had no actual knowledge of any infirmity or defect in the checks. Neither their form nor the circumstances of their negotiation by the fiduciary made petitioner guilty of bad faith in receiving them for his account. There is no distinction between the checks naming petitioner as payee and those naming the fiduciary. A payee as well as an endorsee may be a holder in due course. *Armstrong* v. *Amer. Exch. Bank,* 133 U. S. 433; *Boston Steel Co.* v. *Steuer,* 183 Mass. 140; *Colonial Ranching Co.* v. *First Nat. Bank,* 227 Mass. 12; *Bergstrom* v. *Ritz Carlton,* 171 App. Div. 776, 220 N. Y. 569; *Drumm Const. Co.* v. *Forbes,* 305 Ill. 303; *Johnston* v. *Knipe,* 260 Pa. 504; Brannon, Negotiable Instruments Law, 3d ed., pp. 52–53.

The court below applied an erroneous criterion of notice. *Gerseta Corp.* v. *Wessex Co.,* 3 Fed. (2d) 236; *Cheever* v. *Pittsburgh Co.,* 150 N. Y. 59; *Murray* v. *Lardner,* 2 Wall. 110; *Hotchkiss* v. *National Banks,* 21 Wall. 354.

Mr. Charles E. Hughes, Jr., with whom *Messrs. Augustus L. Richards, Bertram F. Willcox,* and *Harold L. Smith* were on the brief, for respondent.

The deposit by a fiduciary in his individual bank account of checks which show on their face that they represent fiduciary funds is sufficient evidence of misappropriation to impose upon the bank a duty of inquiry. *Farmers Co.* v. *Fidelity Trust Co.,* 86 Fed. 541; *Havana Cent. R. R.* v. *Cent. Trust Co.,* 204 Fed. 546; *Okla. State Bank* v. *Galion Iron Works,* 4 F. (2d) 337; *Wagner Co.* v. *Bank,* 228 N. Y. 37; *Mitchell* v. *First Nat. Bank,* 203 Ky. 770; *Duckett* v. *Bank of Balto.,* 88 Md. 8; *U. S. F. & G. Co.* v. *Bank,* 127 Tenn. 720; *Bank* v. *McPherson,* 102 Miss. 852; *U. S. F. & G. Co.* v. *Adoue,* 104 Tex. 379; *Underwood* v. *Bank of Liverpool,* [1924] 1 K. B. 775; *Toronto Club* v. *Imperial Trust Co.,* 25 Ont.

L. Rep. 330. Distinguishing, *Conn. Sav. Bank* v. *Nat. Surety Co.*, 294 Fed. 261.

The feature of benefit to the recipient of the funds is immaterial, and the reason for the rule is that the use of the funds by the fiduciary to satisfy his individual indebtedness is clear evidence of use of the fiduciary funds for individual purposes. That the test is notice of misappropriation rather than benefit received by the bank is made clear by the decision of this Court in *Manhattan Bank* v. *Walker,* 130 U. S. 267. See also, *Ward* v. *City Trust Co.,* 192 N. Y. 61; *Havana Cent. R. R.* v. *Knickerbocker Trust Co.,* 135 App. Div. 316; *Niagara Woolen Co.* v. *Pacific Bank,* 141 App. Div. 265.

The difficulty of imagining any reason why the principal's interests would be promoted by transfer of his funds to his agent's individual bank account is sufficient evidence of the violence of the assumption that the fiduciary would use the funds in the principal's interest.

It is inconsistent to argue that the bank is not entitled to assume that money rightfully belongs to a fiduciary when it takes it in payment of an indebtedness owed to it, but is entitled so to assume when it deposits it to the fiduciary's individual account and so places him in a position to use it for the payment of his individual indebtedness to others. We see no inconvenience in a rule which would require banks to give general instructions to their tellers not to permit, without special authority based upon adequate inquiry, the deposit to individual credit of a check drawn or endorsed by a fiduciary in his fiduciary capacity. Nor do we perceive any possibility of embarrassment as between banks and their customers. Banks are now obliged to explain to their depositors that under the law they cannot take fiduciary funds in payment of an individual indebtedness of the fiduciary.

The principle that the form of the check charges the bank with notice that the funds are fiduciary funds is too deeply rooted now to be questioned. *Bischoff* v. *Yorkville Bank,* 218 N. Y. 106; *Hale* v. *Windsor Sav. Bank,*

90 Vt. 487; *Brovan* v. *Kyle,* 166 Wis. 347; *Amer. Bonding Co.* v. *Fourth Nat. Bank,* 205 Ala. 652; *Nat. Bank* v. *Insurance Co.,* 104 U. S. 54.

The fiduciary did not have actual authority either to draw checks for his own benefit or to dispose for his own benefit of the checks when drawn. He had no apparent authority to do these things as to any third person who was put on notice that he was acting for his own benefit. *Bank of N. Y.* v. *Amer. Dock Co.,* 143 N. Y. 559; *Park Hotel Co.* v. *Fourth Nat. Bank,* 86 Fed. 742. Distinguishing, *North River Bank* v. *Aymar,* 3 Hill 262; *Strainer* v. *Tysen, id.* 279; *Nat. Safe Deposit Co.* v. *Hibbs,* 229 U. S. 391.

The weight of authority, with respect to agents, is that they are not entitled to deposit their principals' funds to individual credit, and that a bank which permits such a deposit is liable for a resulting misappropriation. Distinguishing, *Safe Deposit Co.* v. *Bank,* 194 Pa. St. 334; *Goodwin* v. *Amer. Nat. Bank,* 48 Conn. 550; *Charleston Co.* v. *Exch. Trust Co.,* 129 S. C. 290; *McCullam* v. *Third Nat. Bank,* 209 Mo. App. 266; *Corp. Agencies* v. *Home Bank of Canada,* [1927] A. C. 318.

Certification or acceptance by drawee banks has no effect on petitioner's duty of inquiry. *First Nat. Bank* v. *Leach,* 52 N. Y. 350; *First Nat. Bank* v. *Whitman,* 94 U. S. 343.

It is generally held that one who takes a negotiable instrument has notice within the meaning of § 95 Neg. Inst. L., if he has knowledge of facts which put him on inquiry. *Hoberg* v. *Sofranscy,* 217 App. Div. 546; *Union Nat. Bank* v. *Bluff City Bank,* 152 Tenn. 486; *Rochester Road Co.* v. *Paviour,* 164 N. Y. 281.

Mr. Justice Holmes delivered the opinion of the Court.

This is a suit brought by the respondent to charge the petitioner with liability for the proceeds of checks drawn upon the agents of the Bank of Montreal or the Guar-

anty Trust Company, in New York, and deposited with the petitioner by the respondent's son. The respondent, a Canadian lawyer, had accounts with the two banks named and, in 1916, gave to his son powers of attorney to draw checks upon them, both powers being general and with no qualification as to the purposes for which such checks might be drawn. Beginning in July of that year, and from time to time down to October, 1918, the son drew checks signed with his father's name by himself as attorney against his father's two accounts, payable seventeen to his own order, three to the order of the petitioner, and deposited them to his own private account with the petitioner. All the checks but two were certified by the Guaranty Trust Company or accepted by the other bank as the case might be. Subsequently the son drew out these funds and applied them to his own use. The respondent did not discover the fraud until the end of 1919, at which time his son absconded. The petitioner had no knowledge that the son was misappropriating his father's money and no notice other than what was given by the form of the checks. The District Court and the Circuit Court of Appeals for the Second Circuit held that notice sufficient to charge the petitioner as matter of law and gave judgment against it, the Circuit Court of Appeals adding interest on the several items from the date when they were credited to the son. 9 F. (2d) 713. A writ of certiorari was granted by this Court. 271 U. S. 653.

No doubt the question is, as was said by the Circuit Court of Appeals, a question of degree, like most questions in the law; but we are of opinion that the Court below applied too strict a rule to an ordinary business transaction. The Court itself pronounced it "a hard rule as business is ordinarily conducted," and seemingly adopted it as much because of authority by which it felt bound as because it confidently thought the rule right.

The petitioner had notice that the checks were drawn upon the respondent's account, but they were drawn in pursuance of an unlimited authority. We do not perceive on what ground the petitioner could be held bound to assume that checks thus lawfully drawn were required to be held or used for one purpose rather than another. In the case of checks drawn by a corporation, not likely to disburse except for corporate purposes, there might be stronger reasons for requiring a bank to be on its guard if an officer having power to draw them deposited checks for considerable sums to his private account; but it recently has been held otherwise by the Judicial Committee of the Privy Council. *Corporation Agencies, Limited* v. *Home Bank of Canada* [1927] A. C. 318. And when the two parties are father and son, both of mature years and in good standing, secret limitations of the power are a pure matter of speculation into which it seems to us extravagant to expect the bank to inquire. The person reposing confidence in the son was not the petitioner but the respondent, *National Safe Deposit, Savings & Trust Co.* v. *Hibbs,* 229 U. S. 391, 397, and he himself tells us that his confidence was unlimited. He put his deposits absolutely into his son's power; and the son, if he drew currency, as he might, could do with it as he saw fit. The notice to the bank was notice only of this relation of the parties. The petitioner, in permitting the son to draw out the money was permitting only what it, like the respondent's banks, would have been bound to allow even if the deposit had been earmarked as a trust. The form in which the withdrawals took place does not appear. They might have been, like the deposits, in checks to the son's own order. All that is known is that the respondent did not get the benefit of them. But we do not place our decision upon that narrow ground. For in addition to what we have said, the transactions went on for over two years and the petitioner fairly might expect the respond-

ent to find it out in a month or two if anything was wrong. Careful people generally look over their bank accounts rather frequently.

It is very desirable that the decision of the Courts of the United States and that of the highest Court of the State where the business was done, should agree, as was recognized by the Circuit Court of Appeals. The result to which we come restores that agreement, at least when the checks are certified or accepted by the banks upon which they are drawn, as was the case here with all but two. *Whiting* v. *Hudson Trust Co.*, 234 N. Y. 394. The certification did not import a statement by the certifying bank that, besides the right of the son to draw, established by the power of attorney, the purposes for which the checks were drawn were lawful and were known by the bank. As the Court remarks in the case cited "The transactions of banking in a great financial center are not to be clogged, or their pace slackened, by over-burdensome restrictions." 234 N. Y. 406.

Judgment reversed.

BIDDLE, WARDEN, *v.* PEROVICH.

CERTIFICATE FROM THE CIRCUIT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 771. Argued May 2, 1927.—Decided May 31, 1927.

Under his power "to grant reprieves and pardons for offenses against the United States" (Const. Art II, § 2), the President may commute a sentence of death to life imprisonment, without the convict's consent. *Burdick* v. *United States*, 236 U. S. 79, limited. P. 486.

RESPONSE to a certificate of questions from the Circuit Court of Appeals, arising upon review of a judgment of the District Court in *habeas corpus* discharging Perovich from the Leavenworth Penitentiary.

Mr. George T. McDermott, with whom *Mr. Robert Stone* was on the brief, for Perovich.

Except in the military forces, or where martial law exists, a person may not be punished for an offense except after a verdict of a jury and a sentence by a court. The President cannot deprive a person of his liberty. Const. Art. III, § 2; Amendments V, VI; *Marbury* v. *Madison,* 1 Cr. 138; *Little* v. *Barreme,* 2 Cr. 170; *Ex parte Milligan,* 4 Wall. 122.

The President has power to pardon, reprieve, or commute. Commutation is an exercise of power, and not of grace; it is effective without delivery to, acceptance by, or consent of the prisoner. Commutation is a lessening of the same kind of punishment. The President may not substitute one kind of punishment for another—a jail sentence for a fine, or deportation instead of imprisonment. *Chapman* v. *Scott,* 10 F. (2d) 156; aff. 10 F. (2d) 690; cert. den., 270 U. S. 657; *In re Howard,* 115 Kan. 323; *Ex parte James,* 1 Nev. 319; *Duehay* v. *Thompson,* 223 Fed. 305; *Ex parte Collins,* 94 Mo. 22; *Ex parte Harlan,* 180 Fed. 127; *United States* v. *Commissioners,* 5 F. (2d) 163; *Hartung* v. *People,* 22 N. Y. 95; *Shepard* v. *People,* 25 N. Y. 406; *People* v. *Hayes,* 140 N. Y. 484; *Malloy* v. *South Carolina,* 237 U. S. 180; *In re Petty,* 22 Kan. 334.

The only legal punishment for murder in the first degree is death, unless the jury qualify their verdict by adding "without capital punishment." Life imprisonment is a different *kind* of punishment than death, and cannot be substituted without consent. Criminal Code, § 275; U. S. Comp. Stats., §§ 10448, 10504.

Pardon is an exercise of grace, and not of power; delivery and acceptance are required to make it effective; any conditions may be attached which the President pleases, and acceptance of the pardon is an acceptance of the conditions. The President may pardon from a death sentence, on condition that the prisoner accept life

imprisonment. *Ex parte Wells,* 18 How. 307; *Ex parte Harlan,* 180 Fed. 119; *Ex parte Grossman,* 267 U. S. 87; *United States* v. *Wilson,* 7 Pet. 150; *Burdick* v. *United States,* 236 U. S. 79; *Ross* v. *McIntyre,* 140 U .S. 453.

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

The rule that a pardon must be accepted to be effective originated in a statement in the opinion in *United States* v. *Wilson,* 7 Pet. 150. That case merely followed the English rule that an executive pardon is a private act of which the courts can not take notice unless pleaded and proved. It is not authority for the proposition that a pardon may be rejected and execution of his sentence insisted on by the convict.

The correct rule is that no exercise of the pardoning power requires acceptance except a true conditional pardon, which imposes a condition not known to the law and which requires voluntary action by the prisoner, but since an individual pardon by executive action is a private act of which the courts may not take judicial notice, a failure of the accused and of the prosecution to bring it properly to the attention of the court may make it ineffective, and in that limited way only may it be said the accused can reject it.

The English authorities, before and since *Wilson's case,* have never held otherwise. None of the large number of American state courts which have, *obiter,* repeated the statement in *Wilson's case,* that all pardons must be accepted to be effective, has ever so held in a case presenting the question. The only real authority in support of the necessity of acceptance is *Burdick* v. *United States,* 236 U. S. 79, decided on the supposed authority of *United States* v. *Wilson.* The rule that a convict has the right to insist on execution of his sentence overlooks the para-

mount public interest and places too much emphasis on the preferences of the convict. It is not well supported by reason. If the question decided in *Burdick's case* is not reconsidered, at least the rule should not be extended in application. *Ex parte Wells,* 18 How. 307; *Ex parte Grossman,* 267 U. S. 87; *Lee* v. *Curveton,* Cro. Eliz. 153; *King* v. *Ring,* 1 Keble 707; *Lee* v. *Murphy,* 22 Gratt. 789; *In re Charles,* 115 Kan. 323; *In re Convicts,* 73 Vt. 414; *Comm.* v. *Lockwood,* 109 Mass. 323; *James* v. *Flanner,* 116 Kan. 624; *Ex parte Powell,* 73 Ala. 517; *Redd* v. *State,* 65 Ark. 475; *Hunnicutt* v. *State,* 18 Tex. App. 498; *Rosson* v. *State, id.* 287; *State v. Garrett,* 135 Tenn. 617; *Michael* v. *State,* 40 Ala. 361; *Carpenter* v. *Lord,* 88 Ore. 128; *In re Victor,* 31 Oh. St. 206; *In re Callicot,* 8 Blatchf. 89; *People* v. *Frost,* 133 App. Div. 179; *Chapman* v. *Scott,* 10 F. (2d) 156; *Ex parte Hawkins,* 10 Okla. Cr. 396; *State* v. *Olander,* 193 Iowa 1379; Jacob, Common Law Commonplaced, 2d ed., p. 288; Lilly, Practical Register, 2d ed., p. 341; Wood, Institute, 10th ed., p. 632; Chitty, Prerogatives of the Crown, p. 99; Stephen, Commentaries, 18th ed., IV, p. 340; Coke, Institutes, III, p. 234; Hawkins, Pleas of the Crown, 6th ed., II, p. 560; Comyn's Digest, Pardon (H); Bacon's Abridgment of Jacob, Common Law Commonplaced, VI, p. 808; Halsbury, Laws of England, vol. 6, p. 404; English and Empire Digest, vol. 11, p. 516 (Pardons); Russell, Law of Crimes, 7th Eng. and 1st Can. ed., bk. 1, pp. 252–254; bk. 2, p. 1996.

Commutations of sentence have always been held not to be governed by the rule that pardons require the consent of the prisoner. In that view the question here is whether the change from death penalty to life imprisonment was a commutation or a conditional pardon.

A commutation is the substitution of a milder punishment known to the law for the one inflicted by the court. Life imprisonment is by statute and by prevailing opinion

considered a less severe punishment than death, and should be so considered by the courts. The narrower view that a commutation is merely a reduction in the degree of the punishment without any change in kind is not supported by the weight of authority. The statute under which Perovich was convicted provided life imprisonment as an alternative penalty for the crime of murder, and life imprisonment was therefore a milder punishment known to and prescribed by law for his offense.

The act of executive clemency was therefore a commutation of punishment and not a conditional pardon. A conditional pardon is one imposing a condition precedent or subsequent not known to the law, and which from its very nature requires voluntary action by the accused to make the pardon effective. *In re Victor,* 31 Oh. St. 206; *Ex parte Collins,* 94 Mo. 22; *In re Charles,* 115 Kan. 323; *State* v. *Wolfer,* 127 Minn. 102; *State* v. *Board,* 16 Utah 478; *Duehay* v. *Thompson,* 223 Fed. 305; *Rich* v. *Chamberlain,* 107 Mich. 381; *United States* v. *Commissioner,* 5 F. (2d) 162; 1 Op. A. G. 327; 4 Op. A. G. 432, 434; *Ex parte Janes,* 1 Nev. 319; *People* v. *Potter,* 1 Parker's Rep. 47; *In re Greathouse,* 10 Fed. Cases 5741; *Ex parte Hunt,* 10 Ark. 284; *State* v. *Wolfer,* 53 Minn. 135; *People* v. *Marsh,* 125 Mich. 410; *Bradford* v. *United States,* 47 Ct. Cls. 141; *State* v. *Horne,* 52 Fla. 125; *In re Williams,* 149 N. C. 436; *State* v. *Smith,* 1 Bailey (S. C.) 283; *Ex parte Hawkins,* 10 Okla. Cr. 396; *Commonwealth* v. *Wyman,* 12 Cush. 237; *McGuire* v. *State,* 76 Miss. 504; *Malloy* v. *South Carolina,* 237 U. S. 180; *contra, Hartung* v. *People,* 22 N. Y. 95; *People* v. *Hayes,* 140 N. Y. 484; *Guiteau* v. *United States,* 26 Albany L. J. 89; Act of April 30, 1790, c. 9, 1 Stat. 112.

If the act of executive clemency in this case be treated as a conditional pardon requiring acceptance, that acceptance may be implied. As such an act of clemency is

beneficial to the prisoner, acceptance should be presumed in the absence of prompt and unequivocal rejection. Service of sixteen years of the life imprisonment should be taken to show acceptance. *Ex parte Powell,* 73 Ala. 517; *Ex parte Reno,* 66 Mo. 266; *Commonwealth* v. *Halloway,* 44 Pa. St. 210.

Mr. Justice Holmes delivered the opinion of the Court.

The Circuit Court of Appeals for the Eighth Circuit has certified questions of law to this Court upon facts of which we give an abridged statement. Perovich was convicted in Alaska of murder; the verdict being that he was 'guilty of murder in the first degree and that he suffer death.' On September 15, 1905, he was sentenced to be hanged; and the judgment was affirmed by this Court. 205 U. S. 86. Respites were granted from time to time, and on June 5, 1909, President Taft executed a document by which he purported to "commute the sentence of the said Vuco Perovich . . to imprisonment for life in a penitentiary to be designated by the Attorney General of the United States." Thereupon Perovich was transferred from jail in Alaska to a penitentiary in Washington, and, some years later, to one in Leavenworth, Kansas. In November, 1918, Perovich, reciting that his sentence had been commuted to life imprisonment, applied for a pardon—and did the same thing again on December 10, 1921. On February 20, 1925, he filed in the District Court for the District of Kansas an application for a writ of *habeas corpus,* on the ground that his removal from jail to a penitentiary, and the order of the President, were without his consent and without legal authority. The District Judge adopted this view and thereupon ordered the prisoner to be set at large. We pass over the difficulties in the way of this conclusion and confine ourselves to the questions pro-

posed. The first is: "Did the President have authority to commute the sentence of Perovich from death to life imprisonment?"

Both sides agree that the act of the President was properly styled a commutation of sentence, but the counsel of Perovich urge that when the attempt is to commute a punishment to one of a different sort it cannot be done without the convict's consent. The Solicitor General presented a very persuasive argument that in no case is such consent necessary to an unconditional pardon and that it never had been adjudged necessary before *Burdick* v. *United States,* 236 U. S. 79. He argued that the earlier cases here and in England turned on the necessity that the pardon should be pleaded, but that when it was brought to the judicial knowledge of the Court "and yet the felon pleads not guilty and waives the pardon, he shall not be hanged." Jenkins, 129, Third Century, case 62.

We will not go into history, but we will say a word about the principles of pardons in the law of the United States. A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the Constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed. See *Ex parte Grossman,* 267 U. S. 87, 120, 121. Just as the original punishment would be imposed without regard to the prisoner's consent and in the teeth of his will, whether he liked it or not, the public welfare, not his consent, determines what shall be done. So far as a pardon legitimately cuts down a penalty, it affects the judgment imposing it. No one doubts that a reduction of the term of an imprisonment or the amount of a fine would limit the sentence effectively on the one side and on the other would leave the reduced term or

fine valid and to be enforced, and that the convict's consent is not required.

When we come to the commutation of death to imprisonment for life it is hard to see how consent has any more to do with it than it has in the cases first put. Supposing that Perovich did not accept the change, he could not have got himself hanged against the Executive order. Supposing that he did accept, he could not affect the judgment to be carried out. The considerations that led to the modification had nothing to do with his will. The only question is whether the substituted punishment was authorized by law—here, whether the change is within the scope of the words of the Constitution, Article II, § 2: "The President . . . shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment." We cannot doubt that the power extends to this case. By common understanding imprisonment for life is a less penalty than death. It is treated so in the statute under which Perovich was tried, which provides that "the jury may qualify their verdict [guilty of murder] by adding thereto 'without capital punishment'; and whenever the jury shall return a verdict qualified as aforesaid the person convicted shall be sentenced to imprisonment at hard labor for life." Criminal Code of Alaska, Act of March 3, 1899, c. 429, § 4; 30 Stat. 1253. See *Ex parte Wells,* 18 How. 307; *Ex parte Grossman,* 267 U. S. 87, 109. The opposite answer would permit the President to decide that justice requires the diminution of a term or a fine without consulting the convict, but would deprive him of the power in the most important cases and require him to permit an execution which he had decided ought not to take place unless the change is agreed to by one who on no sound principle ought to have any voice in what the law should do for the welfare of the whole We are of opin-

ion that the reasoning of *Burdick* v. *United States*, 236 U. S. 79, is not to be extended to the present case. The other questions certified become immaterial as we answer the first question: *Yes.*

The CHIEF JUSTICE took no part in this case.

NEW YORK *v.* ILLINOIS AND SANITARY DISTRICT OF CHICAGO.

IN EQUITY.

No. 14, Orig. Argued April 25, 1927.—Decided May 31, 1927.

1. In a bill for an injunction to restrain diversions of water from the Great Lakes, on the ground that the diversions will impair navigable capacity of the lakes and connected rivers and thereby obstruct and burden commerce to the serious injury of the plaintiff State, a paragraph setting up possible interference with water-power development, but not showing any existing or definitely projected use of the waters for that purpose with which the diversions might interfere, should be stricken from the bill, without prejudice. P. 490.
2. A suit for an injunction must rest on actual or presently threatened injury. *Id.*
3. This Court cannot consider abstract questions. *Id.*

MOTION to strike a paragraph from the plaintiff's bill, sustained.

Mr. James M. Beck, with whom *Messrs. James Hamilton Lewis, Oscar E. Carlstrom,* Attorney General of Illinois, *Cyrus Dietz, Hugh S. Johnson, Maclay Hoyne, George F. Barrett,* and *Edmund D. Adcock* were on the brief, for the defendants, in support of the motion.

Mr. Randall J. Le Boeuf, with whom *Mr. Albert Ottinger* was on the brief, for plaintiff, in opposition thereto.

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

This is a bill in equity brought in this Court by the State of New York against the State of Illinois and the Sanitary District of Chicago to enjoin them from continuing a very substantial diversion of water from Lake Michigan. The character and purpose of the diversion are shown in *Sanitary District of Chicago* v. *United States,* 266 U. S. 405, and do not call for special comment now. The greater part of the bill proceeds on the theory that the diversion impairs the navigable capacity of the Great Lakes and the rivers leading from one lake to another and then to the Atlantic Ocean, and thereby obstructs and burdens commerce over these waterways to the serious injury of the plaintiff State and her people. To this part of the bill the defendants have answered, and evidence on the issues so framed has been or is being taken before a special master. The bill, in its third paragraph, attempts to set up another injury from the diversion. This paragraph has not been answered, but is assailed by a motion to strike it out. The Court has heard oral argument on the motion and will now rule on it.

The third paragraph of the bill apparently proceeds on the theory that the diversion may interfere with or prevent the use of the waters of the Niagara and St. Lawrence Rivers by the plaintiff State and her citizens for the development of power. But it does not show that there is any present use of the waters for such purposes which is being or will be disturbed; nor that there is any definite project for so using them which is being or will be affected. The waters are international and their use for developing power may require the assent of the Dominion of Canada and the United States. No consent of either is shown. The suit is one for an injunction, a form of relief which must rest on an actual or presently

threatened interference with the rights of another. Plainly no basis for such relief is disclosed in what is said about water power development. At best the paragraph does no more than present abstract questions respecting the right of the plaintiff State and her citizens to use the waters for such purposes in the indefinite future. We are not at liberty to consider abstract questions. *New Jersey* v. *Sargent,* 269 U. S. 328. So the motion to strike out the paragraph must be sustained. This ruling will be without prejudice, so that the plaintiff State, if later on in a position to do so, may be free to litigate the questions which the paragraph is intended to present.

Motion to strike out Paragraph III of bill of complaint sustained without prejudice.

POWER MANUFACTURING COMPANY *v.* SAUNDERS.

ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

No. 258. Submitted March 16, 1927.—Decided May 31, 1927.

1. A state law restricting venue in transitory actions, if against a domestic corporation to a county where it has a place of business or in which its chief officer resides, or, if against a natural person, to a county where he resides or is found, but which permits that such actions, when against a foreign corporation, be brought in any county of the State, is unreasonable and arbitrary, and in violation of the equal protection clause of the Fourteenth Amendment, as applied to a foreign corporation doing business in the State by her permission and having a fixed place of business and an agent in one county, but none, and no property or debts, in the county in which the suit is instituted. P. 493.
2. A foreign corporation, by seeking and obtaining permission to do business in a State, does not subject itself to provisions in the State statutes which conflict with the Federal Constitution. P. 497.

169 Ark. 748, reversed.

ERROR to a judgment of the Supreme Court of Arkansas which affirmed a judgment against the above-named com-

pany recovered by Saunders in an action for personal injuries.

Messrs. George C. Lewis, George B. Pugh, and *Thomas S. Buzbee* were on the brief, for plaintiff in error.

Mr. William R. Donham for defendant in error.

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

This was an action to recover for a personal injury sustained by the plaintiff while in the defendant's employ. The plaintiff was a citizen and resident of Ohio, and the defendant was a corporation of that State. Besides its activities in Ohio, the defendant maintained a warehouse at Stuttgart, Arkansas, where it did a local business. The plaintiff received his injury in that warehouse. The defendant had complied with the conditions on which Arkansas permits foreign corporations to do a local business within her limits, and as part of its compliance had named Stuttgart as its place of business in the State and designated an agent residing there on whom process against it might be served. See Crawford & Moses Digest 1921, § 1826. It did no business and had no office, officer or agent elsewhere in the State. Stuttgart is in Arkansas County and is its county seat.

The action was brought in Saline County, Arkansas, service of the summons being made on the defendant's designated agent at Stuttgart. The plaintiff obtained a judgment, which the Supreme Court of the State affirmed, 169 Ark. 748; and the defendant brought the case here on writ of error.

The Arkansas statutes require actions of this character, if against a domestic corporation, to be brought in a county where it has a place of business or in which its chief officer resides, and, if against a natural person, in

a county where he resides or may be found; but they broadly permit such actions, if against a foreign corporation, to be brought in any county in the State. Crawford & Moses Digest 1921, §§ 1152, 1171, 1176, 1829; *Jacks* v. *Central Coal and Coke Co.*, 156 Ark. 211.

Another statute (§ 1174) permits both foreign corporations and persons residing out of the State to be sued in any county in which they have property, or debts owing to them. Attachment and garnishment proceedings and some others may be had under it. But it concededly is without application here and may be put aside. The defendant neither had any property nor owned any debts in the county where it was sued.

By a timely motion to dismiss, the defendant objected to being sued in Saline County and assailed the validity of the statutes, in so far as they permit a foreign corporation to be sued in a county where it does no business and has no office, officer, or agent, on the ground that they are unreasonably discriminatory and arbitrary, and therefore in conflict with the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. The court of first instance upheld the validity of the statutes and accordingly overruled the motion; and the Supreme Court approved that ruling.

Thus the statutes were applied as permitting the defendant, a foreign corporation doing business in one county, to be sued in another county, where it did no business and had no office, officer or agent, on a cause of action which arose in the former. Other counties lay between the two, making the distance from the defendant's place of business to the place of suit 75 miles by railroad and a few miles less by public roads. This of course tended to increase materially the burden otherwise incident to presenting a defense.

It is conceded that the statutes neither permit a domestic corporation to be sued in a county in which it

does no business and has no office, officer or agent, nor permit a natural person to be sued in a county in which he does not reside and is not found. On the contrary, they confine the admissible venue as to both to counties in which the defendant is present in one of the ways just indicated. But a foreign corporation is differently treated. If it be present in a single county, as by having a place of business there, it is made subject to suit not merely in that county, but in any of the 74 other counties although it be not present in them in any sense.

We think it very plain that the statutes discriminate against foreign corporations and in favor of domestic corporations and individuals, and that the discrimination is not theoretical merely, but real and substantial.

The clause in the Fourteenth Amendment forbidding a State to deny to any person within its jurisdiction the equal protection of the laws is a pledge of the protection of equal laws, *Truax* v. *Corrigan,* 257 U. S. 312, 333; *Atchison, Topeka & Santa Fe Ry. Co.* v. *Vosburg,* 238 U. S. 56, 59, and extends as well to corporate as to natural persons, *Smyth* v. *Ames,* 169 U. S. 466, 522; *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis,* 165 U. S. 150, 154; *Santa Clara County* v. *Southern Pacific R. R. Co.,* 118 U. S. 394, 396. It does not prevent a State from adjusting its legislation to differences in situation or forbid classification in that connection; but it does require that the classification be not arbitrary but based on a real and substantial difference having a reasonable relation to the subject of the particular legislation. *Truax* v. *Corrigan, supra,* p. 337; *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis, supra,* 155; *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 78; *Ft. Smith Light & Power Co.* v. *Board of Improvement, ante,* p. 387.

No doubt there are subjects as to which corporations admissibly may be classified separately from individuals and accorded different treatment, and also subjects as to

which foreign corporations may be classified separately from both individuals and domestic corporations and dealt with differently. But there are other subjects as to which such a course is not admissible, the distinguishing principle being that classification must rest on differences pertinent to the subject in respect of which the classification is made.

Here the separate classification of foreign corporations is in respect of the venue or place of bringing transitory actions. The statutes mean foreign corporations doing business within the State by her permission, and therefore having a fixed place of business therein and a resident agent on whom process may be served. We speak only of them. So far as their situation has any pertinence to the venue of transitory actions it is not distinguishable from that of domestic corporations and individuals. Certainly there is no substantial difference. The opinion of the state court does not point to any relevant distinction, nor have counsel suggested any. Of course the restricted venue as to domestic corporations and individuals is prompted by considerations of convenience and economy; but these considerations have equal application to foreign corporations. So far as the plaintiffs in such actions are affected, it is apparent that there is no more reason for a statewide venue when the action is against a foreign corporation than when it is against a domestic corporation or a natural person. So we conclude that the special classification and discriminatory treatment of foreign corporations are without reasonable basis and essentially arbitrary.

The state court put its decision on the ground that venue is a question of procedure which the State may determine; and counsel for plaintiff advance the further ground that the defendant impliedly assented to the venue provisions by seeking and obtaining permission to do business within the State, the provisions being then

on the statute book. But neither ground can be sustained.

It of course rests with the State to prescribe the venue of actions brought in her courts. But the exercise of this power, as of all others, must be in keeping with the limitations which the Constitution of the United States places on state action. Procedural statutes are not excepted, but must fall like others when in conflict with those limitations. This is illustrated in a recent case where a statute of Arizona forbidding the granting of injunctions in certain situations was held to be in conflict with the equal protection clause of the Fourteenth Amendment and invalid, notwithstanding a contention that it was merely a procedural provision excluding a particular remedy in equity but leaving remedies at law open, *Truax* v. *Corrigan, supra,* pp. 322, 330. Further illustration is found in a still later case where a Wisconsin statute subjecting foreign corporations to a burdensome procedural requirement not laid on other litigants was pronounced invalid under the same constitutional provision, *Kentucky Finance Corporation* v. *Paramount Auto Exchange Corporation,* 262 U. S. 544. And on turning to state decisions we find direct rulings that venue provisions must conform to the equal protection clause and are invalid where they discriminate arbitrarily against either individuals or corporations, *Grocers' Fruit Growing Union* v. *Kern County Land Co.,* 150 Cal. 466, 474–475; *McClung* v. *Pulitizer Publishing Co.,* 279 Mo. 370.

The case of *Cincinnati Street Ry. Co.* v. *Snell,* 193 U. S. 30, is cited as if venue provisions were there held to be beyond the reach of the equal protection clause. But this is a strained and inadmissible interpretation. That was an action by an individual against a corporation which was begun, conformably to a general statutory requirement, in the county where the defendant had its principal office and was engaged in business. Another stat-

ute authorized the court to change the venue in such an action "to the adjacent county most convenient to both parties" if it appeared that the corporation had more than fifty local stockholders, and if it was also shown by the affidavit of the other party, supported by five credible citizens, that he could not have a fair and impartial trial in the county where the suit was begun. A showing was made which brought the case within the statute; and the court changed the venue over the defendant's objection that the statute operated unequally and was invalid in that it permitted the other party but not the corporation to secure the change. The statute doubtless proceeded on the assumption, first, that a corporation with many local stockholders might have such influence in the county that the other party would be at a serious disadvantage, unless provision were made whereby the court, on an adequate showing, might change the place of trial to another county free from such influence and as convenient as might be to both parties, and, secondly, that the corporation was not likely to suffer any prejudice in its home county through having many stockholders there. At all events the difference in the situation of the parties and the relation of that difference to the matter of changing the place of trial were such that it could not be said of such discrimination as was shown in the statute that it was without a reasonable and adequate basis. The opinion affirmatively shows that the defendant was not objecting to the place designated by the court for the trial, but only that the statute did not accord it an equal opportunity to secure a change from the county where the action was begun. When the opinion is examined with the actual situation in mind it has little bearing on the case now before us.

The contention advanced by counsel for the plaintiff that the defendant impliedly assented to the venue pro-

visions is answered and refuted by repeated decisions holding that a foreign corporation by seeking and obtaining permission to do business in a State does not thereby become obligated to comply with or estopped from objecting to any provision in the state statutes which is in conflict with the Constitution of the United States. The principal cases are cited and reviewed in *Hanover Insurance Co.* v. *Harding,* 272 U. S. 494, 507, *et seq.,* and *Frost Trucking Co.* v. *Railroad Commission of California,* 271 U. S. 583, 594, *et seq.* To them may be added the case of *W. W. Cargill Co.* v. *Minnesota,* 180 U. S. 452, 468, where it was held that "the acceptance of a license, in whatever form, will not impose upon the licensee an obligation to respect or to comply with any provisions of the statute . . . that are repugnant to the Constitution of the United States."

We accordingly reach the conclusion that the defendant's objection before stated to the validity of the venue provisions was well taken and should have been sustained under the equal protection clause of the Fourteenth Amendment.

Judgment reversed.

MR. JUSTICE HOLMES, dissenting.

In order to enter into most of the relations of life people have to give up some of their Constitutional rights. If a man makes a contract he gives up the Constitutional right that previously he had to be free from the hamper that he puts upon himself. Some rights, no doubt, a person is not allowed to renounce, but very many he may. So we must go further than merely to point to the Fourteenth Amendment. I see nothing in it to prevent a foreign corporation agreeing with the State that it will be subject to the general law of torts and will submit to a transitory action wherever it may be sued. That the

venue for suits against domestic corporations is limited by statute seems to me not enough to invalidate its assent. Every contract is the acceptance of some inequality—and under our decisions I think it cannot be denied that the plaintiff in error did contract. *Pennsylvania Fire Insurance Co.* v. *Gold Issue Mining & Milling Co.*, 243 U. S. 93, 96. The jurisdiction of the Court would have been unquestionable if it had not been objected to, and I do not see why consent could not be manifested by contract as well as by silence. While we adhere to the rule that a State may exclude foreign corporations altogether it seems to me a mistake to apply the inequality clause of the Fourteenth Amendment with meticulous nicety. The Amendment has been held not to overthrow ancient practices even when hard to reconcile with justice. I think there are stronger grounds for not reducing the power of the States to attach conditions to a consent that they have a right to refuse, when there is no attempt to use the conditions to invade forbidden fields.

Apart from the contract of the corporation there seems to me a ground for discrimination that ought to be respected when it has satisfied the State. A statute has to be drawn with reference to what is usual and probable. A foreign corporation merely doing business in the State and having its works elsewhere will be more or less inconvenienced by being sued anywhere away from its headquarters, but the difference to it between one county and another is likely to be less than it will be to a corporation having its headquarters in the State. So I repeat that in my opinion the plaintiff in error cannot complain if the State holds it liable to a transitory action wherever it may be served and sued, as it would have been liable at common law.

MR. JUSTICE BRANDEIS concurs in this opinion.

LONGEST *v.* LANGFORD ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 342. Motion to dismiss submitted May 16, 1927.—Dismissed and certiorari granted May 31, 1927.

1. A case from a state court involving only a question of the construction and applicability, but not the validity, of acts of Congress, is not reviewable by writ of error under Jud. Code, § 237 (a), but by certiorari under § 237 (b). P. 500.
2. A failure to observe this distinction may subject the party suing out the writ to damages and double costs, under Rev. Stats. § 1010; Jud. Code 237 (c). P. 500.
3. The papers on which a writ of error was improvidently allowed by a chief justice of a state supreme court may, under Jud. Code, § 237 (c), be treated as a petition for certiorari, and as if presented to this Court at the time when they were presented to him. P. 501.

Writ of error to 114 Okla. 50, dismissed.

Certiorari granted.

The facts are set out in the opinion.

Messrs. W. F. Semple, S. Russell Bowen, Guy Green, and *Robert R. Pruet* for appellees, in support of the motion.

Messrs. H. A. Ledbetter and *H. E. Ledbetter* for appellants, in opposition thereto.

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

We here are asked to review a judgment of the Supreme Court of Oklahoma rendered after the Act of February 13, 1925, c. 229, 43 Stat. 936, amending the Judicial Code, became effective. An allotment made in the name and right of a deceased Choctaw Indian woman under § 22 of the Act of July 1, 1902, c. 1362, 32 Stat. 641, is involved. The only federal question in the case is whether

Congress intended by that section and other related congressional enactments that the surviving husband of the deceased should take an estate by the curtesy in the land. This question was resolved by the Supreme Court of the State in favor of the husband; and at the instance of the opposing party the chief justice of that court allowed a writ of error bringing the judgment here for review. The writ obviously was improvidently allowed. Section 237(a) of the Judicial Code restricts the cases in which we may review a judgment or decree of a state court on writ of error to those "where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity." This case does not involve any such constitutional question, but only a question of the construction and application of congressional enactments concededly valid. It therefore falls within the class where a review in this Court may be had only on petition for certiorari under § 237(b) of the Judicial Code. The distinction is important, has a real purpose and should be given effect by all who are invested with authority to allow writs of error running from this Court to a state court. A failure to observe it may subject the party suing out the writ to damages and double costs (Rev. Stats., § 1010; Judicial Code, § 237(c)) and result in harmful embarrassment to the other party. Of course where the writ is improvidently allowed the other party may move in this Court to dismiss it. But in actual practice this does not operate as an adequate corrective; for the action of the judge in allowing the writ usually is assumed to be advisedly taken. In the present case the fact that the allowance was improvident escaped the notice of the parties for a full year.

While we cannot take jurisdiction on the writ of error so improvidently allowed, we can, under § 237(c) of the Judicial Code, treat the papers whereon the writ was allowed as a petition for certiorari and as if presented to this Court at the time they were presented to the judge who allowed the writ. The papers have been examined under that section; and we are of opinion that, treating them as a petition for certiorari, they disclose a case and situation in which the petition should be granted.

Writ of error as such dismissed, but as petition for certiorari granted.

MAUL *v.* UNITED STATES.[1]

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

No. 655. Argued January 19, 20, 1927.—Decided May 31, 1927.

1. Officers of the Coast Guard are authorized, by virtue of Rev. Stats. § 3072, to seize on the high seas more than 12 miles from the coast an American vessel subject to forfeiture for violation of the revenue laws. Pp. 503, 512.
2. Section 3072 of the Revised Statutes, providing that "It shall be the duty of the several officers of the customs to seize and secure any vessel or merchandise which shall become liable to seizure by virtue of any law respecting the revenue, as well without as within their respective districts," was not affected by the first paragraph of § 581 of the Act of September 21, 1922, which provides primarily for boarding and searching vessels "at any place in the United States or within four leagues of the coast," to discover and prevent intended smuggling, and secondarily for prompt seizure of the vessel by the searching officer if the search disclose a violation of the law which subjects her to forfeiture. P. 505.
3. In construing altered revenue laws the whole system must be regarded in each alteration, and no disturbance allowed of existing legislative rules of general application beyond the clear intention of Congress. P. 508.
4. Sections 4337 and 4377 of the Revised Statutes, which subject to forfeiture any vessel, enrolled or licensed in the coastwise trade,

[1] "The Underwriter," 13 F. (2d) 433.

which shall proceed upon a foreign voyage without giving up her enrollment or license and without being duly registered, and any licensed vessel employed in trade other than that for which she was licensed, are directed to the protection of the revenue, (besides being regulations of commerce,) and therefore come within the term "law respecting the revenue" as used in § 3072, *supra*. P. 508.

5. Officers of the Coast Guard are "officers of the customs," having "districts" within the meaning of Rev. Stats. § 3072, and are authorized to make seizures thereunder. P. 509.
6. The provision of Rev. Stats. § 3072, for seizures by officers of the customs "as well without as within their respective districts," is to be construed as respects domestic vessels to include the sea outside of customs districts. P. 510.
7. Congress has power to authorize seizure of domestic vessels on the high sea for violation of the revenue laws. P. 511.

13 F. (2d) 433, affirmed.

CERTIORARI (273 U. S. 684) to a decree of the Circuit Court of Appeals reversing one by the District Court, 6 F. (2d) 937, which dismissed a libel for the forfeiture of a domestic vessel charged with violations of the revenue laws. The ground of the dismissal was that the seizure of the vessel more than twelve miles from the coast, and by officers of the Coast Guard, was unwarranted by law, and that the District Court was therefore without jurisdiction.

Mr. Nathan April, with whom *Messrs. Howard M. Long* and *Louis Halle* were on the brief, for petitioner.

Assistant Attorney General Willebrandt, with whom *Solicitor General Mitchell* and *Mr. A. W. Henderson,* Special Assistant to the Attorney General, were on the brief, for the United States.

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

This is a libel of information for the forfeiture of the *Underwriter,* an American vessel enrolled and licensed for the coastwise trade. Five causes of forfeiture are set

forth. One is that, in violation of § 4377 of the Revised Statutes, the vessel was employed in a trade other than that for which she was licensed. Another is that, in violation of § 4337 of the Revised Statutes, the vessel proceeded from the United States on a foreign voyage without giving up her enrolment and license and without being duly registered. The others are not now insisted on.

In December, 1924, officers of the Coast Guard seized the vessel on the high seas, thirty-four miles from the coast, and turned her over to the collector of customs at New London, Connecticut, whereupon the libel was filed and the vessel arrested.

The case was heard on an agreed statement of facts and an exception by the claimant, Maul, to the court's jurisdiction. The exception was sustained on the theory that the officers of the Coast Guard were without authority to seize the vessel at sea more than twelve miles from the coast, and a decree dismissing the libel was entered. 6 Fed. (2d) 937. The Circuit Court of Appeals held the exception untenable, sustained the two causes of forfeiture before stated, and accordingly reversed the decree. 13 Fed. (2d) 433. The claimant petitioned for a review by this Court on certiorari and the petition was granted.

The claimant does not question here that the agreed facts establish the two causes of forfeiture, but does insist that the seizure was made without authority, and particularly that officers of the Coast Guard were not authorized to make such a seizure on the high seas more than twelve miles from the coast. The question has several phases which will be considered.

It is well to bear in mind that the case neither involves the seizure of a foreign vessel nor an exercise of asserted authority to board and search a vessel, domestic or foreign, for the purpose of detecting and thwarting in-

tended smuggling. The seizure was of an American vessel, then on the high seas and more than twelve miles from the coast, which had become "liable to seizure and forfeiture" by reason of definite and accomplished violations of the law under which she was enrolled and licensed.

Section 45 of the Judicial Code declares: "Proceedings on seizures made on the high seas, for forfeiture under any law of the United States, may be prosecuted in any district into which the property so seized is brought and proceedings instituted." This provision originated with the Judiciary Act of 1789, c. 20, § 9, 1 Stat. 73, has remained in force ever since, § 734 Rev. Stats., and plainly recognizes that seizures for forfeitures may be made on the high seas. See *The Merino*, 9 Wheat. 391, 401–402; *The Abby*, 1 Fed. Cas. p. 26. True, it does not indicate how or by whom the seizures may be effected; but other provisions speak to the point. There is need to trace them from the beginning; and in doing so it should be in mind that officers of the Coast Guard are to be deemed customs officers, a matter which will be explained later on.

The Act of July 31, 1789, c. 5, 1 Stat. 29, regulating the collection of duties on the tonnage of vessels and on the importation of merchandise, contained several provisions declaring that vessels violating its provisions should be liable to seizure and forfeiture, and also a section (26) authorizing customs officers "to make seizure of and secure any ship or vessel, goods, or merchandise, which shall be liable to seizure by virtue of this Act, as well without as within their respective districts." That Act was repealed by the Act of August 4, 1790, c. 35, 1 Stat. 145, which enlarged the prior regulations and contained a section (50) giving customs officers the same authority to make seizures that was given

before. Next came the Act of March 2, 1799, c. 22, 1 Stat. 627, which again enlarged the regulations and contained a section (70) respecting seizures which was like that in the prior acts. This last provision is now § 3072 of the Revised Statutes and reads as follows:

"It shall be the duty of the several officers of the customs to seize and secure any vessel or merchandise which shall become liable to seizure by virtue of any law respecting the revenue, as well without as within their respective districts."

Along with the provision thus carefully preserved, the several acts contained other provisions distinct from it which authorized customs officers to board and search vessels bound to the United States and to inspect their manifests, examine their cargoes, and prevent any unlading while they were coming in. A supplemental Act of July 18, 1866, c. 201, 14 Stat. 178, enlarged that provision by declaring that, if it appeared to the officer making the search that there had been a violation of the laws of the United States whereby the vessel or any merchandise thereon was liable to forfeiture, he should make seizure of the same. The provision so enlarged became § 3059 of the Revised Statutes. In the early acts the authority to board and search was limited, not only to vessels bound to the United States, but to such as were within the territorial waters of the United States or within four leagues (twelve miles) of the coast. But in the Act of 1866 and in § 3059 of the Revised Statutes the words expressing these restrictions were omitted. Possibly the omission was not significant, for the same restrictions were expressed in § 3067 of the Revised Statutes which related to the boarding and searching of vessels.

The Act of September 21, 1922, c. 356, 42 Stat. 858, 979, 989, repealed §§ 3059 and 3067 of the Revised Statutes and enacted a provision dealing with the same subject and reading as follows:

"SEC. 581. BOARDING VESSELS. Officers of the customs or of the Coast Guard, and agents or other persons authorized by the Secretary of the Treasury, or appointed for that purpose in writing by a collector may at any time go on board of any vessel or vehicle at any place in the United States or within four leagues of the coast of the United States, without as well as within their respective districts, to examine the manifest and to inspect, search, and examine the vessel or vehicle, and every part thereof, and any person, trunk, or package on board, and to this end to hail and stop such vessel or vehicle, if under way, and use all necessary force to compel compliance, and if it shall appear that any breach or violation of the laws of the United States has been committed, whereby or in consequence of which such vessel or vehicle, or the merchandise, or any part thereof, on board of or imported by such vessel or vehicle is liable to forfeiture, it shall be the duty of such officer to make seizure of the same, and to arrest, or, in case of escape or attempted escape, to pursue and arrest any person engaged in such breach or violation.

"Officers of the Department of Commerce and other persons authorized by such department may go on board of any vessel at any place in the United States or within four leagues of the coast of the United States and hail, stop, and board such vessels in the enforcement of the navigation laws and arrest or, in the case of escape or attempted escape, pursue and arrest any person engaged in the breach or violation of the navigation laws."

The last paragraph of this provision relates to the apprehension and arrest of individuals violating the navigation laws, not to the seizure of vessels and neither party bases any contention or argument on it. So it may be passed as without bearing here.

But the claimant contends and the District Court ruled that the first paragraph is now the sole source and meas-

ure of the authority of Coast Guard officers to seize vessels, and that, as it provides only for seizure within the United States or within twelve miles of the coast, a seizure outside these limits is unlawful. The contention is faulty in that it puts aside § 3072 of the Revised Statutes, before quoted, which authorizes customs officers to seize any vessel "liable to seizure by virtue of any law respecting the revenue" and declares, without limiting words, that this authority may be exercised "as well without as within their respective districts."

Without doubt the provision in the Act of 1922 is intended to take the place of §§ 3059 and 3067 of the Revised Statutes. It deals with the same subject and is accompanied by an express repeal of those sections. But it is not accompanied by a repeal of § 3072, and there is otherwise no reason for thinking it is intended to repeal or disturb that section. While the new provision and § 3072 are closely related and both are directed to the protection of the revenue, they are distinct, free from real repugnance, and well may stand together. One provides primarily for boarding and searching vessels, within prescribed limits, to discover and prevent intended smuggling, and secondarily for the prompt seizure of the vessel by the searching officer if the search discloses a violation of law which subjects her to forfeiture. The other provides broadly, and without restriction as to place, for the seizure of vessels which, through violation of the laws respecting revenue, have become liable to seizure. While the former restricts the authority to board and search to particular limits—the territorial waters and the high seas twelve miles outward from the coast—it does not purport to lay such a restriction on seizures. Where the seizure is incidental to a boarding and search under that provision the presence of the vessel within the prescribed limits operates to fix the place of seizure. Possibly the restriction may be said to affect such a seizure, but only

in a limited sense. In other seizures, of which there are many, the restriction has no bearing and no effect. So no reason appears for thinking Congress clearly intended to displace the general and long continued provision in § 3072. In this situation effect should be given to the familiar rule that in construing altered revenue laws "the whole system must be regarded in each alteration, and no disturbance allowed of existing legislative rules of general application beyond the clear intention of Congress." *Saxonville Mills* v. *Russell,* 116 U. S. 13, 21; *Wood* v. *United States,* 16 Pet. 342, 363; *United States* v. *Sixty-seven Packages of Dry Goods,* 17 How. 85, 93.

Thus far it has been assumed that the seizure came within the terms of § 3072; but questions are suggested in this connection which will be noticed.

One question is whether the vessel's liability to seizure was "by virtue of any law respecting the revenue." The liability arose from a violation of §§ 4337 and 4377 of the Revised Statutes—in that the vessel, being enrolled and licensed for the coastwise trade, proceeded on a foreign voyage without giving up her enrolment and license and without being duly registered,[2] and was employed in a trade other than that for which she was licensed. The sections violated are found in a subdivision of the Revised Statutes entitled "Regulation of Vessels in Domestic Commerce," but the arrangement of sections in the Revision is without special significance, Rev. Stats. § 5600. That subdivision includes several provisions designed to regulate commerce by vessels and also to protect the revenue, these being related subjects. A reading of the sections violated in connection with others in the same sub-

[2] The distinction between being enrolled and licensed and being registered is that the former is a condition to employment in the coastwise trade while the latter pertains to foreign trade.

division [3] makes it plain that they are directed to the protection of the revenue; and therefore they come within the terms of § 3072. That they are also regulations of commerce by vessels does not make them any the less laws respecting the revenue.

Another question is whether officers of the Coast Guard are among those whom the section authorizes to make seizures. It says "officers of the customs" and speaks of "their respective districts."

By the Act of 1790 (§§ 62–64) Congress established the Revenue Cutter Service for the express purpose of protecting the revenue, directed that its expenses be paid out of duties collected on imported merchandise and on the tonnage of vessels, and declared that its officers should "be deemed officers of the customs." By the Act of 1799 (§§ 97–102) these provisions were enlarged and reenacted, collectors of customs were given a power of direction over the service subject to assignments and wide supervision by the Secretary of the Treasury, and officers of the service were given authority to hail "vessels liable to seizure or examination" and to enforce submission. The enlarged provisions were included in the Revised Statutes (§§ 2747–2765) and are still in force, save that in 1915 the Coast Guard became the successor of the Revenue Cutter Service and took over its personnel, vessels, duties and powers, c. 20, 38 Stat. 800.

The regulations issued by the Secretary of the Treasury from time to time show that it early became the practice to assign vessels and officers in this service to particular customs districts and to subject their activities largely to the direction of the collectors of customs.[4]

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[3] Rev. Stat. §§ 4320, 4321, 4324, 4336, 4371; Act of January 16, 1895, c. 24, § 3, 28 Stat. 624.

[4] Regulations, 1843, pp. IX, XV, XVI, XVII; Regulations, 1871, §§ 16, 17, 20, 21, 22, 101, 204, 257; Regulations, 1894, §§ 22, 101, 141, 476.

And it otherwise appears that this practice became so settled that the vessels and officers when assigned were regarded as "belonging" to the particular districts. *The Eliza,* 8 Fed. Cas. p. 455; *The Friendship,* 9 Fed. Cas. p. 822.

In recent years the number of vessels and the personnel have been enlarged and provision has been made for imposing additional duties not requiring special notice here. The practice of assigning vessels and their officers to particular customs districts also has been changed to the extent that now the assignments are of one or more vessels to coast divisions, including one or more customs districts.[5] Otherwise the duties and practice in respect of the protection of the revenue remain practically as before.[6]

It is apparent from this review of the statutes and regulations that Coast Guard officers are to be deemed officers of the customs within the meaning of § 3072, and also that their connection with particular customs districts—whether one or more—is such that they properly may be said to have districts in the sense intended by the term "their respective districts." The term is not peculiar to § 3072. It was applied to Revenue Cutter officers in § 31 of the Act of 1790, § 54 of the Act of 1799, and §§ 3059 and 3067 of the Revised Statutes, and is now applied to Coast Guard officers in § 581 of the Act of 1922.

The remaining question relates to the meaning of the clause indicating where the officers may seize. It says "as well without as within their respective districts." Two constructions are suggested—one restricting the natural sense and treating the clause as if saying "as well within other customs districts as within their own"; and the other accepting the natural sense. The difference

[5] Regulations, 1923, §§ 31, 41.

[6] Regulations, 1923, §§ 22, 812, 814, 2501, 2503.

is that one excludes and the other includes the sea outside customs districts. In actual practice the latter construction has been adopted and it appears to be right. Besides giving effect to the natural import of the clause, it is better adapted to the attainment of the purpose of the section. If vessels violating the revenue laws and thereby incurring liability to forfeiture could escape seizure by departing from or avoiding waters within customs districts the liability to forfeiture would be of little practical effect in checking violations; and it is most improbable that Congress intended to leave the avenues of escape thus unguarded. The terms it has used are easily broad enough to meet the situation effectively, *United States* v. *Bowman,* 260 U. S. 94, 98–100, and no reason is suggested or perceived for cutting them down as respects domestic vessels. If Congress were without power to provide for the seizure of such vessels on the high sea, a restrictive construction might be justified. But there is no want of power in this regard. The high sea is common to all nations and foreign to none; and every nation having vessels there has power to regulate them and also to seize them for a violation of its laws. *The Apollon,* 9 Wheat. 362, 371; *Wilson* v. *McNamee,* 102 U. S. 572, 574; *Lord* v. *Steamship Co.* 102 U. S. 541, 544; *The Hamilton,* 207 U. S. 398, 403; *American Banana Co.* v. *United Fruit Co.,* 213 U. S. 347, 355; *Cunard S. S. Co.* v. *Mellon,* 262 U. S. 100, 123, 129; 3 Opinions A. G. 405; 1 Kent's Com. *26; Hall's International Law, 7th ed., § 77; 1 Hyde International Law, § 227.

Some distinctions have been recognized in respect of seizing domestic vessels when in foreign waters and of seizing foreign vessels on the high sea, *Cunard S. S. Co.* v. *Mellon, supra,* 123–124; *The Apollon, supra,* 370–371; *Church* v. *Hubbart,* 2 Cr. 187, 234–235; *The Marianna Flora,* 11 Wheat. 1, 42; *Manchester* v. *Massachusetts,* 139 U. S. 240, 258; 1 Hyde International Law, § 236; West-

lake Int. Law, p. 177; but the extent and application of these distinctions are not involved in this case.

It follows that the seizure in this instance by the officers of the Coast Guard was lawful and therefore that the exception to the District Court's jurisdiction was ill grounded. Whether if the seizure—made by federal officers—were unlawful the ruling in *Dodge* v. *United States*, 272 U. S. 530, would apply need not be considered.

The decree of the Circuit Court of Appeals is

Affirmed.

MR. JUSTICE BRANDEIS, concurring.

I concur in the judgment of the Court. But I cannot agree to the construction of the statutes on which the decision is rested. The Court holds that the statutes confer upon the Coast Guard express authority to seize on the high seas beyond the twelve-mile limit an American vessel which has become liable to forfeiture for violation of the navigation laws; and the reason assigned is that these are "laws respecting the revenue" within the meaning of § 3072 of the Revised Statutes. As I read the statutes, they do not confer express authority, but the authority exists because it is to be implied as an incident of the police duties of ocean patrol which Congress has imposed upon the Coast Guard. Mere difference of opinion in the construction of intricate statutes can rarely justify expression of dissent. This is especially true where the two views lead, in the particular case, to the same result. But, in this instance, the construction adopted by the Court may have in other cases far-reaching and regrettable results.

Enforcement of the "laws respecting the revenue" forms only a part of the ocean patrol duties imposed by Congress upon the Coast Guard. And seizure on the high seas of vessels which have "become liable to seizure" does not exhaust the services required of the Coast

Guard to ensure enforcement there of the laws respecting the revenue. Unless the Coast Guard has authority to seize the ship and to arrest persons thereon found violating our laws, no American official is authorized to do so. If the statutes are construed as granting to the Coast Guard express authority to make the seizure in question in order to protect the revenue, the authority so granted is obviously very narrow, and the express grant may possibly be read as exhausting the authority conferred beyond the twelve-mile limit; in other words, as showing that no implied authority is conferred. For this reason it seems to me important to state why I cannot assent to the view expressed by the Court.

The claimant concedes that, within the United States, the Coast Guard is charged with the duty of enforcing our navigation laws, and for this purpose, may board, search, and seize American vessels there; that our navigation laws govern American merchant vessels on the high seas; and that the United States could by appropriate legislation authorize the Coast Guard to seize, without a warrant, any such vessel violating our law on the high seas, regardless of distance from our coast. See *United States* v. *Bowman,* 260 U. S. 94, 97; *Cunard Steamship Co.* v. *Mellon,* 262 U. S. 100, 125, 129. His contention apparently is that Congress does not impose upon officers of the Coast Guard any duty to enforce the navigation laws on the high seas beyond the twelve-mile limit; and that, even if it does impose the duty, it has not conferred authority to enforce compliance by means of a seizure to be made there. The question for decision is the power of the Coast Guard to seize American vessels beyond the twelve-mile limit.[1]

[1] The power, in relation to American vessels, was upheld in *The Rosalie M.,* 4 F. (2d) 815, affirmed without passing upon the point in 12 F. (2d) 970. See *The Homestead,* 7 F. (2d) 413, 415. *Contra,*

The Coast Guard is a part of the civil establishment. It is a bureau of the Treasury Department,[2] established by Act of January 28, 1915, c. 20, 38 Stat. 800, in lieu of the existing Revenue Cutter Service and Life-Saving Service. These had thereofore been separate—the Revenue Cutter Service a division, the Life-Saving Service a bureau, of the Treasury. *Louisville & Nashville R. R. Co.* v. *United States,* 258 U. S. 374. The Revenue Cutter Service was established by Act of August 4, 1790, c. 35, §§ 31 and 62–65, 1 Stat. 145, 164, 175. That statute was superseded by the Act of March 2, 1799, c. 22, §§ 54, 70, 97–102, 1 Stat. 627, 668, 678, 699, 700. The provisions of the Act of 1799 concerning search and seizure specifically by revenue cutters were embodied without substantial change in the Revised Statutes, §§ 2760, 2761, 2763, 3067, 3069, 3070 and 3072. Their scope and purpose will be discussed later. They are now in full force, except so far as they were repealed by the Tariff Act of 1922 or may have been modified by § 581 thereof. The

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United States v. *Bentley,* 12 F. (2d) 466; *Lee* v. *United States,* 14 F. (2d) 400, reversed by this Court, *United States* v. *Lee, post,* p. 559. For seizures of foreign vessels, beyond territorial waters, under the hour's run treaties, see *Ford* v. *United States,* 273 U. S. 593; *The Pictonian,* 3 F. (2d) 145; *The Over The Top,* 5 F. (2d) 838; *United States* v. *Henning,* 7 F. (2d) 488, reversed in 13 F. (2d) 74; *The Sagatind,* 11 F. (2d) 673; *Haughan* v. *United States,* 13 F. (2d) 75. For seizures of foreign vessels beyond the treaty limits, see *The Frances Louise,* 1 F. (2d) 1004; *The Panama,* 6 F. (2d) 326. For seizures of foreign vessels between the three and twelve mile limits, under the hovering statutes, before the treaties, see *United States* v. *Bengochea,* 279 Fed. 537; *The Grace and Ruby,* 283 Fed. 475; *United States* v. *1,250 Cases of Intoxicating Liquors,* 292 Fed. 486; *Arch* v. *United States,* 13 F. (2d) 382.

[2] The Act of 1915, § 1, like the earlier law, provides that the Coast Guard "shall operate as a part of the Navy, subject to the orders of the Secretary of the Navy, in time of war or when the President shall so direct."

Act of 1915 did not add to or abridge in any respect existing duties and powers of officers of revenue cutters. It merely transferred to the Coast Guard the duties and powers theretofore possessed.

When the Revenue Cutter Service was established, its duties were limited to the protection of the revenues. In 1793, the duty of enforcing also the navigation laws was imposed.[3] Thereafter, from time to time, the duty of enforcing many other laws relating to transactions involving marine operations was added. Revenue cutters became thus America's civil ocean patrol.[4] But their service is not limited to enforcing our municipal law. They have been employed also in protecting the lives and property of Americans against foreigners in international controversies falling short of war; and they have served during wars in operations against the enemy.[5] Revenue cutters are armed cruisers. Naval discipline, drill and routine prevail on all the ships. Their officers are commissioned, and their men enlisted, like officers and men in the Army, Navy and Marine Corps. The Secretary of the Treasury assigns them to a particular vessel; and the vessel is usually assigned to a particular station. But he may make such transfer of an officer from one vessel to another, and of the vessel from one station to another, as he deems desirable. Both the Secretary of the Treasury and the President may direct any

[3] Act of February 18, 1793, c. 8, § 27, 1 Stat. 305, 315.

[4] The Coast Guard regulations make it the duty of officers to enforce "all . . . maritime laws of the United States." Regulations, 1923, Art. 2501. The cutters are frequently called upon to furnish transportation and other assistance to other departments of the Government. Reports of Revenue Cutter Service and Coast Guard, 1872, p. 12; 1873, pp. 11–13; 1891, p. 4; 1914, p. 101; 1915, pp. 24, 130–140; 1916, p. 21.

[5] Revenue Cutter Service Report for 1891, p. 13; Report for 1897, p. 7; Coast Guard Report for 1920, p. 9.

revenue cutter to cruise in any waters in order to perform any duty of the service. *Wiley* v. *United States*, 40 Ct. Cl. 406; Act of April 21, 1910, c. 182, § 2, 36 Stat. 326; Regulations of Coast Guard (1923), Art. 101.

With the enlargement of the revenue cutters' functions came necessarily an extension of the field of their operations. They range the seas coastwise or far into the ocean, as occasion and the particular duties demand. The earlier regulations [6] issued by the Secretary of the Treasury, included among the laws to be enforced, those prohibiting the slave trade,[7] the laws to preserve neutrality,[8] laws for the suppression of piracy,[9] and the law to prevent the cutting and removing of timber from public lands "for exportation to any foreign country." [10] Among the duties recited in the later regulations [11] are lending medical aid to vessels of the United States engaged in deep sea fisheries; [12] enforcing the sponge fishing law;[13] assisting vessels in distress upon the oceans [14] and

[6] "Instructions to officers of the United States Revenue Cutter Service" issued by the Treasury Department October 3, 1834, p. 1; "Rules and Regulations for the Government of the United States Revenue Marine, issued November 1, 1843," p. ix.

[7] Act of March 22, 1794, c. 11, § 1, 1 Stat. 347; April 20, 1818, c. 91, §§ 2, 4, 3 Stat. 450, 451; see March 3, 1819, c. 101, § 1, 3 Stat. 532.

[8] Rev. Stat. §§ 5283–5287; Act of March 4, 1909, c. 321, 35 Stat. 1088, 1090; Act of June 15, 1917, c. 30, Title V, 40 Stat. 217, 221. See Revenue Cutter Service Report for 1897, pp. 21–22.

[9] Act of April 30, 1790, c. 9, § 8, 1 Stat. 112, 113; Act of March 3, 1819, c. 77, §§ 1, 4, 3 Stat. 510, 511, 513. See Act of May 15, 1820, c. 113, 3 Stat. 600.

[10] Act of March 1, 1817, c. 22, §§ 2, 3, 4, 3 Stat. 347.

[11] Regulations U. S. Coast Guard, 1923, c. 2.

[12] Act of June 24, 1914, c. 124, 38 Stat. 387.

[13] Act of June 20, 1906, c. 3442, 34 Stat. 313; Act of August 15, 1914, c. 253, 38 Stat. 692.

[14] Rev. Stat. § 1536; Act of April 19, 1906, c. 1640, §§ 1–3, 34 Stat. 123. Reports of Revenue Cutter Service, 1873, pp. 7–9; 1881, pp. 9, 15; 1891, pp. 14, 39.

the Great Lakes;[15] removing derelicts;[16] suppressing mutinies;[17] patrolling the North Pacific and the Bering Sea for the purpose of enforcing the laws for the protection of the fur seal and sea otter;[18] and the service of ice observation and patrol, pursuant to the Convention of January 20, 1914, designed to promote safety on the North Atlantic, following the International Conference of November 12, 1913.[19] By no act or regulation is the field of activity restricted to the twelve-mile limit. Some of the duties imposed upon revenue cutters involve necessarily service hundreds of miles from any American coast.[20]

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[15] Rev. Stat. § 2759.

[16] Act of May 12, 1906, c. 2454, 34 Stat. 190.

[17] See e. g., Reports, 1881, pp. 14–23; 1915, p. 20.

[18] Concerning the service of revenue cutters in connection with the forfeiture of vessels killing otter, fur seals, etc., in the Alaskan waters and beyond, see the Acts of July 27, 1868, c. 273, §§ 6, 7, 15 Stat. 240, 241; March 2, 1889, c. 415, § 3, 25 Stat. 1009; July 1, 1870, c. 189, 16 Stat. 180; June 20, 1878, c. 359, 20 Stat. 206, 212; March 3, 1879, c. 182, 20 Stat. 377, 386; December 29, 1897, c. 3, § 8, 30 Stat. 226, 227; March 3, 1899, c. 429, §§ 173–183, 30 Stat. 1253, 1279–1281; June 14, 1906, c. 3299, § 4, 34 Stat. 263, 264; April 21, 1910, c. 183, 36 Stat. 326. To give effect to the convention of July 7, 1911, between Russia, Japan, England, and the United States (37 Stat. 1542), Congress passed the Act of August 24, 1912, c. 373, 37 Stat. 499, which specifically provided (§ 9) for the search and seizure of American vessels on the high seas. An earlier statute giving effect to a similar treaty between England and the United States carried the same provision. Act of April 6, 1894, c. 57, §§ 11, 12, 28 Stat. 52, 55. See also *In re Cooper,* 143 U. S. 472; *The James G. Swan,* 50 Fed. 108; *The La Ninfa,* 75 Fed. 513; *The Alexander,* 75 Fed. 519; *The James G. Swan,* 77 Fed. 473; *United States* v. *The Jane Gray,* 77 Fed. 908. For some years a special fleet of revenue vessels has been assigned to the Bering sea patrol, sometimes in cooperation with the Navy and Department of Commerce. See e. g., Report for 1920, pp. 22–31.

[19] See Report for 1914, p. 86.

[20] See Reports, 1891, pp. 3, 14; 1897, pp. 21–22; 1913, p. 42; 1914, pp. 35, 85, 126, 149–151, 158–161; 1915, pp. 7, 11, 14, 16–18, 24,

Forfeiture of the offending vessel is a punishment commonly prescribed for violation of our navigation laws, and of many other laws which revenue cutters are required to aid in enforcing. Of these there are many which are in no way concerned with the collection of the revenue.[21] In order to enforce these laws adequately, it is necessary that some officials of the Government shall

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130–140; 1916, pp. 11–13, 21, 105; 1917, pp. 13–14, 19–20, 102, 118; 926, p. 22.

[21] Aside from the customs and registry and enrollment acts, referred to at length in the text, there have been many statutes providing for the seizure and forfeiture of vessels, or for a penalty which is made a lien upon the vessel. Some of these statutes confer power of seizure upon the revenue cutters, either specifically or by reference to officers of the customs or officers of the revenue; some provide for seizure by some other means, usually by the navy under the direction of the President; the majority make no specific provision for seizure.

(1) Power to seize or enforce conferred specifically upon revenue cutters. *Embargo and non-intercourse acts:* Joint Resolution of March 26, 1794, 1 Stat. 400; Act of May 22, 1794, c. 33, 1 Stat. 369; Act of April 18, 1806, c. 29, 2 Stat. 379; Act of December 22, 1807, c. 5, 2 Stat. 451 (supplemented by the Act of April 25, 1808, c. 66, § 7, 2 Stat. 499); Act of March 1, 1809, c. 24, 2 Stat. 528; Act of April 4, 1812, c. 49, 2 Stat. 700; Act of December 17, 1813, c. 1, 3 Stat. 88. *Slave trade:* Act of February 28, 1803, c. 10, 2 Stat. 205 (prohibiting importation into states forbidding admission); Act of March 2, 1807, c. 22, 2 Stat. 426 (not providing for the use of the cutters, but recognizing that use by giving the seizing crew part of the proceeds, whether the seizure "be made by an armed vessel of the United States, or revenue cutters thereof"); Act of March 3, 1819, c. 101, 3 Stat. 532 (same provision). *Miscellaneous:* Act of June 25, 1798, c. 58, 1 Stat. 570 (failure to report aliens on board); Act of July 13, 1861, c. 3, § 7, 12 Stat. 255 (closing confederate ports and forfeiting vessels of confederate citizens); Act of August 15, 1914, c. 253, 38 Stat. 692 (regulating sponge fishing in Gulf of Mexico); Act of August 31, 1852, c. 113, § 5, 10 Stat. 121, 140 (illegal carriage of mail); Act of June 8, 1872, c. 335, §§ 235–237, 17 Stat. 283, 312 (same); Act of March 6, 1896, c. 49, 29 Stat. 54 (anchorage in St. Mary's River); Act of May 27, 1796, c. 31, 1 Stat. 474 (state quarantine laws); Act of July 13, 1832, c. 204, 4 Stat. 577 (same); Joint

have authority to seize American vessels which are found violating them. Many of the offenses are of such a character that they can be committed anywhere on the high seas. The challenge of the authority of the Coast Guard

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Resolution of May 26, 1866, 14 Stat. 357 (same); Act of June 7, 1924, c. 316, § 7, 43 Stat. 604, 605 (Oil Pollution Act).

(2) Power to seize or enforce conferred upon some other arm of the government (not necessarily excluding a similar power in the revenue cutters). *Embargo and non-intercourse acts:* Act of February 9, 1799, c. 2, 1 Stat. 613; Act of February 27, 1800, c. 10, 2 Stat. 7; Act of January 9, 1809, c. 5, 2 Stat. 506. *Neutrality laws:* Act of June 5, 1794, c. 50, 1 Stat. 381; Act of April 20, 1818, c. 88, 3 Stat. 447; Act of March 10, 1838, c. 31, 5 Stat. 212; Act of June 15, 1917, c. 30, Title V, 40 Stat. 217, 221. *Piracy laws:* Act of March 3, 1819, c. 77, 3 Stat. 510; Act of August 5, 1861, c. 48, 12 Stat. 314. *Miscellaneous:* Act of May 10, 1800, c. 51, 2 Stat. 70 (slave trade); Act of February 4, 1815, c. 31, 3 Stat. 195 (trading with the enemy); Act of August 2, 1813, c. 57, 3 Stat. 84 (seizure of American vessel using English pass, on high seas); Act of February 19, 1862, c. 27, 12 Stat. 340 (coolie trade); Act of September 8, 1916, c. 463, § 806, 39 Stat. 756, 799 (vessel departing without clearance); Act of June 15, 1917, c. 30, Title II, 40 Stat. 217, 220 (regulations governing vessels in territorial waters in time of emergency).

(3) No express provision for seizure or enforcement. *Navigation regulations:* Act of March 1, 1817, c. 31, 3 Stat. 351 (foreign vessels in coasting trade); Act of March 3, 1817, c. 39, 3 Stat. 361 (same); Act of March 2, 1819, c. 46, 3 Stat. 488 (excess of passengers); Act of February 22, 1847, c. 16, § 2, 9 Stat. 127, 128 (same); Act of March 3, 1855, c. 213, 10 Stat. 715 (same); Act of July 4, 1864, c. 249, § 7, 13 Stat. 390, 391 (false passenger list); Act of July 7, 1838, c. 191, 5 Stat. 304 (inspection and license for steam vessels); Act of May 5, 1864, c. 78, § 2, 13 Stat. 63, 64 (deception as to name of vessel); Act of February 28, 1871, c. 100, §§ 1, 45, 16 Stat. 440, 453 (same); Act of March 3, 1805, c. 42, § 3, 2 Stat. 342, 343 (armed vessel departing without clearance); Act of June 7, 1897, c. 4, § 4, 30 Stat. 96, 103 (rules of navigation); Act of June 9, 1910, c. 268, § 7, 36 Stat. 462, 463 (motorboat regulations); Act of May 28, 1906, c. 2566, § 1, 34 Stat. 204 (foreign-built dredge not documented). *Embargo and non-intercourse acts:* Act of June 13, 1798, c. 53, 1 Stat. 565; Act of February 28, 1806, c. 9, 2 Stat. 351; Act of April

to make a seizure beyond the twelve-mile limit presents, therefore, questions affecting the enforcement not only of the navigation laws, but also of the customs laws, the National Prohibition Law, and others. If the officers of revenue cutters were without authority to seize American merchant vessels found violating our laws on the high seas beyond the twelve-mile limit, or to seize such vessels found there which are known theretofore to have violated our laws without or within those limits, many offenses against our laws might, to that extent, be committed with impunity. For clearly no other arm of the Government possesses such authority.

The questions presented necessitate enquiry into early and recent administrative practice, as well as into legislation and judicial decisions. I shall consider first whether officers of revenue cutters had authority to seize on the high seas for violation of the navigation laws prior to

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18, 1818, c. 70, 3 Stat. 432; Act of May 15, 1820, c. 122, 3 Stat. 602; Act of March 1, 1823, c. 22, 3 Stat. 740. *Trading with the enemy:* Act of July 6, 1812, c. 129, 2 Stat. 778. *Quarantine laws:* Act of August 30, 1890, c. 839, § 6, 26 Stat. 414, 416; Act of February 15, 1893, c. 114, 27 Stat. 449. *Opium laws:* Act of February 23, 1887, c. 210, 24 Stat. 409; Act of February 9, 1909, c. 100, 35 Stat. 614; Act of January 17, 1914, c. 9, 38 Stat. 275. *Miscellaneous:* Act of April 30, 1790, c. 9, § 8, 1 Stat. 112, 113 (piracy); Act of March 22, 1794, c. 11, 1 Stat. 347 (slave trade); Act of March 1, 1817, c. 22, 3 Stat. 347 (transportation of timber cut from navy lands); Act of March 2, 1831, c. 66, 4 Stat. 472 (same); Act of March 3, 1825, c. 107, 4 Stat. 132 (taking wrecks on Florida coast to foreign port); Act of May 6, 1882, c. 126, § 10, 22 Stat. 58, 61, amended by the Act of July 5, 1884, c. 220, § 10, 23 Stat. 115, 117 (Chinese exclusion); Act of July 2, 1890, c. 647, § 6, 26 Stat. 209, 210 (property transported in restraint of trade); Act of August 13, 1912, c. 287, §§ 1, 9, 37 Stat. 302, 308 (use of radio apparatus on vessel on high seas). See also the enumeration of certain offenses under the criminal code which usually take place on the high seas, in *United States* v. *Bowman,* 260 U. S. 94, 98–100.

the Tariff Act of 1922; then, whether that Act abridged their authority.

First. The provisions of the navigation laws alleged to have been violated, have been in force since the beginning of our Government. Act of February 18, 1793, c. 8, §§ 8, 32, 1 Stat. 305, 308, 316; Rev. Stat. §§ 4337, 4377. The express authority to board and search in terms beyond the territorial limits of the United States appeared first in §§ 31 and 64 of the customs-collection Act of August 4, 1790, c. 35, 1 Stat. 145, 164, 175, which established the Revenue Cutter Service. The authority there conferred upon it was to board and search within "the United States or within four leagues [twelve miles] of the coast." It applied to all vessels—foreign as well as American; but was limited to inbound vessels. These sections, which granted power to board and search, contained no express grant of power to seize. Express statutory authority to seize in terms beyond the territorial limits of the United States for violation of its laws was not conferred, until the Tariff Act of 1922, in respect to any offence except in those few instances in which Congress, in pursuance of specific treaties, provided that any vessel, foreign or American, might be seized.[22] We are concerned here only with the right of the Coast Guard to seize an American vessel for violation of a law applicable solely to such vessels.

The only express statutory authorization upon which, prior to the Tariff Act of 1922, a claim of power in any official to seize a vessel on any waters for violation of the navigation laws could possibly be predicated were § 27 of the Act of February 18, 1793, c. 8, 1 Stat. 305, 315 (a navigation law), which was repealed by its omission from

[22] See, for example, the treaties mentioned in note 18, *supra,* and statutes giving effect thereto.

the Revised Statutes; [23] and § 2 of the Act of July 18, 1866, c. 201, 14 Stat. 178 (a customs-collection law), which was embodied in § 3059 of the Revised Statutes as a part of "Title XXXIV, Collection of Duties upon Imports;" and § 3072 of the Revised Statutes, which dealt with seizures for violation of "any law respecting the revenue." [24] Section 3059 authorized "any officer of the customs, including" those "of a revenue cutter," to "go on board of any vessel . . . to inspect, search and examine the same . . .; and if it shall appear that any breach or violation of the laws of the United States has been committed, whereby . . . such vessel . . . is liable to forfeiture, to make seizure of the same . . ."

The authority which § 3059, § 3072, and the earlier acts, expressly conferred upon all officers "of the customs" was to seize "as well without as within his district." No distinction was there made between foreign and domestic vessels; nor between inbound and outbound vessels. The clause appeared first in the Act of July 31, 1789, c. 5, § 26, 1 Stat. 29, 43, the earliest law regulating the collection of customs. As there used, the clause clearly meant only that collectors, naval officers and surveyors should have the authority to seize in other districts of the United States besides the particular ones to which

[23] Section 27 was never expressly repealed. In the "Revision of United States Statutes as Drafted by the Commissioners" (1872), it appeared as § 620 of Title 36, c. 10. It does not appear in the Revised Statutes as finally enacted, however, and hence, under § 5596, must be deemed to have been repealed, because of the omission, since many other sections of the Act of February 18, 1793, were included therein. It is in phraseology and substance similar to § 2 of the Act of July 18, 1866, c. 201, 14 Stat. 178.

[24] That section also is a re-enactment of identical provisions in earlier customs collection laws. See Acts of March 2, 1799, c. 22, § 70, 1 Stat. 627, 678; August 4, 1790, c. 35, § 50, 1 Stat. 145, 170; July 31, 1789, c. 5, § 26, 1 Stat. 29, 43.

they were respectively appointed. For the clause antedated the first express authorization of either search or seizure without the territorial limits of the United States; and antedated also the establishment of the Revenue Cutter Service.[25] Did the phrase "without . . . his district," when used in § 3059, continue to mean within some other customs collection district of the United States; or did it acquire the new meaning of anywhere, even without the territorial waters of the United States? Compare *Taylor* v. *United States*, 3 How. 197, 205.

If the former meaning is the true one, there was prior to the Tariff Act of 1922 no express authority in officers of revenue cutters to seize for violation of any law beyond the territorial limits of the United States. If the latter meaning is the true one, not only officers of revenue cutters, but also all other customs officers were given by § 3059 express authority to seize anywhere on the high seas any vessel, foreign or American, found violating our laws. In my opinion the former meaning is clearly the true one. Congress cannot have intended to confer the general authority to seize foreign vessels upon the high seas.[26] And the clause in question is used in § 581 of the Act of 1922 in the same sentence with an express territorial limitation. But it does not follow that American vessels violating our laws beyond the territorial limits could not be seized. Authority to seize American vessels

[25] See also Alexander Hamilton's Report of February 2, 1795, American State Papers, Finance, Vol. I, No. 77, pp. 348, 349, urging the insertion of a similar clause in the statutes dealing with the power of internal revenue officers, who, of course, operate on land only.

[26] It has been commonly asserted that, even under the hovering laws, a sovereign may not seize a foreign vessel until it enters the territorial waters. These do not extend beyond the three-mile limit. John Bassett Moore, 1 Digest International Law, 726; L. H. Woolsey, Foreign Relations of the United States (1912), p. 1289; Charles Cheney Hyde, Int. Law, pp. 417–420. But see last group of cases cited in note 1, *supra*.

there was conferred upon officers of revenue cutters by implication. They possessed the authority as an incident of their office of ocean patrol. They are officers of the branch of the Government charged with the faithful execution of the laws. Wherever on the high seas they were charged with enforcing compliance with our laws, there they were, in my opinion, authorized to seize American vessels, regardless of the distance from our coast.[27] Compare *United States* v. *Macdaniel,* 7 Pet. 1, 15; *United States* v. *Tingey,* 5 Pet. 115, 126; 28 Op. Atty. Gen. 121, 124, 549, 552.

There is no limitation upon the right of the sovereign to seize without a warrant vessels registered under its laws, similar to that imposed by the common law and the Constitution upon the arrest of persons and upon the seizure of "papers and effects."[28] See *Carroll* v. *United*

[27] The power of the ordinary peace officers to arrest and to seize does not seem to have been conferred originally by statute. As to the sheriff, statutes dealt with the method of appointment, tenure of office, and qualifications, but not with the extent of his powers. See 1 Blackstone Comm., 339–346; Dalton, Sheriff, *passim.;* Watson, Sheriff, c. I, c. III. Similarly as to constables and watchmen. See 4 Blackstone Comm., 292. These powers, including of course the power to arrest, are in this country thought to inhere in these offices, except in so far as they may be limited by statute. See *South* v. *Maryland,* 18 How. 396, 401–2; *Mayor of Baltimore* v. *State,* 15 Md. 376, 393 (constables and justices of the peace); *Kirksey* v. *Bates,* 7 Port. (Ala.) 529, 532 (notaries); *Doering* v. *State,* 49 Ind. 56, 61 (policeman); *Hawley* v. *Butler,* 54 Barb. (N. Y.) 490, 494–495 (marshals); *State* v. *Reichman,* 135 Tenn. 653, 661–662, 667 (sheriff). See Mechem, Public Officers, § 502. Compare *Allor* v. *Board of Auditors,* 43 Mich. 76 (constables); *People* v. *Keeler,* 29 Hun. (N. Y.) 175, 178; *State* v. *Brunst,* 26 Wis. 412; *State* v. *Dews,* R. M. Charlt. (Ga.) 397, 439; *State v. De Lorenzo,* 81 N. J. L. 613, overruling *Virtue* v. *Freeholders,* 38 Vroom, 139; *Commonwealth* v. *O'Cull,* 7 J. J. Marsh (Ky.) 149, 150; *Turner* v. *Holtzman,* 54 Md. 148, 159–160; *Quinn* v. *Heisel,* 40 Mich. 576.

[28] See also *Boyd* v. *United States,* 116 U. S. 616, 622–624. The right of the sovereign to seize a vessel for violation of the municipal

States, 267 U. S. 132, 151–153. Smuggling is commonly attended by violation of the navigation laws. From the beginning of our Government officers of revenue cutters have, for the purpose of enforcing the customs laws, been expressly authorized to board and search inbound vessels on the high seas within twelve miles of our coast. It is not to be lightly assumed that Congress intended to deny to revenue cutters so engaged authority to seize American vessels found to be violating our navigation laws. Nor is it lightly to be assumed that Congress intended to deny to officers of revenue cutters engaged in enforcing other laws of the United States beyond the twelve-mile limit, the authority to seize American vessels found to be violating our navigation laws beyond those limits.

From the beginning of our government, it has been the practice of revenue cutters to make such seizures. The official records and judicial decisions show that revenue cutters were employed early in our history, and that they have been employed continuously since, in enforcing our navigation laws upon the high seas regardless of distance from the coast; and that, whether operating within the United States or without, they have, regardless of distance from the coast, seized American vessels found violating our laws, without regard to whether the laws violated related to the revenue.[29] Congress has by its ac-

law, is in some respects analogous to the right of a belligerent, recognized by the international law, to seize contraband. See 2 Moore, Digest International Law, § 309; *The Marianna Flora,* 11 Wheat. 1, 42; *United States* v. *La Jeune Eugenie,* 26 Fed. Cas. No. 15,551.

[29] In most cases, the cutters merely report violations of law, without making seizures. The reports do show, however, that when it was thought necessary to arrest American vessels, the seizures were made without regard to location. See *The Elizabeth,* 8 Fed. Cas. No. 4, 352 (1810); *The Eliza,* 8 Fed. Cas. No. 4, 346 (1813); *United States* v. *The Little Ann,* 26 Fed. Cas. No. 15,611 (1809), reversed in 15 Fed. Cas. No. 8, 397; *The Brig Ann,* 9 Cranch, 289 (1815);

tion sanctioned this exertion of power. It supported the activities of the service by ever increasing appropriations.[30] It equipped the Coast Guard, before the Tariff Act of 1922, with able cruising cutters, many of which were engaged largely in patrol beyond the twelve-mile limit. To seize anywhere on the high seas American ves-

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Burke v. *Trevitt*, 4 Fed. Cas. No. 2, 163 (1816). Compare 3 Op. Atty. Gen. 405. See also "Instructions to Officers in the United States Revenue Cutter Service," October 3, 1834, p. 9; "Rules and Regulations for the Government of the Revenue Marine," November 1, 1843, p. xv. Thus, in regard to specific American vessels, the Commandant's office frequently sends out confidential orders to "seize whenever and wherever found", or to "board and search whenever and wherever found."

The files of the Coast Guard show that from September 1, 1922, to February 10, 1927, at least seventy-five American vessels were seized beyond the twelve-mile limit, for violations of the Prohibition Act alone; of these seizures at least twenty-one were made more than thirty miles from the coast.

[30] After the adoption of the Eighteenth Amendment Congress made each year a large increase in the appropriation for the Coast Guard; and provided for the acquisition of additional vessels of the cruiser type. Before the passage of the Tariff Act of 1922 the year's appropriations had been increased to $9,800,000 and the acquisition or construction of additional cruising vessels had been authorized. On April 2, 1924, a special appropriation of $12,194,900 was made for construction of additional ocean-going vessels and for reconditioning and equipping those vessels which it authorized the Navy to transfer to the Coast Guard. The appropriation for maintenance increased to $20,800,000 by 1926.

In 1919, the aggregate of vessels boarded was 2,005; in 1922, 31,653; in 1925, 53,080. The number of vessels seized or reported for violations of law increased from 601 in 1919 to 1,887 in 1925. It should be noted that comparatively few of the penalties for minor infractions of the law are collected. By the Act of February 14, 1903, c. 552, § 10, 32 Stat. 825, 829, the power to remit penalties and forfeitures for violation of laws "relating to merchant vessels", theretofore in the hands of the Secretary of the Treasury, was given to the Secretary of Commerce. This power has been liberally exercised. See e. g., 1913 Annual Report of Commissioner of Navigation, p. 23.

sels found violating our laws was thus, I think, within the implied authority of its officers before the Act of 1922. It remains to consider whether that Act abridged the authority theretofore possessed.

Second: The Tariff Act of 1922 includes as Title IV a revision of the customs administrative provisions then in force. 42 Stat. 858, 948, *et seq.* In § 642 it recites the provisions of the earlier law which the Act repealed. Among these are §§ 3059 and 3067 of the Revised Statutes. The former is the section which conferred upon officers of the customs express power to seize "within or without his district." The latter is the section which conferred upon them authority to board and search inbound vessels within twelve miles of our coast. The sections parallel to § 3067, relating specifically to officers of revenue cutters, first found in § 64 of the Act of 1790, reenacted as § 99 of the Act of 1799, and again as §§ 2760, 2761, 2762 of the Revised Statutes, were neither repeated nor repealed by the Act of 1922. Nor did it repeat or repeal § 3072. For the provisions repealed it substituted § 581, which, so far as material, is as follows: [31]

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[31] The second paragraph of § 581, 42 Stat. 979, relates solely to officers of vessels of the Department of Commerce. It is as follows:

"Officers of the Department of Commerce and other persons authorized by such department may go on board of any vessel at any place in the United States or within four leagues of the coast of the United States and hail, stop, and board such vessels in the enforcement of the navigation laws and arrest or, in case of escape or attempted escape, pursue and arrest any person engaged in the breach or violation of the navigation laws."

Prior to 1903, the Secretary of the Treasury was charged with both the administration and the enforcement of the navigation laws. The administration was committed in part to the collectors of the ports, in part to the Bureau of Navigation. The enforcement was committed in part to the collectors, in part to the Revenue Cutter Service. In that year Congress created the Department of Commerce and Labor and transferred to it the Bureau of Navigation. Act of February 14, 1903, c. 552, 32 Stat. 825. In 1913 that bureau became a

"*Boarding Vessels.*—Officers of the customs or of the Coast Guard, and agents or other persons authorized by the Secretary of the Treasury, or appointed for that purpose in writing by a collector may at any time go on board of any vessel or vehicle at any place in the United States or within four leagues of the coast of the United States, without as well as within their respective districts, to examine the manifest and to inspect, search, and examine the vessel or vehicle, and every part thereof, and any person, trunk, or package on board, and to this end to hail and stop such vessel or vehicle, if under way, and use all necessary force to compel compliance, and if it shall appear that any breach or violation of the laws of the United States has been committed, whereby or in consequence of which such vessel or vehicle, or the merchandise, or any part thereof, on board of or imported by such vessel or vehicle is liable to forfeiture, it shall be the duty of such officer to make seizure of the same, and to arrest, or, in case of escape or attempted escape, to pursue and arrest any person engaged in such breach or violation."

The provision quoted above was adopted by Congress without substantial change from the draft of a bill contained in the report "Upon the Revision of the Customs Administrative Laws" made by the United States Tariff Commission to the Committee on Ways and Means in 1918, and re-submitted in 1921. Whether intentionally or not, the paragraph of § 581 quoted above introduced

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part of the new Department of Commerce. Act of March 4, 1913, c. 141, 37 Stat. 736. Thereby certain duties in respect to the administration of the navigation laws passed to the Department of Commerce. To enable it to take some part also in the enforcement of the navigation laws Congress provided it with a few cutters. See Annual Report of Commissioner of Navigation, 1915, pp. 31–32. The above paragraph was inserted at the instance of the Department of Commerce when the Customs Administration law was in the conference committee.

two changes into the statutory law. Unlike the earlier statutes, it did not limit to inbound vessels the right to board and search. And, unlike the earlier statutes, it apparently conferred (through the inclusion of the grant of authority to seize in the same paragraph with the grant of authority to board or search) upon all customs officers the right to seize any vessel on any waters within the twelve-mile limit.[32] The reports of the Commission and those of the Committees of Congress discuss many proposed changes in the customs administrative laws. But nowhere in the reports of the Commission or of Congress, or in the statute enacted, is there a suggestion of purpose to abridge by this provision the authority theretofore possessed by the Coast Guard to make seizure on the high seas. It seems clear that Congress did not by this revision intend that the power to seize on the high seas for violation of laws respecting the revenue should remain, but that the similar power to seize for violation of other laws should be taken away.

Since, in my opinion, R. S. § 3059 had not conferred any express power to seize beyond territorial waters, I do not think its repeal shows any intention to take away the then existing implied power of the Coast Guard to seize American vessels anywhere on the high seas, for violation of any law of the United States. There is no foundation for the assumption of the claimant that the first paragraph of § 581 was intended as the exclusive grant of the power to seize. The primary purpose of that paragraph was not to provide for the seizure of American vessels of known or suspected guilt. It was to facilitate, by means of boarding and examination of manifest before arrival in port, both the entry of admittedly innocent vessels and the collection of revenues. This end was furthered by enabling customs officers to board and search any vessel, foreign or domestic, within

[32] See note 26, *supra.*

the stated limits, without the necessity of establishing probable cause. The authority to board and search foreign vessels beyond the territorial limits would doubtless not have been implied as a mere incident of the customs officers' duties, and it is probable that the authority to board and search American vessels in the absence of probable cause was not regarded as clear.

Other action of Congress taken at about the same time shows that Congress had no purpose to abridge the Coast Guard's activities or powers. The appropriation acts make provision for large increases in equipment and personnel to enable it to combat the increased smuggling operations following upon the enactment of the National Prohibition Law. Moreover, conventions were negotiated with Great Britain and other foreign nations to secure permission to seize their vessels on the high seas if found engaged in smuggling operations.[33] Neither in the negotiations nor in the conventions was any reference made to a twelve-mile limit. The limitation agreed upon was an hour's run from our coast. The distance covered by the hour's run would often greatly exceed twelve miles from our coast. But Congress did not deem it necessary to enact supplementary legislation in order to make the conventions effective.[34]

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[33] At least nine such treaties have been proclaimed. England, January 23, 1924, 43 Stat. 1761; Norway, May 24, 1924, 43 Stat. 1772; Denmark, May 29, 1924, 43 Stat. 1809; Germany, May 19, 1924, 43 Stat. 1815; Sweden, May 22, 1924, 43 Stat. 1830; Italy, June 3, 1924, 43 Stat. 1844; Panama, June 6, 1924, 43 Stat. 1875; Netherlands, August 21, 1924; Cuba, March 11, 1926.

[34] On March 3, 1924, the Secretary of State (Mr. Hughes) addressed a communication to the House Committee on Foreign Affairs in which it was said: "The proposed treaty is, in a strict sense, self-executing, requiring no legislation on the part of Congress to make it effective." Hearings before House Committee on Foreign Affairs on H. Res. 174, 68th Cong., 1st Session, p. 7.

In my opinion, then, the Coast Guard is authorized to arrest American vessels subject to forfeiture under our law, no matter what the place of seizure and no matter what the law violated.

MR. JUSTICE HOLMES joins in this opinion.

NICHOLS, COLLECTOR, *v.* COOLIDGE ET AL., EXECUTORS.

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

No. 88. Argued January 6, 7, 1927.—Decided May 31, 1927.

1. An absolute conveyance of real estate made without money consideration by deed to the grantor's children is not a transfer intended to take effect in possession or enjoyment at or after the grantor's death within the intendment of §402, par. (c) of the Revenue Act approved February 24, 1919, "Estate Tax," although the premises were contemporaneously leased by the grantees to the grantor for one year or any renewal thereof, but subject to the lessors' right to terminate the term during any year, and although the parties contemplated that the grantor should enjoy the property for residential purposes as long as she desired, but made no valid agreement to that effect. P. 538.
2. Section 402 (c), *supra*, in so far as it requires that there shall be included in the gross estate the value of property transferred by a decedent prior to its passage, merely because the conveyance was to take effect in possession or enjoyment at or after his death, violates the Fifth Amendment. P. 542.

4 F. (2d) 112, affirmed.

ERROR to a judgment of the District Court, recovered by Coolidge and Loring, Executors, from Nichols, Collector, representing the amount of certain federal estate taxes unlawfully assessed and collected over their protest.

Mr. Thomas H. Lewis, Jr., Attorney in the Bureau of Internal Revenue, with whom *Solicitor General Mitchell,*

Mr. A. W. Gregg, General Counsel, Bureau of Internal Revenue, and *Mr. Newton K. Fox,* Attorney in the Bureau of Internal Revenue, were on the brief, for plaintiff in error.

Mr. Robert G. Dodge, with whom *Mr. Harold S. Davis* was on the brief, for defendants in error.

Messrs. Tyson S. Dines, Peter H. Holme, Harold D. Roberts, J. Churchill Owen, Abram J. Rose, Leonard B. Smith, Isaac B. Lipson, Russell L. Bradford, Henry C. Eldert, Arthur D. Hill, Richard H. Wiswall, Arthur F. Mullen, and *Antoinette Funk* filed briefs as *amici curiae,* by special leave of Court.

Mr. Justice McReynolds delivered the opinion of the Court.

Defendants in error sued to recover additional federal taxes exacted of the estate in their keeping. The cause was heard upon an agreed statement; judgment went for them on a directed verdict; and this writ of error, allowed April 3, 1925, brings the matter here. In a comprehensive charge the trial court interpreted the law, but gave no further opinion. 4 Fed. (2d) 112.

Mrs. Julia Coolidge, of Massachusetts, died January 6, 1921. As required by the Revenue Act approved February 24, 1919, c. 18, 40 Stat. 1057, 1096, the executors returned a schedule to the Collector. He estimated the gross estate at $180,184.73 and allowed $77,747.74 deductions. They paid the amount assessed upon the balance. Their return did not include certain property transferred by the decedent through duly executed deeds and without valuable consideration, some to trustees and some directly to her children. The Commissioner of Internal Revenue held that under § 402 (c) the value of all this property at her death must be included in the gross estate.

He raised the assessment accordingly and demanded the additional tax—$34,662.65—here challenged.

July 29, 1907, Mrs. Coolidge and her husband owned certain real estate in Boston, also valuable personal property, which they transferred without consideration to trustees, who agreed to hold it and pay the income to the settlors, then to the survivor, and after his death to distribute the corpus among the settlors' five children or their representatives. The deed directed that the interest of any child predeceasing the survivor should pass as provided by the statute of distribution " in effect at the time of the death of such survivor." The trustees were authorized to sell the property, to make and change investments, etc. April 6, 1917, the settlors assigned to the children their entire interest in the property, especially any right to the income therefrom. At the death of Mrs. Coolidge the trustees held property worth $432,155.35, but through sales and changes much of what they originally received had passed from their possession.

May 18, 1917, by deeds purporting to convey the fee Mrs. Coolidge—her husband joining—gave their five children two parcels of land long used by her for residences. Contemporaneously the grantees leased these parcels to the conveyors for one year at nominal rental, with provision for annual renewals until notice to the contrary. All parties understood that renewals would be made if either lessee wished to occupy the premises. When Mrs. Coolidge died the value of this property was $274,300.

Plaintiff in error now maintains the above-described transfers by Mrs. Coolidge were intended to take effect in possession or enjoyment at or after death, within the ambit of § 402 (c), Act February 24, 1919, and that the value at her death of the property held by the conveyees constituted part of her gross estate.

The court below held the transfer of the residences (1917) was absolute; the right to possess or enjoy them

did not depend upon death; and their value constituted no part of the gross estate. Also, that under the statute the value of the property conveyed to trustees in 1907 or resulting therefrom must be included in the gross estate, but, thus construed, the Act went beyond the power of Congress.

Relevant portions of "Title IV—Estate Tax," Act February 24, 1919, are printed below.* It undertakes to

* Sec. 401. That (in lieu of the tax imposed by Title II of the Revenue Act of 1916, as amended, and in lieu of the tax imposed by Title IX of the Revenue Act of 1917) a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 403) is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States:

1 per centum of the amount of the net estate not in excess of $50,000;

2 per centum of the amount by which the net estate exceeds $50,000 and does not exceed $150,000;

3 per centum of the amount by which the net estate exceeds $150,000 and does not exceed $250,000;

4 per centum of the amount by which the net estate exceeds $250,000 and does not exceed $450,000;

6 per centum of the amount by which the net estate exceeds $450,000 and does not exceed $750,000; . . .

25 per centum of the amount by which the net estate exceeds $10,000,000. . . .

Sec. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate;

(b) To the extent of any interest therein of the surviving spouse, existing at the time of the decedent's death as dower, courtesy, or by virtue of a statute creating an estate in lieu of dower or courtesy;

(c) 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 at any time created a trust, in contemplation of or intended to take

lay a charge equal to the sum of specified percentages—from one to twenty-five—"of the value of the net estate . . . upon the transfer of the net estate of every

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effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;

(d) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent;

(e) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except in case of a bona fide sale for a fair consideration in money or money's worth; and

(f) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life.

Sec. 403. That for the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a resident, by deducting from the value of the gross estate [specified items and an exemption of $50,000] . . .

Sec. 408. . . . If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being

decedent" dying thereafter. And it directs that the net estate shall be ascertained by deducting from the gross certain items and an exemption of $50,000. Also, "That

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the purpose and intent of this title that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution. If any part of the gross estate consists of proceeds of policies of insurance upon the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds, in excess of $40,000, of such policies bear to the net estate. If there is more than one such beneficiary the executor shall be entitled to recover from such beneficiaries in the same ratio.

Sec. 409. That unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien. If the Commissioner is satisfied that the tax liability of an estate has been fully discharged or provided for, he may, under regulations prescribed by him with the approval of the Secretary, issue his certificate releasing any or all property of such estate from the lien herein imposed.

If (a) the decedent makes a transfer of, or creates a trust with respect to, any property in contemplation of or intended to take effect in possession or enjoyment at or after his death (except in the case of a bona fide sale for a fair consideration in money or money's worth) or (b) if insurance passes under a contract executed by the decedent in favor of a specific beneficiary, and if in either case the tax in respect thereto is not paid when due, then the transferee, trustee, or beneficiary shall be personally liable for such tax, and such property, to the extent of the decedent's interest therein at the time of such transfer, or to the extent of such beneficiary's interest under such contract of insurance, shall be subject to a like lien equal to the amount of such tax. Any part of such property sold by such transferee or trustee to a bona fide purchaser for a fair consideration in money or money's worth shall be divested of the lien and a like lien shall then attach to all the property of such transferee or trustee, except any part sold to a bona fide purchaser for a fair consideration in money or money's worth.

the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated "—

(a) To the extent of his interein therein subject to the payment of charges against the estate, expenses of administration, and subject to distribution. (b) The dower or courtesy, etc., interest of the surviving spouse. (c) 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 at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money or money's worth. (d) Any interest held jointly with another and payable to the survivor. (e) Property passing under a general power of appointment. (f) The excess over $40,000 of insurance taken out by the decedent upon his own life.

Edwards v. *Slocum,* 264 U. S. 61, 62, says of this tax: "This is not a tax upon a residue, it is a tax upon a transfer of his net estate by a decedent, a distinction marked by the words that we have quoted from the statute, and previously commented upon at length in *Knowlton* v. *Moore,* 178 U. S. 41, 49, 77. It comes into existence before and is independent of the receipt of the property by the legatee. It taxes, as Hanson, Death Duties, puts it in a passage cited in 178 U. S. 49, 'not the interest to which some person succeeds on a death, but the interest which ceased by reason of death.' " *Y. M. C. A.* v. *Davis,* 264 U. S. 47, 50: "What was being imposed here [Act February 24, 1919] was an excise upon the transfer of an estate upon death of the owner."

Concerning transfer of the residences in 1917, the trial court charged—

"I do not have much difficulty in reaching a conclusion respecting the deeds of the Boston and Brookline real estate, and I will first consider the claims of the parties respecting those transfers.

"The deeds conveyed, with warranty covenants, absolute and indefeasible title to the real estate without any valid reservations, conditions or restrictions whatsoever.

"The leases, executed the same day, were for one year or any renewal thereof but were always subject to the right in the lessors to terminate the term during any year by giving the notice as therein provided. It is conceded that the parties contemplated that the premises would be enjoyed by the decedent and her husband so long as they might desire to use them for residential purposes, but the decedent had no valid agreement to that effect. Her rights must be held to be governed by the term of the lease. If it could be said that the grantees did not come into full possession and enjoyment of the estate at the time of the conveyances—and I am inclined to the opinion that they did—their right to come into full possession did not depend in the slightest degree upon the death of the grantor. The effect of this transaction was to vest in the five sons named in the deed full and complete title to the property including the right of disposition. They had a right to sell the property subject to the lease and had all rights incident to ownership. There was here a gift completed during the lifetime of the donor. The act of 1918 did not purport to tax such gifts.

"I have reached the conclusion, therefore, that respecting the property conveyed by the deed, the facts of this case do not bring the property within the reach of the statute and that the Commissioner of Internal Revenue

was without authority to include the value of it as a part of the gross estate. I, therefore, give the following instructions, as requested by the plaintiffs: The real estate referred to in the second count of the declaration was not a part of the net estate of Julia Coolidge within the meaning of the Revenue Act of 1918."

We agree with this conclusion and accept as adequate the reasons advanced to support it.

Counsel for the United States argue that the challenged subsection only undertakes to tax the transfer from the dead and merely uses the gross estate to measure the charge. Taken together, §§ 402, 408 and 409 disclose definite purpose to do much more than tax this transfer.

Section 402 directs that the gross estate shall be ascertained by including (among other things) the value at his death of 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 at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money or money's worth." The language of this section inhibits the conclusion that only subsequent transfers are to be included. Under *Lewellyn* v. *Frick,* 268 U. S. 238, 251, only such transfers come within § 402 (f). *Shwab* v. *Doyle,* 258 U. S. 529, 536, confined § 202 (b), Act September 8, 1916, c. 463, 39 Stat. 756, 777—prototypes of § 402 (c), Act 1919—to subsequent transfers. The emphatic words, " whether such transfer or trust is made or created before or after the passage of this Act," added by the latter Act, evidently were intended to exclude a like construction.

Section 408 authorizes an executor to recover from one who receives life insurance " such portion of the total tax paid as the proceeds, in excess of $40,000, of such policies

bear to the net estate." Section 409 imposes a lien to secure the tax upon the gross estate; and provides: "If (a) the decedent makes a transfer of, or creates a trust with respect to, any property in contemplation of or intended to take effect in possession or enjoyment at or after his death (except in the case of a bona fide sale for a fair consideration in money or money's worth) or (b) if insurance passes under a contract executed by the decedent in favor of a specific beneficiary, and if in either case the tax in respect thereto is not paid when due, then the transferee, trustee, or beneficiary shall be personally liable for such tax, and such property, to the extent of the decedent's interest therein at the time of such transfer, or to the extent of such beneficiary's interest under such contract of insurance, shall be subject to a like lien equal to the amount of such tax."

For the United States it is said that the imposition under consideration is an exercise of the federal taxing power and is imposed upon a transmission of property by death. Also, that what Congress intended was to provide a measure for the tax which would operate equally upon all those who made testamentary dispositions of their property, whether this was by will or intestacy or only testamentary in effect; the immediate purpose was not to prevent evasions, for the statute applies to transactions completed when there was none to be evaded. And the conclusion is that the measure adopted is reasonable, since the specified transactions are testementary in effect.

But the conveyance by Mrs. Coolidge to trustees was in no proper sense testamentary, and it bears no substantial relationship to the transfer by death. The mere desire to equalize taxation cannot justify a burden on something not within congressional power. The language of the statute is not consistent with the idea that it utilizes the gross estate merely to measure a proper

charge upon the transfer by death. See *Lewellyn* v. *Frick, supra. Frick* v. *Pennsylvania,* 268 U. S. 473, 494, rejected a somewhat similar claim, and said—" Of course, this was but the equivalent of saying that it was admissible to measure the tax by a standard which took no account of the distinction between what the State had power to tax and what it had no power to tax, and which necessarily operated to make the amount of the tax just what it would have been had the State's power included what was excluded by the Constitution. This ground, in our opinion, is not tenable. It would open the way for easily doing indirectly what is forbidden to be done directly, and would render important constitutional limitations of no avail."

The exaction is not a succession tax like the one sustained by *Scholey* v. *Rew,* 23 Wall. 331. *Keeney* v. *New York,* 222 U. S. 525. The right to become beneficially entitled is not the occasion for it. There is no claim that the transfers were made in contemplation of death or with purpose to evade taxation. The provision applicable in such circumstances is not relied on and the extent of congressional power to prevent evasion or defeat of duly-imposed exactions need not be discussed.

Certainly, Congress may lay an excise upon the transfer of property by death reckoned upon the value of the interest which passes thereby. But under the mere guise of reaching something within its powers Congress may not lay a charge upon what is beyond them. Taxes are very real things and statutes imposing them are estimated by practical results.

As the executors paid the contested charge out of property which actually passed by death, only their rights are here involved. If the fund held by them had been insufficient and payment had been exacted from others, somewhat different questions might require consideration. *Lewellyn* v. *Frick, supra.*

The statute requires the executors to pay an excise ostensibly laid upon transfer of property by death from Mrs. Coolidge to them but reckoned upon its value plus the value of other property conveyed before the enactment in entire good faith and without contemplation of death. Is the statute, thus construed, within the power of Congress?

Undoubtedly, Congress may require that property subsequently transferred in contemplation of death be treated as part of the estate for purposes of taxation. This is necessary to prevent evasion and give practical effect to the exercise of admitted power, but the right is limited by the necessity.

Under the theory advanced for the United States, the arbitrary, whimsical and burdensome character of the challenged tax is plain enough. An excise is prescribed, but the amount of it is made to depend upon past lawful transactions, not testamentary in character and beyond recall. Property of small value transferred before death may have become immensely valuable, and the estate tax, swollen by this, may leave nothing for distribution. Real estate transferred years ago, when of small value, may be worth an enormous sum at the death. If the deceased leaves no estate there can be no tax; if, on the other hand, he leaves ten dollars both that and the real estate become liable. Different estates must bear disproportionate burdens determined by what the deceased did one or twenty years before he died. See *Frew* v. *Bowers,* 12 Fed. (2d) 625.

This court has recognized that a statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment. *Brushaber* v. *Union Pacific R. R.,* 240 U. S. 1, 24; *Barclay & Co.* v. *Edwards,* 267 U. S. 442, 450. See also *Knowlton* v. *Moore,* 178 U. S. 41, 77. And we must conclude that § 402 (c)

of the statute here under consideration, in so far as it requires that there shall be included in the gross estate the value of property transferred by a decedent prior to its passage merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious and amounts to confiscation. Whether or how far the challenged provision is valid in respect of transfers made subsequent to the enactment, we need not now consider.

The judgment of the court below is

Affirmed.

MR. JUSTICE HOLMES, MR. JUSTICE BRANDEIS, MR. JUSTICE SANFORD, and MR. JUSTICE STONE concur in the result.

FEDERAL TRADE COMMISSION *v.* AMERICAN TOBACCO COMPANY.

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

No. 279. Argued April 19, 20, 1927.—Decided May 31, 1927.

A judgment of the Circuit Court of Appeals which turns on a matter of fact of no general importance, depending on an appreciation of circumstances admitting of different interpretations, will not be revised by certiorari. P. 544.

9 F. (2d) 570, affirmed.

CERTIORARI (270 U. S. 638) to a judgment of the Circuit Court of Appeals which set aside an order of the Federal Trade Commission.

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

Mr. Edward S. Rogers, with whom *Mr. Jonathan H. Holmes* was on the brief, for respondent.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

The statement of the petition for certiorari that the judgment and opinion below might seriously hinder future administration of the law was grave and sufficiently probable to justify issuance of the writ.

Proper decision of the controversy depends upon a question of fact. Did the American Tobacco Company become party to the unlawful combination of tobacco jobbers at Philadelphia to maintain prices? After considering much evidence the Commission gave affirmative answer to that query; but the Circuit Court of Appeals thought there was nothing to support their view. 9 Fed. (2d) 570.

It now appears to us that this matter of fact is of no general importance. Accordingly, we adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations. And upon that ground alone we affirm the judgment below.

The opinion of the Circuit Court of Appeals is of uncertain intendment and is not satisfactory as an exposition of the law. What this Court has said in many opinions indicates clearly enough the general purpose of the statute and the necessity of applying it with strict regard thereto.

Affirmed.

JOINES *v.* PATTERSON ET AL.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 298. Argued April 26, 1927.—Decided May 31, 1927.

1. Conclusions of a state supreme court based upon questions of federal law wrongly determined, and acted upon, require a reversal of the judgment and remand of the cause for further proceedings. P. 548.

2. Laws of Arkansas, when extended over the Indian Territory by Congress, carried with them the settled constructions placed upon them by the Arkansas courts and, so construed, became in effect laws of the United States as though originally enacted by Congress for the government of the Territory. P. 549.
3. Under § 3509 of Mansfield's Digest of the Statutes of Arkansas, as extended to the Indian Territory, a proceeding by a guardian to sell land of his Choctaw Indian wards, allotted under the Choctaw-Chickasaw Supplemental Agreement in the name of their deceased ancestor, was an original proceeding—not ancillary to that in which the guardian was appointed—and was properly begun in the United States Court for that Territory of the Judicial District in which the land was situate; and, under the Oklahoma Enabling Act, upon creation of that State, the cause was properly transferable to a county court of a county included within the former District in which it was begun and embracing in part the land, although that was not the district in which the guardian was appointed. P. 551.
4. The seven year limitation prescribed by § 4471 of Mansfield's Digest upon suits to recover land began to run from the taking of possession by one who continued in open peaceful possession for the allotted time, though claiming under void muniments. P. 553.
5. Rights of action arising in the Indian Territory before the admission of Oklahoma as a State, remained subject to the Arkansas statute of limitations. P. 554.

114 Okla. 9, reversed.

CERTIORARI (271 U. S. 638) to a judgment of the Supreme Court of Oklahoma directing a final decree for the respondents herein, in their suit to establish against the petitioner their claim of title to allotted Choctaw lands.

Mr. William G. Davisson for petitioner.

Mr. W. F. Semple was on the brief for respondents.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

This controversy concerns title to lands allotted after her death to Emma Patterson, a Choctaw Indian. Once

within the Southern Judicial District of Indian Territory, they are now in Murray, Stephens and Carter counties, Oklahoma. By original complaint presented to the Murray County District Court, February 21, 1920, respondents here—William M. Patterson, surviving husband of Mrs. Patterson, and their five children—alleged that, although petitioner U. Sherman Joines had held actual and peaceful possession of the lands since July 5, 1907, the legal title thereto was in them. And they asked an appropriate decree establishing their rights.

Mrs. Patterson, resident of the Central Judicial District, Indian Territory, died there May 14, 1906, leaving five minor children, born, respectively, 1894, 1897, 1900, 1903 and 1905. Her surviving husband, father of these children and a white man, was appointed guardian for them by the United States Court, Central District, sitting at Durant (now in Bryan County, Oklahoma). Thereafter, April 24, 1907, he petitioned the United States Court for the Southern District, sitting at Ardmore (now in Carter County, Oklahoma), to sell the lands. May 2, 1907, that court authorized the sale, and on the following October 8 the guardian filed his report showing sale of them at public outcry July 5, 1907, for two thousand dollars to U. Sherman Joines, petitioner here, the highest bidder. He also stated that, acting as their guardian, he had conveyed to Joines all interest of the minors in the lands.

October 5, 1907, purporting to act as guardian, Patterson undertook by deed to convey to Joines all the minors' interest in the lands. Since then Joines has held open and adverse possession.

July 14, 1913, the County Court, Carter County, Oklahoma, after reciting its succession to the United States court sitting at Ardmore, undertook to confirm the sale made in 1907. August 5, 1913, Patterson, purporting to act as guardian, again undertook by deed to convey to

petitioner the minors' right, title and interest in and to the lands. This deed recited the court proceedings during 1907 and the guardian's action thereunder, including his report of sale; also the 1913 order of confirmation by the Carter County Court. It further stated that court was "authorized to do any and all things herein which the said United States court for the Southern District of the Indian Territory, sitting at Ardmore, could have done."

The District Court for Murray County heard the present cause without a jury upon an agreed statement of facts, and held—

That William M. Patterson acquired a life estate by curtesy in the lands which had been barred by the seven-year statute of limitations in force within Indian Territory October 5, 1907.

That by putting Joines into possession of the lands and allowing him to retain this for fourteen years without complaint Patterson estopped himself from asserting any claim thereto.

That the United States court for the Southern District of Indian Territory had jurisdiction to authorize sale by the guardian of the minors' interest and confirmation thereof by the County Court, Carter County, Oklahoma, was not void.

That the adult children and heirs are barred by the statute of limitations from asserting any claim to the lands.

An appropriate decree adjudging the issues for Joines followed.

Upon appeal, the Supreme Court of Oklahoma first upheld the trial court, but, after a rehearing, it disapproved all the above-stated conclusions, reversed the judgment and directed final decree for respondents here. 114 Okla. 9.

The Supreme Court accepted and acted upon at least two conclusions which we think are erroneous. (1) That the proceeding in the United States court at Ard-

more to sell the lands was merely ancillary to the main guardianship matter at Durant, in the Central District, and therefore should have been transferred to Bryan, not to Carter County. (2) That the Arkansas seven-year statute of limitations—§ 4471 Mansfield's Digest—did not commence to run against William M. Patterson and in favor of Joines when the latter took possession, since no interest passed to him—the court proceedings and the guardian's deed being wholly insufficient to give even color of title. These conclusions were based upon questions of federal law wrongly determined. They were acted upon by the court below. We must, therefore, reverse its judgment and remand the cause for further proceedings. See *Whitehead* v. *Galloway,* 249 U. S. 79.

Section 30, Act of May 2, 1890, c. 182, 26 Stat. 81, 94, as amended by the Act of March 1, 1895, c. 145, 28 Stat. 693, divided Indian Territory into three judicial districts—Northern, Central and Southern—and defined their limits. Section 31 extended over it certain general laws of Arkansas as published in Mansfield's Digest. Among these were Chapters 20, 49, 73 and 97, relating, respectively, to the common and statute law of England, descent and distribution, guardians, curators and wards, and limitations.

Section 32 of the same Act provided that "county," in the laws of Arkansas so extended, should mean judicial division (afterwards district), and "Indian Territory" might be substituted for "State of Arkansas."

Section 22, Act of Congress approved July 1, 1902, c. 1362, 32 Stat. 641, 643—the Choctaw-Chickasaw Supplemental Agreement—provided: "If any person whose name appears upon the rolls, prepared as herein provided, shall have died subsequent to the ratification of this agreement and before receiving his allotment of land the lands to which such person would have been entitled if living shall be allotted in his name, and shall,

together with his proportionate share of other tribal property, descend to his heirs according to the laws of descent and distribution as provided in chapter forty-nine of Mansfield's Digest of the Statutes of Arkansas: *Provided,* That the allotment thus to be made shall be selected by a duly appointed administrator or executor."

When extended over Indian Territory, the specified laws of Arkansas carried the settled constructions placed upon them by courts of that State. So construed, they became, in effect, laws of the United States as though originally enacted by Congress for government of the Territory. *Willis* v. *Eastern Trust & Banking Co.,* 169 U. S. 295, 307; *James* v. *Appel,* 192 U. S. 129, 135; *Gidney* v. *Chappel,* 241 U. S. 99, 102. See also *Byrd* v. *State,* 99 Okla. 165.

Oklahoma, with boundaries including Indian Territory, came into the Union November 16, 1907. The Enabling Act, approved June 16, 1906, c. 3335, 34 Stat. 267, 277, as amended by the Act of March 4, 1907, c. 2911, 34 Stat. 1286, 1287, directed—

"SEC. 19. That the courts of original jurisdiction of such State shall be deemed to be the successor of all courts of original jurisdiction of said Territories and as such shall take and retain custody of all records, dockets, journals, and files of such courts except in causes transferred therefrom, as herein provided; the files and papers in such transferred cases shall be transferred to the proper United States circuit or district court, together with a transcript of all book entries to complete the record in such particular case so transferred.

"SEC. 20. That all causes, proceedings, and matters, civil or criminal, pending in the district courts of Oklahoma Territory, or in the United States courts in the Indian Territory, at the time said Territories become a State, not transferred to the United States circuit or district courts in the State of Oklahoma, shall be proceeded

with, held, and determined by the courts of said State, the successors of said district courts of the Territory of Oklahoma, and the United States courts in the Indian Territory; with the right to prosecute appeals or writs of error to the supreme or appellate court of said State, and also with the same right to prosecute appeals or writs of error from the final determination in such cases made by the supreme or appellate court of such State to the Supreme Court of the United States, as is provided by law for appeals and writs of error from the supreme or final appellate court of a State to the Supreme Court of the United States."

The Constitution of Oklahoma provides—

"Section 1 ['Schedule]. No existing rights, actions, suits, proceedings, contracts, or claims shall be affected by the change in the forms of government, but all shall continue as if no change in the forms of government had taken place. And all processes which may have been issued previous to the admission of the State into the Union under the authority of the Territory of Oklahoma or under the authority of the laws in force in the Indian Territory shall be as valid as if issued in the name of the State.

"Section 2. All laws in force in the Territory of Oklahoma at the time of the admission of the State into the Union, which are not repugnant to this Constitution, and which are not locally inapplicable, shall be extended to and remain in force in the State of Oklahoma until they expire by their own limitation or are altered or repealed by law.

"Section 23. When this Constitution shall go into effect, the books, records, papers, and proceedings of the probate court in each county, and all causes and matters of administration and guardianship, and other matters pending therein, shall be transferred to the county court of such county, except of Day County, which shall be

transferred to the County Court of Ellis County, and the county courts of the respective counties shall proceed to final decree or judgment, order, or other termination in the said several matters and causes as the said probate court might have done if this Constitution had not been adopted. The District Court of any county, the successor of the United States court for the Indian Territory, in each of the counties formed in whole or in part in the Indian Territory, shall transfer to the county court of such county, all matters, proceedings, records, books, papers, and documents appertaining to all causes or proceedings relating to estates: Provided, That the Legislature may provide for the transfer of any of said matters and causes to another county than herein prescribed."

Section 3509, Mansfield's Digest: "When it shall appear that it would be for the benefit of a ward that his real estate, or any part thereof, be sold or leased and the proceeds put on interest, or invested in productive stocks, or in other real estate, his guardian or curator may sell or lease the same accordingly upon obtaining an order for such sale or lease from the court of probate of the county in which such real estate or the greater part thereof shall be situate." Sections 3510 and 3511 prescribe the procedure for such causes.

Reid v. *Hart,* 45 Ark. 41, 46, 48 (1885), distinctly holds that the court of the county wherein lies real estate belonging to a ward is the proper tribunal to entertain an application for its sale by his guardian. The opinion declares: "There had, however, been provisions made for the sale of lands, on the application of administrators and executors, for the payment of debts. They were adopted early in our state history, being found in the Revised Code (Sec. 147) and remained in force until the adoption of the Civil Code of 1868. They required that the application for such an order should be made to the Probate Court of the county *in which the lands are situate.* The

Act of December 23, 1846, enlarged the scope of purposes for which such sales might be made, and associated 'guardians' with personal representatives (*ubi supra*) but made no change as to the tribunal. It may fairly be inferred that, by this association, the Legislature contemplated that guardians should conform to the same rule, and make their applications for the sale of lands in the county where they lay. . . . This is law to this day, and has been brought forward into Mansfield's Digest, Sec. 3509. This displays a system by which we endeavor to supply the omission in the act of 1846, which fails to designate the probate court meant, by reasoning from the organic unity of the whole system." And see *MaHarry* v. *Eatman,* 29 Okla. 46, 53.

Under the statute thus construed, the court for the Southern Judicial District, Indian Territory, at Ardmore had jurisdiction of the guardian's petition to sell. The cause there was not merely ancillary to the original guardianship proceeding in the Central District, wherein Patterson was appointed. It had the status of an independent suit.

The Enabling Act directed that causes pending in the United States courts for Indian Territory should be proceeded with and determined by the successor courts of Oklahoma. As we understand the opinion below, the court recognized that if the guardian's suit for sale, begun at Ardmore, was an original and independent one, transfer of it to the Carter County court for further action was proper. We think it was an original proceeding and therefore was transferred to the proper court for further action according to the rights of the parties. See *Dewalt* v. *Cline,* 35 Okla. 197, and *Bailey* v. *Jones,* 96 Okla. 56.

Joines went into open, peaceful possession of the allotted lands October 5, 1907, when the following parts of Chapter 97, Mansfield's digest, were in force—

"Section 4471. No person or persons, or their heirs, shall have, sue or maintain any action or suit, either in law or equity, for any lands, tenements or hereditaments but within seven years next after his, her or their right to commence, have or maintain such suit shall have come, fallen or accrued; and all suits, either in law or equity, for the recovery of any lands, tenements or hereditaments shall be had and sued within seven years next after title or cause of action accrued, and no time after said seven years shall have passed. . . .

"Section 4476. No action for the recovery of real property, when the plaintiff does not claim title to the lands, shall be brought or maintained when the plaintiff, or his testator or intestate, has been five years out of possession."

Under the settled construction given to the seven-year statute of limitations by the courts of Arkansas, it began to run against Patterson when Joines took possession. "So long as a man is in possession of land, claiming title, however wrongfully, and with whatever degree of knowledge that he has no right, so long the real owner is out of possession, in a constructive as well as an actual sense. It is of the nature of the statute of limitation, when applied to civil actions, in effect, to mature a wrong into a right, by cutting off the remedy. To warrant its application in ejectment, the books require *color of title,* by deed or other documental semblance of right in the defendant, only when the defense is founded on a *constructive adverse possession.* But neither a deed nor any equivalent muniment is necessary, where the possession is indicated by *actual occupation, and any other evidence of an adverse claim exists.* The muniment is but one circumstance by which to make out an adverse possession." *Ferguson* v. *Peden,* 33 Ark. 150, 155; *Jacks* v. *Chaffin* (1879), 34 Ark. 534, 541; *Logan* v. *Jelks, id.* 547, 549.

The Supreme Court of Oklahoma seems definitely to have approved the doctrine that rights of action arising in Indian Territory prior to statehood remained subject to the Arkansas statute of limitations. *Patterson* v. *Rousney,* 58 Okla. 185, 202; *Davis* v. *Foley,* 60 Okla. 87, 88. And see *U. S. Fidelity, etc. Co.* v. *Fidelity Trust Co.,* 49 Okla. 398, 408; *Sandlin* v. *Barker,* 95 Okla. 113, 117.

Considering our conclusions in respect of the two federal questions already dealt with and views long accepted by the court below, it seems unnecessary for us now to consider other points relied on by counsel.

Reversed.

CLARK ET AL. *v.* POOR ET AL.

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

No. 275. Argued April 19, 1927.—Decided May 31, 1927.

1. A final judgment of the District Court, three judges sitting, which dismisses a bill challenging the constitutionality of a state statute and seeking to enjoin its enforcement, is reviewable in this Court, on appeal under Jud. Code § 266, as amended by Act of February 13, 1925, when an interlocutory injunction had been applied for and a restraining order issued. P. 556.
2. A state regulation providing that, before operating over the state highways, a common carrier by motor shall apply for and obtain a certificate or permit therefor from a state commission and shall pay an extra tax for the maintenance and repair of the highways and for the administration and enforcement of the laws governing their use, is constitutional though applied to carriers engaged exclusively in interstate commerce. P. 556.
3. That the tax so exacted is not all used for maintenance and repair of the highways, but some of it for defraying expenses of the commission in administration and enforcement of the act, and some for other purposes, is no concern of the taxpayer, it being assessed for a proper purpose and not unreasonable in amount. P. 557.

4. An additional provision that no certificate should issue until a policy covering liability and cargo insurance had been filed with the commission, is not a ground for complaint in this case, even if it be unconstitutional in its application to the plaintiffs as interstate carriers, since there are other provisions declaring that the act shall apply to interstate commerce only in so far as permitted by the Federal Constitution, and that the invalidity of any part shall not affect any other part; and since the requirement of such insurance was not the ground for plaintiffs' refusal to apply for the certificate or pay the tax, and was waived by the defendant commission in this Court. P. 557.

Affirmed.

APPEAL from a decree of the District Court dismissing a bill to enjoin the defendants, constituting the Public Utilities Commission of Ohio, from enforcing against Clark and Riggs, interstate carriers by motor, provisions of the Ohio Motor Transportation Act.

Mr. Murray Seasongood, with whom *Messrs. Lester A. Jaffe* and *Robert P. Goldman* were on the brief, for appellants.

Messrs. Albert M. Calland and *John W. Bricker,* with whom *Mr. C. C. Crabbe,* Attorney General of Ohio, was on the brief, for appellees.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

The Ohio Motor Transportation Act of 1923, as amended, Gen. Code, §§ 614–84 to 614–102, provides that a motor transportation company desiring to operate within the State shall apply to the Public Utilities Commission for a certificate so to do and shall not begin to operate without first obtaining it; also, that such a company must pay, at the time of the issuance of the certificate and annually thereafter, a tax graduated according

to the number and capacity of the vehicles used. §§ 614–87, 614–94.

Clark and Riggs operate as common carriers a motor truck line between Aurora, Indiana, and Cincinnati, Ohio, exclusively in interstate commerce. They ignored the provisions of the Act, and operated without applying for a certificate or paying the tax. Then they brought this suit, in the federal court for southern Ohio, to enjoin the Commission from enforcing as against them the provisions of the Act. The case was heard in the District Court before three judges on final hearing, under § 266 of the Judicial Code as amended by the Act of February 13, 1925. It appeared that while the Act calls the certificate one of "public convenience and necessity," the Commission had recognized, before this suit was begun, that, under *Buck* v. *Kuykendall,* 267 U. S. 307 and *Bush* v. *Maloy,* 267 U. S. 317, it had no discretion where the carrier was engaged exclusively in interstate commerce, and was willing to grant to plaintiffs a certificate upon application and compliance with other provisions of the law. See *Cannon Ball Transportation Co.* v. *Public Utilities Commission,* 113 Oh. St. 565, 567. The bill was dismissed. It is here on direct appeal. This Court has jurisdiction as an interlocutory injunction had been applied for and a restraining order issued. *Moore* v. *Fidelity & Deposit Co.,* 272 U. S. 317, 320–321; *Smith* v. *Wilson,* 273 U. S. 388.

The plaintiffs claim that, as applied to them, the Act violates the commerce clause of the Federal Constitution. They insist that, as they are engaged exclusively in interstate commerce, they are not subject to regulation by the State; that it is without power to require that before using its highways they apply for and obtain a certificate; and that it is also without power to impose, in addition to the annual license fee demanded of all persons using automobiles on the highways, a tax upon them, under

§ 614–94, for the maintenance and repair of the highways and for the administration and enforcement of the laws governing the use of the same. The contrary is settled. The highways are public property. Users of them, although engaged exclusively in interstate commerce, are subject to regulation by the State to ensure safety and convenience and the conservation of the highways. *Morris* v. *Duby, ante,* p. 135; *Hess* v. *Pawloski, ante,* p. 352. Users of them, although engaged exclusively in interstate commerce, may be required to contribute to their cost and upkeep. Common carriers for hire, who make the highways their place of business, may properly be charged an extra tax for such use. *Hendrick* v. *Maryland,* 235 U. S. 610; *Kane* v. *New Jersey,* 242 U. S. 160. Compare *Packard* v. *Banton,* 264 U. S. 140, 144.

There is no suggestion that the tax discriminates against interstate commerce. Nor is it suggested that the tax is so large as to obstruct interstate commerce. It is said that all of the tax is not used for maintenance and repair of the highways; that some of it is used for defraying the expenses of the Commission in the administration or enforcement of the Act; and some for other purposes. This, if true, is immaterial. Since the tax is assessed for a proper purpose and is not objectionable in amount, the use to which the proceeds are put is not a matter which concerns the plaintiffs.

Plaintiffs urge that the decree should be reversed because of the provision in the Act concerning insurance. The Act provides that no certificate shall issue until a policy covering liability and cargo insurance has been filed with the Commission. § 614–99. The lower court held that, under *Michigan Public Utilities Commission* v. *Duke,* 266 U. S. 570, this provision could not be applied to exclusively interstate carriers, *Red Ball Transit Co.* v. *Marshall,* 8 F. (2d) 635, 639; and counsel for the Com-

mission stated in this Court that the requirements for insurance would not be insisted upon. Plaintiffs urge that because this was not conceded at the outset, it was error to deny the injunction. The circumstances were such that it was clearly within the discretion of the court to decline to issue an injunction; and since an injunction was the only relief sought, it properly dismissed the bill. Compare *Chicago G. W. Ry. Co.* v. *Kendall,* 266 U. S. 94, 100–101. The plaintiff's did not apply for a certificate or offer to pay the taxes. They refused or failed to do so, not because insurance was demanded, but because of their belief that, being engaged exclusively in interstate commerce, they could not be required to apply for a certificate or to pay the tax. Their claim was unfounded. Moreover, the Act made each section and part thereof independent and declared that " the holding of any section or part thereof to be void or ineffective for any cause shall not affect any other section or part thereof." § 614–102. And the Act also provided that it should apply to interstate commerce only in so far as such regulation was permitted by the Federal Constitution. § 614–101.

It is not clear whether the liability insurance, for which the Act provides, is against loss resulting to third persons from the applicant's negligence in using the highways within the State, or is for loss to passengers resulting from such negligence, or for both purposes. We have no occasion to consider whether, under any suggested interpretation, liability insurance, as distinguished from insurance on the interstate cargo, may be required of a carrier engaged wholly in interstate commerce. Compare *Hess* v. *Pawloski, supra.* The decree dismissing the bill is affirmed, but without prejudice to the right of the plaintiffs to seek appropriate relief by another suit if they should hereafter be required by the Commission to comply with conditions or provisions not warranted by law. *Affirmed.*

Counsel for Parties.

UNITED STATES *v.* LEE.

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

No. 752. Argued March 8, 1927.—Decided May 31, 1927.

1. Officers of the Coast Guard are authorized, by virtue of Rev. Stats. § 3072, to seize on the high seas beyond the twelve-mile limit an American vessel subject to forfeiture for violation of any law respecting the revenue. *Maul* v. *United States, ante,* p. 501. P. 562.
2. From that power it is fairly to be inferred that they are likewise authorized to board and search such vessels when there is probable cause to believe them subject to seizure for violation of revenue laws, and to arrest persons thereon engaged in such violation. P. 562.
3. Where a boat was properly seized by a Coast Guard officer beyond the twelve-mile limit and brought in, a search of her by a deputy surveyor of the port, within the territory of the United States, was authorized by § 581 of the Tariff Act of 1922, and failure of the Government to institute proceedings to forfeit the boat and cargo of illicit liquor did not, by retroaction, render illegal either the seizure or the search. P. 563.
4. A search of a boat made as an incident of a lawful arrest does not violate the Constitution. P. 563.
5. An examination of a boat with a search light, before boarding her, is not an unconstitutional search, and discovery thereby of illicit liquor is admissible in evidence. P. 563.
6. Legal evidence is not rendered inadmissible by a later trespass upon the part of the officers who obtained it. P. 563.

14 F. (2d) 400, reversed.

CERTIORARI (273 U. S. 686) to a judgment of the Circuit Court of Appeals reversing a conviction for conspiracy to violate the Tariff and Prohibition Acts, upon the ground that evidence admitted was obtained by an illegal search and seizure.

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

No appearance for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

In the federal court for Massachusetts, Lee and two others, all apparently American citizens, were indicted for conspiring within the United States to violate §§ 591 and 593 of the Tariff Act of 1922, c. 356, 42 Stat. 858, 981, 982, and § 3 of the National Prohibition Act, October 28, 1919, c. 85, Title II, 41 Stat. 305, 308. The defendants pleaded not guilty. Lee and one other were convicted. Lee sued out a writ of error. The Court of Appeals (one judge dissenting) vacated the judgment on the ground that evidence had been admitted which was obtained by an illegal search and seizure. 14 F. (2d) 400. This Court granted a writ of certiorari. 273 U. S. 686.

On the afternoon of February 16, 1925, the boatswain of a Coast Guard patrol boat saw a motor boat of the numbered type proceed in a southeasterly direction from Gloucester harbor. He followed her at a distance of 500 yards, lost sight of her after sundown, apparently in a fog, at a point about 20 miles east of Boston Light, and discovered her later alongside the schooner *L'Homme* in a region commonly spoken of as Rum Row, at a point 24 miles from land. On board the motor boat were Lee, two associates, and 71 cases of grain alcohol. The boatswain arrested the three men, seized the motor boat, and took her with them and the liquor to Boston. There this indictment was found. It does not appear that the Government instituted proceedings to forfeit either the motor boat or the liquor. The motor boat, which had a length of about 30 feet, was registered in Lee's name.

The boatswain testified that when he discovered the motor boat alongside the *L'Homme:*

"I put a searchlight on her and told those aboard the motor boat to put up their hands. In the boat I found the three defendants, McNeil, Vieria, and Lee. I hooked the boat over and found a number of cans of alcohol on board it. I searched the defendants for weapons and found none. I put two of my men on board the motor boat and took the boat and the defendants to Boston."

The liquor does not appear to have been put in evidence. The deputy surveyor of the port testified that, upon the motor boat's arrival in Boston, he examined the cases on board and found that they contained alcohol, 95 degrees proof; and that Lee, when interrogated, said: "I ran the engine, and the first thing I knew I was alongside a schooner. I did not see any cases on our boat until captured by the revenue cutter." The testimony of the deputy surveyor as to what he found on the motor boat, and that of the boatswain as to what he found upon his examination of the motor boat at the time of his command to those on board to throw up their hands, was admitted over Lee's objection and subject to exception duly made.

The Court of Appeals, expressing disagreement with the conclusion reached in *The Underwriter,* 13 F. (2d) 433, held that the Coast Guard is not authorized to visit and search American vessels on the high seas more than twelve miles from the coast; that the seizure there made was without authority; that it was illegal, since it did not appear that the Government had ratified it by the institution of legal proceedings to enforce the forfeiture; that the search and seizure having been illegal, knowledge gained as a result of the illegal search could not be put in evidence, *Weeks* v. *United States,* 232 U. S. 383; and that the testimony of the deputy surveyor and of the boatswain was wrongly admitted.

The Government contends that the Coast Guard has authority to visit, search and seize an American vessel on the high seas beyond the twelve-mile limit when probable cause exists to believe that our law is being violated; that it has authority also to arrest persons on such vessel who there is reason to believe are engaged in committing a felony; that here probable cause was shown that the crime, a felony, was being committed; that if any search, within the meaning of the Constitution, was made of the motor boat before she reached port, it was valid as an incident of a lawful arrest of persons who the officer had reasonable cause to believe were engaged in committing a felony; that the constitutional prohibition against search and seizure without a warrant is not applicable to this small motor boat which does not appear to have been used as a place of residence; and that it does not appear that any search was, in fact, made before the motor boat was examined in Boston by the deputy surveyor, within the territorial limits of the United States, where search is clearly valid.

In the main the contentions of the Government are in our opinion well founded. Officers of the Coast Guard are authorized, by virtue of Revised Statutes, § 3072, to seize on the high seas beyond the twelve-mile limit an American vessel subject to forfeiture for violation of any law respecting the revenue. *Maul* v. *United States* [*The Underwriter*], *ante*, p. 501. From that power it is fairly to be inferred that they are likewise authorized to board and search such vessels when there is probable cause to believe them subject to seizure for violation of revenue laws, and to arrest persons thereon engaged in such violation. Compare *Ford* v. *United States*, 273 U. S. 593, 609–616. The authority asserted is not as broad as the belligerent right to visit and search even without probable

cause. Compare *The Marianna Flora,* 11 Wheat. 1, 42. In the case at bar, there was probable cause to believe that our revenue laws were being violated by an American vessel and the persons thereon, in such manner as to render the vessel subject to forfeiture. Under such circumstances, search and seizure of the vessel, and arrest of the persons thereon, by the Coast Guard on the high seas is lawful, as like search and seizure of an automobile, and arrest of the persons therein, by prohibition officers on land is lawful. Compare *Carroll* v. *United States,* 267 U. S. 132, 149. As the Coast Guard was authorized to seize the motor boat, the search of her by the deputy surveyor within the territory of the United States was, in any event, authorized under § 581 of the Tariff Act of 1922. The failure of the Government to institute thereafter proceedings for forfeiture of the motor boat and the liquor did not, by retroaction, render illegal either the seizure or the search.

Moreover search, if any, of the motor boat at sea did not violate the Constitution, for it was made by the boatswain as an incident of a lawful arrest. *Agnello* v. *United States,* 269 U. S. 20, 30. But no search on the high seas is shown. The testimony of the boatswain shows that he used a searchlight. It is not shown that there was any exploration below decks or under hatches. For aught that appears, the cases of liquor were on deck and, like the defendants, were discovered before the motor boat was boarded. Such use of a searchlight is comparable to the use of a marine glass or a field glass. It is not prohibited by the Constitution. Compare *Hester* v. *United States,* 265 U. S. 57. A later trespass by the officers, if any, did not render inadmissible in evidence knowledge legally obtained. *McGuire* v. *United States,* 273 U. S. 95.

Reversed.

THE ASSIGNED CAR CASES.*

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Nos. 709, 710, 711, 712, 713, 714, 715, 716, 606, 638. Argued March 2, 3, 1927.—Decided May 31, 1927.

1. Congress may prescribe the conditions on which private cars may be used on interstate railroads, and how carrier-owned cars shall be used. P. 575.
2. A rule of the Interstate Commerce Commission which requires that in determining how many coal cars are available for distribution in a district, the carrier placing them shall count, in addition to its own cars, those owned by foreign railroads and assigned to their fuel service and those owned by and assigned to the service of private shippers, and which prohibits the carrier, unless permitted by emergency order of the Commission, from placing for loading at any mine more than that mine's rateable share of all such cars, but which does not divert the surplus of cars owned by one shipper to the use of another—does not involve an unconstitutional taking of the property of the private car owners, nor invade the private business affairs of the carrier. P. 572.
3. Paragraph 12 of § 1 of the Interstate Commerce Act, as amended by § 402 of the Transportation Act, 1920, which declares it the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the mines served by it, and, when the supply available for such service does not meet the mines' requirements, "to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine," leaves to the Commission the administrative discretion to determine how the cars shall be distributed. P. 576.

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* The docket titles of these cases are: *United States et al.* v. *Berwind-White Coal Mining Co. et al.; Same* v. *Bethlehem Steel Co. et al.; Same* v. *Rainey-Wood Coke Co. et al.; Same* v. *Public Service Electric & Gas Co.; Pocahontas Operators' Assn. et al.* v. *Berwind-White Coal Mining Co. et al.; Same* v. *Bethlehem Steel Co. et al.; Same* v. *Rainey-Wood Coke Co. et al.; Same* v. *Public Service Electric & Gas Co.; United States et al.* v. *Akron, Canton & Youngstown Ry. et al.; Pocahontas Operators' Assn. et al.* v. *Same.*

4. Paragraph 10 of § 1 of the amended Interstate Commerce Act, defining "car service" as including the distribution of cars "used in the transportation of property" does not limit the Commission's authority to make regulations in respect of coal car service, under pars. 12 and 14, *supra*, to cars supplied by railroads in performance of their common-carrier duties of transportation for the public. The authority extends to cars carrying coal for use as fuel by the transporting, or other, railroad. P. 578.
5. The rule of car distribution here involved is not arbitrary or unreasonable. P. 578.
6. The authority to establish reasonable rules with respect to car service conferred by par. 14 of § 1 of the amended Interstate Commerce Act includes power to make a rule of car distribution uniformly applicable. P. 580.
7. Courts are not to weigh the evidence introduced before the Commission, enquire into the soundness of its reasoning, or question the wisdom of the regulations prescribed by it. P. 580.
8. In making a general rule of coal car distribution the Commission exercises a legislative function and it is not a condition to the validity of the rule that there be adduced evidence of its appropriateness in respect of every railroad to which it will be applicable. P. 582.
9. There is evidence to support the Commission's finding that existing "assigned car" practice caused discrimination in the use of other transportation facilities. The contention that, in adopting the rule here in question, the Commission, under guise of regulating carrier instrumentalities, sought to equalize industrial fortune and opportunity, is unfounded. P. 583.
10. The fact that use of private cars is permitted by Congress and that shippers acquire them in their own interest, does not prevent the Commission from prohibiting their use in a way which will probably result in unjust discrimination against others and prove otherwise detrimental to transportation service. P. 584.

9 F. (2d) 429, reversed.

THESE were suits, five in number, brought in the District Court for the Eastern District of Pennsylvania to enjoin and annul an order of the Interstate Commerce Commission establishing a general rule of coal car distribution, including "assigned cars"—i. e., privately owned cars and railroad fuel cars placed at specified mines for the

use of particular shippers. The defendants in each case were the United States, the Interstate Commerce Commission, and various intervening mine operators. The District Court granted the relief prayed, 9 F. (2d) 429, and appeals were taken to this Court under Jud. Code § 238, as amended, separate appeals being taken in each case by the United States and the Commission, on the one hand, and the other intervening defendants, on the other.

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

Mr. R. Granville Curry, with whom *Mr. P. J. Farrell* was on the brief, for the Interstate Commerce Commission.

Mr. E. L. Greever for the Pocahontas Operators' Assn., submitted.

Messrs. Francis I. Gowen and *F. M. Rivinus,* with whom *Messrs. Henry W. Biklé, W. S. Bronson, W. L. Kinter, W. A. Northcutt, C. C. Paulding, Theodore W. Reath,* and *C. M. Sheafe, Jr.,* were on the brief, for appellees in Nos. 606 and 638.

Mr. Walker D. Hines, with whom *Messrs. Francis B. Biddle, John H. Barnes, August G. Gutheim, Charles Heebner,* and *Wayne Johnson* were on the brief, for appellees in No. 709.

Mr. Frederick H. Wood, with whom *Messrs. Frederic L. Ballard, Hoyt A. Moore, Paul D. Cravath, L. A. Manchester, Charles S. Belsterling, Nathan L. Miller,* and *John B. Putnam* were on the brief, for appellees in No. 710.

Mr. Wayne Johnson for appellees in Nos. 709 and 713, submitted.

Messrs. John L. O'Brian, Hugh F. Smith, and *Ralph J. Baker* for appellees in Nos. 711 and 715, submitted.

Messrs. Frank Bergen, August G. Gutheim, James W. Carmalt, and *William H. Speer* for appellees in Nos. 712 and 716, submitted.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

These five suits were brought in the federal court for eastern Pennsylvania under the Urgent Deficiencies Act, October 22, 1913, c. 32, 38 Stat. 208, 219, to enjoin and annul an order of the Interstate Commerce Commission. The order, which was to become effective March 1, 1925, prescribes for all railroads subject to its jurisdiction a so-called "Assigned Car Rule" governing the distribution of cars among bituminous coal mines in times of car shortage. *Assigned Cars for Bituminous Coal Mines,* 80 I. C. C. 520; 93 I. C. C. 701. Some of the plaintiffs are operators of coal mines, some distributors of coal, some large private consumers of coal, and some are railroads. All had been parties to the proceeding before the Commission in which the order was entered. The defendants in each case are the United States, the Interstate Commerce Commission, and various intervening mine operators. All the defendants answered. The cases were heard together on the evidence before three judges. A final decree granting the relief prayed for was entered in each case on December 15, 1925. *Berwind-White Coal-Mining Co.* v. *United States,* 9 F. (2d) 429. The cases are here on appeal under § 238 of the Judicial Code as amended.[1] They were argued together.

[1] In each suit the United States and the Interstate Commerce Commission, on the one hand, and the intervening defendants, on the other, took separate appeals, which were given separate docket

The term assigned cars is used in contradistinction to system cars. By assigned cars are meant those placed for use at a specified mine for a particular shipper. By system cars are meant those, from time to time on the line, which are being kept available for use at any mine for any shipper. Assigned cars are of two classes. One class of assigned cars consists of private cars. These are cars owned (or leased) by some shipper (or subject to the control of a particular person not a rail-carrier) who delivers them to the railroad for placement at designated mines for loading and transportation as desired by the owner of the cars. Assigned cars of the other class are called railroad fuel cars. These consist wholly of cars owned (or leased) by some carrier, which, instead of being left, like system cars, for use indiscriminately in carrying coal from any mine for any consignor to any consignee, are assigned to a particular mine to carry coal to be used as fuel by a particular carrier.

Four of the suits were brought by private car owners. They illustrate different conditions under which, or different purposes for which, private cars are so used. The plaintiffs in No. 709 are coal merchants who operate mines. The plaintiffs in No. 710 are integrated concerns which operate mines solely in order to supply coal to their manufacturing plants. The plaintiffs in No. 711 are by-product coke concerns which do not operate any mine. The plaintiff in No. 712 is a public utility which does not operate any mine. In each of these four cases, the cars owned were acquired by the shipper, and are used, solely in order to assure transportation of an indispensable supply of coal. The number of coal cars used on the railroads of the United States is estimated as between

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numbers in this Court. Throughout the opinion reference is made, for convenience, only to the appeals of the United States and the Interstate Commerce Commission.

900,000 and 950,000. Of these about 29,000 are private cars.

The fifth suit, No. 606, is brought by owners of railroad fuel cars. The plaintiffs in it are 35 railroads, including many of the leading bituminous coal carriers of the United States and representing each of the several classes of railroad fuel car owners. Railroad fuel cars are divided, according to ownership, into foreign fuel cars, that is, those which belong to, and are used for the fuel supply of, a carrier other than the one on whose lines the mine is located; and home line or system fuel cars, that is, those which are owned by, and are used to supply fuel to, the carrier on whose lines the mine is located. Railroad fuel cars are further classified according to the ownership, use and character of the mine to which they are assigned. That is, whether the cars are used wholly in connection with a mine owned by the carrier which owns the cars; whether they are used in connection with a mine not owned by such carrier but whose whole output is contracted for by it; or whether the mine at which the cars are to be placed is a "commercial" one, that is, a mine which supplies coal also to the general public. About 28 per cent. of all bituminous coal mined is consumed by railroads. The number of the railroads to which the prescribed rule applies is 3073. Of these, all except the 35 plaintiffs in No. 606 have acquiesced in the order.

The subject of discrimination in the distribution of coal cars in times of car shortage has occupied much of the time of the Commission ever since its establishment.[2] Some general investigations of the matter were under-

[2] The earliest reported cases are *Riddle, Dean & Co.* v. *Pittsburgh & L. E. R. R. Co.*, 1 I. C. C. 374; *Same* v. *New York, Lake Erie & Western R. R. Co.*, 1 I. C. C. 594; *Same* v. *Baltimore & Ohio R. R. Co.*, 1 I. C. C. 608.

taken by it pursuant to resolutions of Congress.[3] Many specific enquiries were made in passing upon complaints of individual shippers who charged unjust discrimination by individual carriers.[4] In two of these cases, *Railroad Commission* v. *Hocking Valley Ry. Co.*, 12 I. C. C. 398; *Traer* v. *Chicago & Alton R. R. Co.*, 13 I. C. C. 451, a rule or practice was prescribed for individual carriers, in 1907 and 1908, which was approved by this Court upon review in *Interstate Commerce Commission* v. *Illinois Central R. R. Co.*, 215 U. S. 452. That practice, which became known as the Hocking Valley-Traer rule,

[3] See Reports on Discrimination and Monopolies in Coal and Oil, January 25, 1907, pp. 49–81; April 28, 1908; June 9, 1914, 31 I. C. C. 193, 217–224; also *In re Assignment of Freight Cars*, 57 I. C .C. 760.

[4] Between April 28, 1908, and the date of the Commission's second opinion in the case at bar, alleged discrimination in the distribution of coal cars was passed upon by the Commission in 33 opinions written in 28 cases. *Rail & River Coal Co.* v. *B. & O. R. R. Co.*, 14 I. C. C. 86; *Traer* v. *C. B. & Q. R. R. Co.*, 14 I. C. C. 165; *Hillsdale Coal & Coke Co.* v. *Pa. R. R. Co.*, 19 I. C. C. 356; 23 I. C. C. 186; *Jacoby* v. *Pa. R. R. Co.*, 19 I. C. C. 392; *Bulah Coal Co.* v. *Pa. R. R. Co.*, 20 I. C. C. 52; *Colorado, etc., Ass'n* v. *Denver & R. G. R. R. Co.*, 23 I. C. C. 458; *Gay Coal Co.* v. *C. & O. Ry. Co.*, 23 I. C. C. 471; *Consol. Fuel Co.* v. *A., T. & S. F. Ry. Co.*, 24 I. C. C. 213; *In re Irregularities in Mine Ratings*, 25 I. C. C. 286; *National Coal Co.* v. *B. & O. R. R. Co.*, 28 I. C. C. 442; 30 I. C. C. 725; *Huerfano Coal Co.* v. *Colo. & S. E. R. R. Co.*, 28 I. C. C. 502; 41 I. C. C. 657; *McCaa Coal Co.* v. *C. & C. Ry. Co.*, 30 I. C. C. 531; 33 I. C. C. 128; *Vulcan Co.* v. *Ill. Cent. R. R. Co.*, 33 I. C. C. 52; *Greenfield* v. *Pa. R. R. Co.*, 47 I. C. C. 403; *Swaney* v. *B. & O. R. R. Co.*, 49 I. C. C. 345; *Gallatin Coal Co.* v. *L. & N. R. R. Co.*, 55 I. C. C. 491; *Northern Coal Co.* v. *M. & O. R. R. Co.*, 55 I. C. C. 502; *Avella Coal Co.* v. *Pittsburgh & W. Va. Ry. Co.*, 58 I. C. C. 313; 77 I. C. C. 731; *Southern, etc., Ass'n* v. *L. & N. R. R. Co.*, 58 I. C. C. 348; *Griffith* v. *Jennings*, 60 I. C. C. 232; *Dickinson Fuel Co.* v. *C. & O. Ry. Co.*, 60 I. C. C. 315; *Northern W. Va. Ass'n* v. *Pa. R. R. Co.*, 60 I. C. C. 569; *Fairmont & C. Coal Co.* v. *B. & O. R. R. Co.*, 62 I. C. C. 269; *Dering Mines Co.* v. *Director-Gen'l*, 62 I. C. C. 265; *Meyersdale Coal Co.* v. *B. & O. R. R. Co.*, 62 I. C. C. 429; 69 I. C. C. 74; *Northern W. Va. Ass'n* v. *Pittsburgh & L. E. R. R. Co.*, 68

was later adopted, either voluntarily or pursuant to orders of the Commission, by other carriers.[5] So far as concerned private cars, the rule was, in substance, adopted, during federal control, by the Railroad Administration. Car Service Circular 31—effective October 10, 1918; revised December 23, 1919. Upon the termination of federal control, the Commission issued a notice to carriers and shippers (dated March 2, 1920) recommending "that until experience and careful study demonstrated that other rules would be more effective and beneficial," the uniform rule contained in that circular should be continued in effect. Later (April 15, 1920), it recommended that the Hocking Valley-Traer rule be applied by the carriers also to railroad fuel cars.[6] But no uniform rule

I. C. C. 167; *Bell Coal Co.* v. *B. & O. S. W. R. R. Co.*, 74 I. C. C. 433; *Wayne Coal Co.* v. *Director Gen'l*, 92 I. C. C. 3. In addition 23 complaints for discrimination in the distribution of coal cars were dismissed, for various causes, without reported opinion.

[5] See *Royal Coal and Coke Co.* v. *Southern Ry. Co.*, 13 I. C. C. 440; *Rail & River Coal Co.* v. *B. & O. R. R. Co.*, 14 I. C. C. 86; *Hillsdale Coal & Coke Co.* v. *Pa. R. R. Co.*, 19 I. C. C. 356.

[6] Under the Railroad Administration the assignment of cars for railroad fuel had (after July 1, 1918) been vested in the Car Service Division. This division was abolished by the termination of federal control. Confusion resulted. The amendment of the Commission's recommendation made on April 15, 1920, was that rule 8 of Circular 31 should read: "Private cars and cars placed for railroad fuel loading in accordance with the decisions of the Interstate Commerce Commission in *R. R. Com. of Ohio* v. *H. V. Ry. Co.*, 12 I. C. C. 398, and *Traer* v. *Chicago & Alton Railroad Co.*, 13 I. C. C. 451, will be designated as 'assigned' cars. All other cars will be designated as 'unassigned' cars."

On September 28, 1920, the Commission issued its Service Order No. 18, effective October 1, renewing its recommendation of April 15, 1920, with the proviso: "That common carriers by railroad may not assign cars for their own fuel and fail to count such cars against the mines' distributive share unless the entire output of such mine is taken by such carrier for a period of not less than six consecutive months." This order was cancelled March 24, 1921, at the time of the commencement of the investigation here involved.

concerning assigned cars applicable to all carriers had been prescribed by the Commission until the entry of the order here complained of; and much diversity in practice existed. Many of the railroads had secured their coal during periods of car shortage without resort to the use of assigned cars; and one, at least, of the leading bituminous coal carriers of the United States declines to permit the use of any assigned cars on its lines.

The rule here assailed was the fruit of an investigation commenced by the Commission of its own motion, in March, 1921, with a view to prescribing just and reasonable rules applicable to all carriers concerning the use of assigned cars for bituminous coal. Every carrier subject to its jurisdiction was made a respondent. Private coal car owners, coal mine operators, coal miners, coal distributors and large coal consumers became parties by intervention. The evidence introduced occupied nearly 6,000 pages. The investigation extended over four years. The reports of the Commission on the original hearing and the rehearing occupy 117 pages of the record. It concluded that the practices expressed in the Hocking Valley-Traer rule, and other existing regulations of carriers, resulted in unjust discrimination and were unreasonable. It ordered that the carriers cease and desist from such practices. And it prescribed the uniform rule which prohibits any carrier from placing for loading at any mine more than that mine's rateable share of all cars, including assigned cars, available for use in the district; unless the carrier is permitted to place more by an emergency order issued by the Commission pursuant to par. (15) of § 1 of the Interstate Commerce Act as amended by § 402 of the Transportation Act, February 28, 1920, c. 91, 41 Stat. 456, 477. This rule requires that, in determining how many cars are available in the district, the carrier placing the cars shall count all cars; that is, it must include with those owned by it, all owned by foreign railroads and

assigned for their fuel service and likewise all owned by private shippers and assigned for their service. Thus, the prohibition embodied in the rule applies to all carriers, whatever the character of the consignor or consignee, and whatever the use to which the coal is to be put.

The operation of the uniform rule may be illustrated by the following example: Assume that there are in the district 10 mines each with a rating, or capacity, of 20 cars a day; that of the 200 cars needed to fill the district's requirement only 100 cars are available on a particular day; and that of the 100, only 85 are owned by the railroad, the remaining 15 being owned by Mine A. Under the rule, the share of each mine would be 10 cars. Mine A would be permitted to have placed its own cars, but only 10 of them. If, on the other hand, 95 of the 100 cars had been owned by the carrier, and only 5 by Mine A, there would be placed at its mine, in addition to its own 5 cars, 5 of the carriers so-called system cars. The rule does not divert the surplus of cars owned by one shipper to use by another. It merely puts a restriction upon the use of the private car by limiting the number of the so-called assigned cars, which may be placed at a particular mine at a particular time. The owner may use the surplus elsewhere. Or he may lease the surplus cars to the carrier or to another shipper. The operation of the rule upon assigned railroad fuel cars is precisely similar. The limitation is imposed in order to improve the service and to prevent any mine (including one operated by a railroad) from securing, at the particular time, more than its rateable share of the aggregate available coal transportation facilities.

The order here assailed differs from the Hocking Valley-Traer rule approved in *Interstate Commerce Commission* v. *Illinois Central R. R. Co., supra,* in two respects. Under the Hocking Valley-Traer rule the carrier was permitted to place at a mine all the cars (whether private or railway fuel cars) which had been assigned to it, even

if the number assigned exceeded its pro rata of all available cars. The prohibition formerly imposed was merely upon placing at a mine any system cars, if it had its full quota from assigned cars. Under the rule here assailed, the carrier is prohibited from placing at a mine more cars than its pro rata, even if all sought to be placed are assigned private cars or railway fuel cars. Moreover, the rule here assailed is a uniform rule governing all carriers without regard to their particular circumstances, whereas the *Hocking Valley-Traer* cases prescribed a practice for the individual carrier after it had been found, upon specific enquiry, that the carrier had been guilty of undue discrimination. Thus, the earlier orders were in their nature largely judicial. The order here attacked is wholly legislative.

No question is here involved concerning those rules, regulations or practices of the carriers by which the ratings of the several mines are determined. See *In re Rules Governing Ratings of Coal Mines, etc.,* 95 I. C. C. 309. No question is raised concerning the limits of the districts into which the carriers' lines are divided for the purpose of applying the rule. No question is raised concerning the adequacy of the supply of system cars. See *Car Shortage, etc.,* 12 I. C. C. 561; *Car Supply Investigation,* 42 I. C. C. 657. Nor is any question presented here concerning the compensation of, or allowance to, private cars owners for the use of their cars in performing the transportation under the tariffs. See *Matter of Private Cars,* 50 I. C. C. 652. There was confessedly no irregularity in the method of proceeding pursued by the Commission. There is a faint contention that the only remedy for violation of the rule is prosecution for the penalty provided by the statute; and that the Commission exceeded its authority in enjoining the placing. The contention is clearly groundless. The order is in a form which, in other connections, has been approved by this

Court. *Baltimore & Ohio R. R. Co.* v. *Interstate Commerce Commission,* 221 U. S. 612; *United States* v. *Union Stock Yard Co.,* 226 U. S. 286; *Pipe Line Cases,* 234 U. S. 548, 561. The sole question requiring consideration is the validity of the requirement that, unless permission is given by the Commission, carriers shall, in placing assigned cars, be limited to the mine's quota, although the number of cars assigned to it exceeds the quota.

The order is challenged on several grounds. All of the plaintiffs insist that in prescribing a universal rule the Commission has exceeded the powers conferred by Congress. All of the plaintiffs appear to attack the rule also on the ground that it is inherently unreasonable. Some insist that the order is unsupported by the findings and the evidence. Some that the rule involves a taking of property without due process of law. The private car owners urge specifically that the rule is an arbitrary interference with the use of their own property. The railroads urge especially that the rule is an illegal interference with their right to manage their own affairs.

First. There is clearly no constitutional obstacle. The rule prescribed does not involve a taking of the property of the private car owner. Congress could exclude private cars from interstate railroads. Compare *United States* v. *Delaware & Hudson Co.,* 213 U. S. 366, 405–6, 411, 415. And it may prescribe conditions on which alone they may be used. See *Procter & Gamble Co.* v. *United States,* 225 U. S. 282; *Swift & Co.* v. *Hocking Valley Ry. Co.,* 243 U. S. 281. Limiting their use does not involve regulation of the coal mining industry. Likewise, Congress may prescribe how carrier-owned cars shall be used. The regulation prescribed does not invade the private business affairs of the carrier. It merely limits the use of certain interstate transportation facilities.

Second. The main question for decision is one of statutory construction. It is whether Congress has vested in

the Commission authority to prohibit a use of assigned cars by a general rule, which in its judgment is necessary to prevent unjust discrimination among mines or shippers and to provide reasonable service. The legislation to be construed is paragraphs 10 to 17, added to § 1 of the Interstate Commerce Act by § 402 of Transportation Act, 1920, February 28, 1920, c. 91, 41 Stat. 456, 476. The paragraphs more directly involved are:

"(12) It shall also be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine. Failure or refusal so to do shall be unlawful, and in respect of each car not so counted shall be deemed a separate offense, and the carrier, receiver, or operating trustee so failing or refusing shall forfeit to the United States the sum of $100 for each offense, which may be recovered in a civil action brought by the United States.

"(14) The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by carriers by railroad subject to this Act. . . ."

Three widely divergent constructions of paragraph (12) are urged. The railroads contend that it prescribes a rule of distribution complete in itself; that the rule there prescribed is the Hocking Valley-Traer rule; and that the provision neither requires nor permits action by the Commission supplementary thereto. In support of this view

the congressional history of the provision is particularly relied upon. The United States contends also that paragraph (12) prescribes a complete rule of car distribution; but its insistence is that the statute abolished the Hocking Valley-Traer rule and substituted for it a rule identical with that ordered by the Commission. Support for its view is sought particularly in the penalty provision of paragraph (12), in the provision of paragraph (10) which defines car service, and in paragraph (11) which prohibits any unjust and unreasonable practice in respect to car service. The Commission contends that paragraph (12) does not prescribe a complete rule; that it does not require either pro rata distribution of cars or distribution according to the Hocking Valley-Traer rule; that it requires merely that all cars be counted as the basis for determining the pro rata share of each mine; and that it leaves to the Commission administrative discretion to determine how the cars shall be distributed. The Commission's contention is, in our opinion, the sound one. It gives effect to the command that all cars shall be counted; and it leaves full scope both to the duty imposed upon the carriers in paragraph (11), and to the authority conferred upon the Commission in paragraph (14), to establish reasonable rules with respect to car service. This construction is consistent also with the legislative history of the provision, including the action of the conference committee by which the differences between the Senate and House bills were reconciled.[7]

[7] The conference committee, House Report No. 650, 66th Cong., 2nd Sess., p. 61, rejected § 34 of the Senate amendment which provided: "That each and every car furnished or used for the transportation of coal during a car shortage period shall be counted against the proportionate distributive share of the mine receiving or using it and that no car shall be furnished to or used by any mine for the transportation of coal during a car shortge period in excess of the proportionate distributive share of such mine regardless in either case of who the consignor or consignors, or the consignee or

One other question of statutory construction is urged by the railroads. They deny the authority of the Commission to deal with the distribution of railroad fuel cars. They point to paragraph 10 of § 1, which defines "car service" as including the distribution of cars "used in the transportation of property." The contention is that, because of the phrase quoted, the Commission's authority to make reasonable regulations with respect to car service, conferred by paragraph (14), is limited to the supervision of the performance by railroads of their common-carrier duties of transportation for the public, and does not extend to supervision of their activity in securing fuel for use by the carrier. The contention is, in our opinion, groundless. So far as concerns foreign railroad fuel cars, the owner is obviously in the same position as a private shipper.[8] Carrying coal by a railroad for its own use as fuel is likewise transportation. See *Interstate Commerce Commission* v. *Ill. Cent. R. R. Co.*, 215 U. S. 452, 474. It would require very explicit language to convince us that Congress intended to permit discrimination if effected by the use of railroad fuel cars. Moreover, the phrase in question appears also in paragraph 12, which provides that the carrier must count against the mine all cars used "for transportation of coal."

Third. It is contended that the rule prescribed is void because unreasonable. Most of the evidence and much of the briefs and arguments were directed to showing the hardships, waste and losses which would result from the prescribed restriction on the use of assigned cars. Private car owners urge that assigned car mines will be com-

consignees, or the owner or owners of the coal loaded or to be loaded into such cars may be, or the purpose for which such coal may be used or intended, or the ownership of such car or cars. . . ."

[8] Compare *Rates on Railroad Fuel*, 36 I. C. C. 1, 9; *Divisions of Joint Rates on Railway Fuel Coal*, 37 I. C. C. 265.

pelled to reduce loadings to conform to the average of system car mines; that private coal cars, representing large investment and sorely needed by their owners, will stand idle on the tracks; that steel industries will be partially or completely shut down and thousands of steel workers will be thrown out of employment; that coke and by-product companies will be partially or completely shut down and their employees temporarily deprived of their means of livelihood; that public utility companies will be compelled to resort to the unsatisfactory and uneconomic spot market for coal; that the supply of gas and electricity to the public will be seriously curtailed; that coal burning steamships will be delayed in sailing; and that the further development and expansion of the important by-product coke process will cease. The railroads urge that the prescribed rule will deprive them of the only effective means of procuring at all times, in dependable volume, suitable coal essential to their operation; that it will increase the cost of coal to them by preventing their running at full capacity the mines owned by them or those whose product they contract for; that it will increase the cost of operation also by depriving them of coal of uniform and approved quality; that in times of greatest car shortage it will involve the non-use by them of a large number of unused private cars; and that it will otherwise prevent efficient transportation service.

There was much evidence that the practice which had been sanctioned in the *Hocking Valley-Traer* cases did not operate satisfactorily. The Commission concluded that it was "not the fruition of ripe experience." Compare *Hillsdale Coal & Coke Co.* v. *Pennsylvania R. R. Co.*, 19 I. C. C. 356, 387. The effort to formulate a rule which would prevent discrimination was resumed. The Commission found that the existing assigned-car practice reduces to a certain extent the supply of cars furnished to commercial mines; that the larger and steadier supply of

cars gives the assigned-car mines a great advantage in steadiness of operation, and hence in cost of production, in the selling markets, and in the labor market; and that, apart from the discrimination inherent in the assigned-car rule, the carriers have been guilty of other willful discriminatory practices, which, as a practical matter, it would be difficult to prevent as long as the rule prevailed. It found also that the use of private cars tends more and more to produce inequalities in the use of other facilities, such as locomotives, tracks, and terminals; and that many, at least, of the so-called car shortages have been due not to an absence of cars but to an inability to move them, i. e., to a shortage of such other facilities. It found, also, that the railroads could, by various devices, obviate most of the difficulty in securing fuel, which they anticipated would result from the order here attacked.

The argument most strongly urged is that, because the rule prescribes absolute uniformity, regardless of the necessities of the railroad or other consumer, regardless of the ownership of the mine or the cars, regardless of the character of the business done by the mine or its customer, it is necessarily unreasonable, and, hence, that the order is void. But the authority to establish reasonable rules conferred by paragraph (14) includes power to prescribe a rule of universal application. There was ample evidence to support the Commission's findings. It is not for courts to weigh the evidence introduced before the Commission, *Western Papermakers' Chemical Co.* v. *United States,* 271 U. S. 268, 271; or to enquire into the soundness of the reasoning by which its conclusions are reached, *Interstate Commerce Commission* v. *Illinois Central R. R. Co.,* 215 U. S. 452, 471; *Skinner & Eddy Corporation* v. *United States,* 249 U. S. 557, 562; or to question the wisdom of regulations which it prescribes. *United States* v. *New River Co.,* 265 U. S. 533, 542.

These are matters left by Congress to the administrative "tribunal appointed by law and informed by experience." *Illinois Central R. R. Co.* v. *Interstate Commerce Commission,* 206 U. S. 441, 454.

We cannot say that it was arbitrary and unreasonable for the Commission to conclude that good service could be secured by a uniform rule which might be departed from with its consent and that unjust discrimination could not be prevented without such a uniform rule. It acted in the light of a rich experience. It had learned by experience that the existing practices resulted in discrimination and unsatisfactory service. It had learned, also through experience, that the emergency powers conferred by the Transportation Act, 1920, afforded adequate means of supplying the needs and of averting the possible hardships and losses, of carriers and of private coal consumers, to which the evidence and arguments had been largely directed.[9] For the Commission had had much experience in applying these emergency powers in connection with this distribution of coal cars in times of car shortage, before it prescribed the rule here challenged.[10] Moreover, so

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[9] Compare *Peoria & Pekin Union Ry. Co.* v. *United States,* 263 U. S. 528; *United States* v. *New River Coal Co.,* 265 U. S. 533; *United States* v. *Koenig Coal Co.,* 270 U. S. 512; *United States* v. *Michigan Portland Cement Co.,* 270 U. S. 521. See also *Baltimore & Ohio R. R. Co.* v. *Lambert Run Coal Co.,* 267 Fed. 776, modified in *Lambert Run Coal Co.* v. *Baltimore & Ohio R. R. Co.,* 258 U. S. 377; *Avent* v. *United States,* 266 U. S. 127; *Assignment of Freight Cars, Senate Resolution, No. 376,* 57 I. C. C. 760, 766; *Notice to Carriers and Shippers,* I. C. C., April 15, 1920; Service Order I. C. C. No. 18, September 20, 1920; Service Order I. C. C. No. 23, July 25, 1922.

[10] In some cases the emergency order was made applicable to all the railroads of the United States; in some only to carriers within a particular district. In some cases the emergency order applied to many carriers and many mining districts; in others to only a single carrier or a single district. In some cases the order applied only to

far as concerns railroad fuel cars, the operation of the rule as modified from time to time by emergency orders would resemble the practice of the Car Service Section of the Railroad Administration during federal control.[11]

Fourth. The contention that findings of the Commission concerning discrimination were unsupported by evidence, or that findings essential to the order are lacking, rests largely upon a misconception. This objection was directed particularly to the finding that the existing prac-

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shipments to a particular destination or for a particular purpose or by a particular route; in others the order was not so restricted. In some cases the order governed the shipments until further notice; in some the period was fixed. In some cases there were suspensions. In some cases the order was limited to shipments of a specified amount of coal to a particular consignee. In some cases the order was limited to cars of a particular description. In some the amount to be shipped by each of several carriers was limited. In some the order applied only to mines of a particular character. In some the limitation depended upon the particular conditions existing at the mines. In every case the emergency order recites in general terms the facts found by the Commission as a justification for its action. See Service Order No. 5, June 9, 1920; No. 6, June 19, 1920; No. 7, June 19, 1920; No. 8, June 30, 1920; No. 9, July 13, 1920, amended July 29, 1920; No. 10, July 20, 1920, amended July 24, 1920, Aug. 3, 1920, and Oct. 27, 1920; No. 11, July 26, 1920, amended Aug. 31, 1920, and Sept. 17, 1920; No. 12, Aug. 10, 1920; No. 14, Aug. 25, 1920; No. 15, Sept. 16, 1920; No. 16, Sept. 16, 1920; No. 17, Sept. 16, 1920, amended March 3, 1921; No. 19, Oct. 1, 1920, amended Jan. 15, 1921; No. 20 (superseding No. 15) Oct. 8, 1920, amended Nov. 6, Nov. 15, Nov. 27, 1920; No. 21, Oct. 8, 1920, amended Nov. 24, 1920; No. 25, Sept. 19, 1922, amended Oct. 17, Nov. 18, Nov. 23, and Dec. 8, 1922; No. 26, Nov. 22, 1922, amended Dec. 6, 1922; No. 27, Nov. 28, 1922; No. 28, Nov. 29, 1922; No. 29, Dec. 2, 1922, amended Dec. 11, 1922; No. 30, Dec. 12, 1922; No. 31, Dec. 20, 1922; No. 32, Dec. 30, 1922, amended Jan. 8, 1923; No. 33, Jan. 6, 1923; No. 34, Jan. 6, 1923; No. 35, Jan. 15, 1923; No. 36, Jan. 15, 1923; No. 38, Feb. 9, 1923, amended Feb. 26, 1923; No. 39, March 5, 1923.

[11] Circular C. S. 31, September 12, 1918; Revised December 23, 1919.

tice in regard to assigned cars results in giving to the mines enjoying assigned cars an unjust and unreasonable share of railroad services and of facilities other than cars. The claim is that the evidence, upon which the finding of the resulting discrimination in these other transportation facilities rests, relates to only a few carriers, and that the general finding to that effect is without support, because the evidence introduced was not shown to be typical. Compare *New England Divisions Case,* 261 U. S. 184, 196–197; *United States* v. *Abilene & Southern Ry. Co.,* 265 U. S. 274, 291. The argument overlooks the difference in the character between a general rule prescribed under paragraph (12) and a practice for particular carriers ordered or prohibited under §§ 1, 3 and 15 of the Interstate Commerce Act. In the cases cited, the Commission was determining the relative rights of the several carriers in a joint rate. It was making a partition; and it performed a function quasi-judicial in its nature. In the case at bar, the function exercised by the Commission is wholly legislative. Its authority to legislate is limited to establishing a reasonable rule. But in establishing a rule of general application, it is not a condition of its validity that there be adduced evidence of its appropriateness in respect to every railroad to which it will be applicable. In this connection, the Commission, like other legislators, may reason from the particular to the general.

Fifth. Equally unfounded is the contention that, under the guise of regulating carrier instrumentalities, the Commission is seeking to equalize industrial fortune and opportunity. The object of the rule was not to equalize fortunes, but to prevent an unjust discrimination in the use of transportation facilities and to improve the service. In essence, the power exerted is the same as that sustained in *Interstate Commerce Commission* v. *Illinois Central R. R. Co.,* 215 U. S. 452, where it was held that

the Commission had power to prohibit the use of any system car, if the private cars assigned to the mine equalled its quota. The fact that Congress has permitted the use of private cars, and that the shippers' acquisition of them proceeds from the motive of self-interest which is recognized as legitimate, cannot prevent the Commission from prohibiting a use of the equipment in a way which it concludes will probably result in unjust discrimination against others and may prove detrimental otherwise to the transportation service. Compare *United States* v. *Illinois Central R. R. Co.*, 263 U. S. 515, 523, 524; *Virginian Ry. Co.* v. *United States*, 272 U. S. 658, 663–665. The contention is admittedly baseless if, as we have concluded, there is evidence to support the finding that the assigned-car practice causes discrimination in the use of other transportation facilities. For the appellees concede that the possession of private cars confers upon them no superior claim to other services.

The order challenged is valid. The bills must be dismissed. The decrees are

Reversed.

The separate opinion of MR. JUSTICE McREYNOLDS.

A temperate and dependable statement concerning the scope and effect of the order here challenged, taken from the brief of counsel for appellees, is printed in the margin.* And see the carefully-prepared opinion of the

* Privately-owned coal cars and cars furnished for railroad fuel coal, are collectively known technically as "Assigned Cars; " this by reason of the fact that they are assigned by the owner of the car (whether a railroad company obtaining coal for fuel, or a shipper owning cars used for the transportation of its coal) for loading at mines, either owned by the owner of the car or with which it has contracts for coal. Coal cars of railroad ownership, other than those assigned to the loading of railroad fuel coal, are known and will be referred to as " system cars."

court below, *Berwind-White Coal-Mining Co. et al.* v. *United States,* 9 Fed. (2d) 429.

To me it seems plain enough that the real purpose of the order was not rationally to control distribution of

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Car-distribution rules assume importance only in times of car shortage; that is to say, when car orders exceed car supply. To provide for such periods the capacity of such mine is rated in cars per day. A mine may order cars each day up to but not exceeding its rated capacity and in time of a car shortage generally does so (even though it might not actually have equivalent orders for coal) in order that it may get as many cars as possible.

Under the practice now prevailing, but condemned by the Commission, all private cars (to the use of which system-car mines have no right,—that right being conceded to be exclusively in the owner of the car), and railway fuel cars are placed at the mine to which assigned even though such mine thereby receives cars to a greater extent of its rated mine capacity than is true of mines not having assigned cars. If such cars equal or exceed the *pro rata* of mine capacity to all cars on hand, such mines receive no system cars. It is only when such cars are less than such *pro rata* that such mines share in the distribution of system cars, and then only in such numbers as bring its cars up to such *pro rata.* The distribution of system cars to system mines is of course based on the *pro rata* available. The effect of the Commission's order is to forbid a mine to have the use of any private cars or railway fuel cars in excess of the same proportion or *pro rata* of rated mine capacity to which mines not having assigned cars are able to receive cars.

In respect of railway fuel cars, the effect of the order under review is to prohibit the placement of such cars, in times of car shortage, at any mine owned by the railway company, or with which it has contracts for coal, in sufficient numbers to load the output of such mines (or the proportion thereof taken by the railroad company for fuel purposes), provided the cars required for this purpose exceed the *pro rata* allotment of system cars, of which there is a shortage, at mines at which the company does not obtain fuel, and which, for the loading of their output, are dependent upon system cars.

In respect of private cars, the order prohibits any railroad, where there is a shortage of system cars, from placing private coal cars at any mine of the owner of such cars (or with which it has contracts for coal) in excess of the number of system cars placed on the same

cars during times of shortage, but to force railroads and other large consumers to apportion their purchases of coal among a larger number of producers and thus advantage mines from which such consumers preferred not to buy. Both carrier and large manufacturer must have steady supplies of suitable coal, and it may be highly important to obtain these from one or a few approved mines. But if such mines are to be denied fuel and private cars during times of shortage, then for their reasonable protection

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day at a mine of similar capacity, which is dependent upon system cars for its supply. The order applies irrespective of the number of such private cars available for placement and loading. It applies when the carrier has motive power and other facilities sufficient to move all available cars, both system and private, as well as when it has not.

The order is universal in its application and admits of no exception for any cause. It runs against every railroad in the United States, although as to the conditions on many, including many coal-loading roads, there was no evidence.

Each of the appellees had found by experience that it could not rely on the coal equipment of the railroads to provide the daily supply of suitable coal necessary for its operation in times of periodic and recurring coal-car shortages, which shortages were due largely to the sudden expansion of orders for cars on the part of high-cost mines which operated irregularly and principally only in times when the coal business was exceptionally active. Each, therefore, became a private car owner to protect its coal supply at such times. The mileage allowances made for the use of such cars by the railroad are insufficient to pay for their upkeep. The only advantage in their ownership lies in their use in times of car shortage. The order thus deprives the respondents and other owners of private cars of all beneficial use thereof. . . .

The order does not require the resulting surplus of private cars to be appropriated for general use, and the Commission's report distinctly disclaims any power so to do. Unless the owner consents to such appropriation, however, cars which he owns and needs, and which he bought as a protection against system car shortages, must stand idle, even though the railroad company is able and willing to place and move such cars and all system cars available for loading as well.

these great consumers probably will endeavor to scatter their orders.

The railroads of this country are private property. They must be operated by their owners according to law under supervision of the Interstate Commerce Commission; but that body is not intrusted with their management and ought not to be permitted to assume it under any guise. In practice, carriers must use many cars daily for gathering fuel necessary for their operations, and I know of no authority possessed by the Commission to prevent them from purchasing this where and as their managers think best. To permit such interference under the mere guise of a rule for distribution of cars seems to me altogether wrong.

Upon this record we must assume that the carriers have met their obligation to provide an adequate number of system cars.

The practice of hiring and using private cars by railroad has been recognized and accepted by both Congress and the Commission. It has enlarged the total number of cars available for use and thereby aided all shippers. Those who provide private cars take nothing from any other shipper, but heretofore have secured the use of such cars for themselves although, because of temporary shortage, the system cars were insufficient to meet the demands of others.

If the order was intended to enlarge the total supply of cars or bring about more equitable distribution of available cars in times of shortage, it was foolish. Supply cannot be increased, nor equitable distribution enforced, by prohibiting the use of private or fuel cars when most needed—requiring them to stand idle on the sidings. If, on the other hand, as I must think, the real purpose was to force large consumers to scatter their purchases, the order goes beyond any power intrusted to the Commission.

The decree below should be affirmed.

LAWRENCE ET AL. *v.* ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY.

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

No. 894. Argued April 20, 21, 1927.—Decided May 31, 1927.

1. Section 17 of the Act of October 15, 1914, providing that every restraining order shall define the injury and state why it is irreparable and why the order was granted without notice, and that no temporary injunction shall be granted without notice " unless it shall clearly appear from specific facts shown by affidavit or by the verified bill that immediate and irreparable injury, loss or damage will result to the applicant before notice can be served and a hearing had thereon," applies to suits brought under § 266 of the Judicial Code. P. 595.
2. An order granting a temporary injunction without setting forth specific reasons for issuing it, is contrary to the Act of October 15, 1914, c. 323, § 19, but not therefore void. P. 591.
3. A decree of the District Court temporarily enjoining action of state officials for the enforcement of a state law, should be accompanied by an opinion setting forth fully the reasons. P. 596.
4. Evidence of danger of irreparable injury is essential to justify issuance of a temporary injunction. P. 592.
5. Where a railway company, after acquiescing for years in an order of a state commission enjoining removal of its shops and division point from one place to another pending determination by the commission of objections made by citizens of the place where they were located, indicated its purpose to make the change, and the matter was set for hearing by the commission, and the railway failed to show that an emergency required an immediate change or that delay in applying to a federal court would subject it to penalties under the state law, the case was not one of such threatened irreparable injury as to justify the federal court in issuing an interlocutory injunction against the commission's hearing the case, it being clear that the railway by participating in such hearing would not waive its right to contest in the federal court the constitutionality of the state law under which the commission was acting. P. 592.

6. Whether the Oklahoma law forbidding railroads from removing shops and division points, in certain cases, without previously securing permission of the State Corporation Commission, is constitutional as applied to a railroad engaged in interstate as well as intrastate commerce, is not here determined; but to require such a regulating body to be advised of such changes is not such an obvious interference with interstate commerce that on application for a preliminary injunction the Act should lightly be assumed to be beyond the power of the State. P. 594.

Reversed.

APPEAL from an interlocutory decree of the District Court which enjoined the Corporation Commission of Oklahoma from enforcing an order by which the Railway was required not to remove its shops and division point from the City of Sapulpa, and from preventing it from putting into effect a contemplated passenger train schedule, and which enjoined the other defendants—the Attorney General of the State and citizens of Sapulpa—from participation in proceedings before the Commission.

Mr. C. B. Ames, with whom *Messrs. Edwin Dabney,* Attorney General of Oklahoma, *Houston B. Teehee,* Assistant Attorney General, and *T. L. Blakemore* were on the brief, for appellants.

Mr. C. B. Stuart, with whom *Messrs. E. T. Miller, M. K. Cruce,* and *Ben Franklin* were on the brief, for appellee.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This is a direct appeal from a decree for an interlocutory injunction entered by the federal court for northern Oklahoma. The plaintiff below was the St. Louis-San Francisco Railway Company; the defendants the Corporation Commission of that State, its Attorney General and some citizens of Sapulpa. The bill was filed on Jan-

uary 11, 1927. The case was heard on January 19, by three judges under § 266 of the Judicial Code, as amended, and was decided on the same day. No opinion was delivered.

The Act of February 5, 1917, Compiled Oklahoma Laws 1921, §§ 3482–3485, § 5548, prohibits a railroad from removing its "shops or division points which have been located at any place in this State for a period of not less than five years without previously securing the permission of the Corporation Commission to make such removal." Railroad shops and a division point of the St. Louis-San Francisco system have been located in Sapulpa, Oklahoma, since 1890. The Railway indicated a purpose to remove these shops and the division point to Tulsa. On February 19, 1917, the Corporation Commission issued, upon complaint of citizens of Sapulpa and upon notice to and hearing of the Railway, a temporary restraining order enjoining the removal. The Railway acquiesced in this order; the Commission retained jurisdiction of the cause; and neither party took any action therein for nearly ten years. In December, 1926, while the restraining order issued in 1917 was in force, the Railway, without leave of the Commission and without making any application in the cause, directed that the division point for passenger trains be changed in January, 1927, to Tulsa; and it indicated a purpose to remove its shops to West Tulsa. Thereupon, the complaining citizens of Sapulpa filed in the cause a motion, which, reciting these facts, prayed that the cause be set for hearing and that meanwhile the Commission prohibit the Railway from making any change. The Commission set the hearing for January 17, 1927, and renewed the temporary restraining order.

The Railway brought this suit shortly before the day set for the hearing by the Commission. The bill charges that the Oklahoma Act violates the commerce clause, the

due process clause and the equal protection clause; and that, hence, the Commission is without jurisdiction in the premises. The sole prayer is that the defendants be enjoined " from compelling plaintiff to submit to the jurisdiction of the Corporation Commission in the several matters aforesaid," that is, the proposed removal from Sapulpa. The decree is broader than the prayer. It enjoins the Commission from hearing the cause pending before it; from taking any other action therein; from making or enforcing any order restraining the Railway from removing its shops or division point from Sapulpa, and specifically from putting into effect a contemplated passenger train schedule on January 23, 1927, the schedule being intended to facilitate the change of the division point. It enjoins the other defendants from participation in any way in the proceedings before the Commission.

The decree disregards the requirement of § 19 of the Act of October 15, 1914, c. 323, 38 Stat. 730, 738; United States Code of Laws, Title 28, § 383, p. 909, " That every order of injunction . . . shall set forth the reasons for the issuance of the same, shall be specific in terms, . . ." It does not declare that the Oklahoma statute is unconstitutional; nor does it state any other reason why the action enjoined is a violation of plaintiff's rights. It does not recite, even in general terms, that there is danger of irreparable loss. It sets forth no fact from which such danger can be inferred. It recites merely that the case was submitted on affidavits and that " the court having considered said affidavits and having heard argument of counsel both for plaintiff and defendants, is of the opinion that the temporary injunction prayed for by plaintiff herein should be in all things granted."

Although proper practice demands that the provision thus prescribed by Congress be scrupulously observed, disregard of the statutory requirement concerning the

form of the order did not render the interlocutory decree void. *Druggan* v. *Anderson,* 269 U. S. 36, 40. It must, however, be reversed, because the verified bill and the affidavits fail to supply that evidence of danger of irreparable injury to plaintiff which is essential to justify issuance of a temporary injunction. Indeed, it appears affirmatively from the allegations of the bill and the facts testified to in the affidavits that irreparable injury would not have resulted from the failure to issue a restraining order before serving notice on the defendants; that the interlocutory injunction should have been denied, except possibly as to the adoption of the new passenger train schedule on January 23, 1927; and that otherwise action by the court should have awaited the final hearing.

The only relief prayed for in the bill is that the defendants be enjoined " from compelling plaintiffs to submit to the jurisdiction of the Corporation Commission in the several matters aforesaid." There is no prayer for general relief. No right or interest of the Railway would have been prejudiced by participating in the hearing before the Commission and awaiting the result thereof. The Railway would not thereby have waived its right to contest in the federal court the validity of the Oklahoma law. Nor would delay in making application to the federal court have subjected it to penalties under the Oklahoma law. The earliest date on which the Railway is definitely shown to have proposed to take any action falling within the prohibition of the Commission's order was January 23, 1927, when the Railway proposed to put into effect the new schedule involving change of the division point for passenger trains from Sapulpa to Tulsa. The hearing before the Commission had been set for January 17, 1927. It was clearly possible, and was perhaps probable, that the Commission would, after hearing argument on that day, have modified its order so as to permit the passenger schedule to go into effect. For

the matter of serious concern to Sapulpa was the threatened removal of the shops and the freight terminals; not the proposed new schedule for passenger trains. Moreover, if the Commission had refused to permit the passenger schedule to go into effect, the Railway would still have had ample opportunity before January 23 to secure from the federal court relief in that respect.

The broader permission to remove both the shops and the division point might also have been granted by the Commission if it had been permitted to proceed with the hearings set for January 17. The Railway asserts that the removal would result in an improved service and in economy in operation. If this appeared to be true, it was the duty of the Commission, under the Oklahoma law, to authorize the removal, unless thereby the health of the employees of the Railway or of their families was imperiled. It is not to be assumed that the Railway proposed to remove the shops to an unhealthy location. And it may not be assumed that the Commission would have disregarded its duty. *Grand Trunk Ry. Co.* v. *Michigan Railroad Commission,* 231 U. S. 457, 464–466; *Western & Atlantic R. R.* v. *Georgia Public Service Commission,* 267 U. S. 493, 496.

The facts alleged in the bill and testified to in the affidavits, show also otherwise that there was not danger of irreparable loss to plaintiff within established rules of equity practice. The Railway had for ten years acquiesced in the Commission's order prohibiting removal. There had not been, so far as appears, even a suggestion to the Commission that the Act under which the order issued was invalid or that the order was otherwise objectionable to the Railway. The advisability of the removal of the shops was a matter as to which the Railway officials had differed in judgment. The vice-president in charge of operation testified: "We should have changed many years ago." The president assured a committee representing Sapulpa in December, 1925, that the city

was the logical place for the terminal now located there, . . . that his company was considering the enlargement of the terminals . . . and that there was not reason for any anxiety on the part of the citizens of Sapulpa as to the removal of the terminals." In December, 1926, apparently, the Railway's officials concluded that, in view of the changed traffic and operating conditions, the time had come when the removal of the shops and division point from Sapulpa to Tulsa should be undertaken; and that, with a relatively small capital outlay at Tulsa, the removal would result not only in improved service, but also in an important saving in operating expenses. But there was no emergency requiring the issue of an interlocutory injunction. To the Railway the matter was not one of vital concern. For it, time was not of the essence. The effect of the Commission's restraining order was merely to keep things in *statu quo* until the final hearing in the federal court. The interlocutory decree set the Railway free to remove the shops before the case could be heard on final hearing. By ending the *status quo* which had existed for ten years, it exposed the city and its citizens to danger of irreparable loss. The change subjected Sapulpa to grave and immediate peril. Removal of the shops which had been located in Sapulpa for a generation would probably affect property values seriously and might bring disaster in its train. It might ruin businesses. It might result in unemployment. It might compel many of Sapulpa's citizens to seek homes elsewhere. On application for an interlocutory injunction such considerations are of weight.

We have no occasion to determine whether the Oklahoma Act is obnoxious to the Federal Constitution. But as bearing upon the propriety of issuing the temporary injunction, the fact is important that the controversy concerns the respective powers of the Nation and of the States over railroads engaged in interstate commerce.

Such railroads are subject to regulation by both the State and the United States. The delimitation of the respective powers of the two governments requires often nice adjustments. The federal power is paramount. But public interest demands that, whenever possible, conflict between the two authorities and irritation be avoided. To this end it is important that the federal power be not exerted unnecessarily, hastily, or harshly. It is important also that the demands of comity and courtesy, as well as of the law, be deferred to. It was said in *Western & Atlantic R. R.* v. *Georgia Public Service Commission,* 267 U. S. 493, 496, that a law of a State may be valid which prohibits an important change in local transportation conditions without application to the state commission, although the ultimate authority to determine whether the change could or should be made may rest with the federal commission. And it was there said that the "action of the Company in discontinuing the service without a petition" to the state body was "arbitrary and defiant." Compare *Henderson Water Co.* v. *Corporation Commission,* 269 U. S. 278. To require that the regulating body of the State be advised of a proposed change seriously affecting transportation conditions is not such an obvious interference with interstate commerce that on application for a preliminary injunction the Act should lightly be assumed to be beyond the power of the State.

The decree recites that a restraining order was issued on the filing of the bill. So far as appears, the court also disregarded in issuing it the requirement of § 17 of the Act of October 15, 1914, Code, Title 28, § 381, p. 909. We think that § 17 applies to suits brought under § 266 of the Judicial Code.[1] Section 17 provides: "Every such

[1] Section 17 took the place of § 263 of the Judicial Code, which was of general application. The last sentence of § 17 (omitted from § 381 of Title 28 of the Code) reads: "Nothing in this section

temporary restraining order . . . shall define the injury and state why it is irreparable and why the order was granted without notice . . ." It provides also: "No temporary restraining order shall be granted without notice to the opposite party unless it shall clearly appear from specific facts shown by affidavit or by the verified bill that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon." Such facts do not appear to have been shown. They are not alleged in the verified bill; and the affidavits in support were not filed until the hearing on the interlocutory injunction.

The purpose of Congress in requiring that "every order for an injunction shall set forth the reasons for the issuance of the same," was in part to ensure deliberation, and thus minimize the chances of error. It was in part to prevent or allay the irritation naturally incident to interference by injunction with the action of the state government. Congress did not require the court to supplement the recitals in the decree by a fuller statement in an opinion. The importance of an opinion to litigants and to this Court in cases of this character was pointed out in *Virginian Ry. Co.* v. *United States,* 272 U. S. 658, 675. The importance is even greater where the decree enjoins the enforcement of a state law or the action of state officials thereunder. For then, the respect due to the State demands that the need for nullifying the action of its legislature or of its executive officials be persuasively shown.

Reversed.

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contained shall be deemed to alter, repeal or amend section two hundred and sixty-six" of the Judicial Code. In requiring specific findings of irreparable damage in the issuance of restraining orders, no alteration, repeal or amendment of § 266 was made.

Counsel for Parties.

ARKANSAS RAILROAD COMMISSION ET AL. *v.* CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY.

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

No. 549. Argued April 20, 1927.—Decided May 31, 1927.

1. Failure to set forth the reasons for issuing an injunction, as required by § 19 of the Act of October 15, 1914, is improper but does not invalidate the decree. P. 598.
2. A decree of the District Court setting aside an order of a state railroad commission concerning rates should be supported by an opinion stating fully the reasons. P. 603.
3. An order of the Interstate Commerce Commission requiring that certain intrastate rates should not be lower than corresponding interstate rates thereby established is not authority for further increasing the intrastate rates to meet higher interstate rates prescribed in subsequent proceedings wherein the commission considered the propriety of ordering such increase but refused to do so, the commission having, in effect, construed the earlier order as confined to the rates established in the earlier case. P. 602.
4. Where there is a serious doubt whether an order of the Interstate Commerce Commission extends to intrastate rates, the doubt should be resolved in favor of the state power. P. 603.

Reversed.

APPEAL from a final decree of the District Court enjoining an order of the Arkansas Railroad Commission which suspended an intrastate commodity tariff filed by the Railroad. The suit was by the Railroad against the Commission and a state prosecuting attorney.

Mr. Edward A. Haid, with whom *Messrs. H. W. Applegate,* Attorney General of Arkansas, and *Brooks Hays,* Assistant Attorney General, were on the brief, for appellant.

Mr. Thomas S. Buzbee, with whom *Messrs. Marcus L. Bell* and *William F. Dickinson* were on the brief, for appellee.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This is a direct appeal from a final decree of the federal court for eastern Arkansas granting an injunction under paragraph 3 of § 238 of the Judicial Code as amended by the Act of February 13, 1925. The plaintiff below was the Chicago, Rock Island and Pacific Railroad; the defendants the Arkansas Railroad Commission and a state prosecuting attorney. The controversy concerns an order of the state commission which suspends for examination an intrastate commodity tariff, framed on the mileage basis, which had been filed by the Railroad to cover cottonseed and its products. A restraining order issued two days after the filing of the bill in accordance with a stipulation of the parties. An interlocutory injunction was granted after overruling a motion to dismiss the bill. The defendants then answered. The case was heard before three judges on final hearing; and evidence which occupies 174 pages of the printed record was introduced. The final decree sets aside the order of the state commission suspending the tariffs and enjoins enforcement of that order.

No opinion was delivered on entry of either the interlocutory or the final decree. And neither decree states the reasons for issuing the injunction. Failure to observe the requirement of § 19 of the Act of October 15, 1914, c. 323, 38 Stat. 730, 738; Code of Laws, Title 28, § 383, p. 909, although improper, does not invalidate the decrees. *Lawrence* v. *St. Louis-San Francisco Ry. Co., ante,* p. 588. But we are of opinion that on the undisputed facts the decree appealed from should be reversed with directions to dismiss the bill.

The tariff filed by the Railroad, which the Arkansas Commission suspended, covers only intrastate rates. It corresponds with tariffs for interstate rates which the In-

terstate Commerce Commission prescribed. The earlier intrastate tariff for which it was a substitute was lower. The Railroad claims that the state commission should be enjoined because the earlier tariff is unlawful and that the suspended tariff, although applicable only to intrastate rates, is valid, under the doctrine of the *Shreveport* case, *Houston East & West Texas Ry. Co.* v. *United States,* 234 U. S. 342. The Railroad concedes that States have the exclusive right to fix intrastate rates, subject to the limitation that such rates must not unduly discriminate against interstate commerce; that a mere difference in rate does not constitute an undue discrimination; that the question whether discrimination exists is one for the Interstate Commerce Commission; that to justify federal interference there must be substantial disparity resulting in real discrimination; and that the extent of the alleged discrimination must be found in the federal commission's order. It contends that the Interstate Commerce Commission found that the existing intrastate class and commodity tariff discriminated unjustly against interstate commerce; that it ordered the removal of the discrimination; and that the Railroad had, therefore, the right and the duty to substitute a new non-discriminating tariff. The answer of the state commission is a denial that the federal commission made such finding or order.

The issue presented must be determined by construing the reports and orders of the Interstate Commerce Commission. The controversy had its origin in a general enquiry, arising out of alleged discrimination against Memphis through Arkansas and other intrastate rates, but extending to the entire rate schedule of the Southwest and between the Southwest and Mississippi river crossings—an investigation which has occupied much time of the federal commission.[1] The particular question here

[1] The controversy began with complaints, filed by Memphis and Natchez interests, alleging that the rates from Memphis and Natchez

presented involves primarily only the reports and orders in two cases, *Memphis-Southwestern Investigation—Commodity Rates,* 77 I. C. C. 473, and *Oklahoma Commission* v. *Abilene & Southern Ry. Co.,* 98 I. C. C. 183. In the former case a standard distance scale of rates on commodities, including those on cottonseed and its products, was prescribed or approved (i) interstate from the river crossings to points in Arkansas, southern Missouri, and western Louisiana; (ii) interstate between points in Arkansas, southern Missouri, and western Louisiana; and (iii) the same scale was virtually prescribed intrastate in Arkansas by a finding that, to avoid discrimination, the rates from Memphis and Natchez to Arkansas should not exceed, for equal distances, the Arkansas intrastate rates.[2] There was an express finding that the Arkansas intrastate rates were discriminatory and an order that the discrimination should

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to Arkansas were prejudicial as compared with Arkansas intrastate rates, and with the rates from other Mississippi River crossings to Arkansas. See *Memphis Freight Bureau* v. *St. L. I. M. & S. Ry. Co.,* 39 I. C. C. 224; *City of Memphis* v. *C. R. I. & P. Ry. Co.,* 39 I. C. C. 256; 43 I. C. C. 121; 45 I. C. C. 487; *Natchez Chamber of Commerce* v. *L. & A. Ry. Co.,* 52 I. C. C. 105. Efforts to obey orders made in those cases revealed that it was difficult to deal with the rates there involved except as part of a general adjustment of rates in the Southwest. Accordingly those cases were reopened for consideration in a general investigation. The first report of the general investigation established a distance scale of maximum interstate class rates between points in Arkansas, Oklahoma, and southern Missouri; and between certain river crossings and such points. *Memphis-Southwestern Investigation,* 55 I. C. C. 515. It virtually prescribed the same scale of class rates intrastate in Arkansas by finding that the intrastate rates should not be less, for equal distances, than the interstate rates from Memphis and Natchez to Arkansas. In *Extension of Memphis-Southwestern Scale,* 62 I. C. C. 596, the same scale of class rates was approved for extension to Texas points. All these cases dealt with class rates only; the reports referred to in the text deal with commodity rates only.

[2] Throughout the opinion no mention is made of charges for the ferry and bridge crossings of the Mississippi. All the distance scales

be removed. Thereupon, the intrastate rates were changed, in conformity with the order; and those in force at the time of the institution of this suit were filed, to become effective as of November 27, 1923. Ultimately they had the approval of the state commission. The findings and orders of the Interstate Commerce Commission in that case (77 I. C. C. 473) were made without prejudice to any orders which might be made in the *Oklahoma Commission* case or in others then pending.

In the *Oklahoma Commission* case (98 I. C. C. 183), attack was made upon the interstate rates on cottonseed and its products, not only upon those in the territory involved in the *Memphis-Southwestern* case, but also upon those in Oklahoma, Texas, and New Mexico and upon those from such points to western classification territory. The intrastate rates of New Mexico, Texas, Oklahoma, Arkansas, western Louisiana, and southern Missouri were also attacked. The report prescribed an interstate distance scale on such products throughout most of the territory involved, and between such territory and the Mississippi river crossings (East St. Louis and south), the scale being somewhat higher than the Memphis-Southwestern scale. The Texas and Oklahoma intrastate rates were found prejudicial to interstate commerce to the extent to which they were lower than the interstate rates, for like distances in force in those states. But the Interstate Commerce Commission made no finding or order with reference to the Arkansas intrastate rates, saying:

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prescribed by the Commission make provision for added charges for such crossings; and the discrimination orders against the intrastate rates make allowance for such charges.

The Memphis-Southwestern distance scale was later put into effect voluntarily intrastate in Louisiana. And it was approved for application from Oklahoma, Arkansas, and western Louisiana to Fort Worth. *Fort Worth Cotton Oil Co.* v. *A. T. & S. F. Ry. Co.*, 80 I. C. C. 18.

"The evidence of record upon which a conclusion may be reached as to the discriminatory character of the intrastate rates on cottonseed and cottonseed cake, meal, and hulls now in effect in Arkansas and on all these commodities applying between points in Louisiana is very meager. . . . We are not informed as to the routes over which the Arkansas intrastate rates apply, and particular instances of discrimination in the present rates are absent."

The Railroad concedes that intrastate Arkansas rates are not within the terms of the order of the federal commission in the *Oklahoma Commission* case. Its argument is that in the *Memphis-Southwestern* case it was ordered that the Memphis to Arkansas rates should not exceed the Arkansas intrastate rates; that that order has not been rescinded; and hence that when the interstate rate from Memphis to Arkansas was raised as a result of the *Oklahoma Commission* case, it became the duty of the railroads to raise the intrastate rates to a corresponding degree. But it appears that in the later case the Interstate Commerce Commission considered the propriety of ordering the Arkansas intrastate rates raised to the new level, and refused to do so. There was no rescission in terms of the former order. But when the two orders are read together, as they must be, it is clear that the Commission construed its earlier order as requiring only that the Arkansas rates should not be lower than the interstate Memphis to Arkansas rates prescribed in that case, as long as they should be maintained.[3]

[3] The latest report of the Interstate Commerce Commission dealing with Southwestern rates, April 5, 1927, appears not to apply to the commodity rates on cottonseed and its products here in question. *Consolidated Southwestern Cases*, 123 I. C. C. 203, 360–362, 409–410, 429–439. See also *Commodity Rates in Southwestern Territory*, 101 I. C. C. 308.

The intention to interfere with the state function of regulating intrastate rates is not to be presumed. Where there is a serious doubt whether an order of the Interstate Commerce Commission extends to intrastate rates, the doubt should be resolved in favor of the state power. If, as the Railroad believed, the federal commission intended to include the intrastate Arkansas rates within its order, it should have taken action, through appropriate application, to remove the doubt by securing an expression by that commission of the intention so to do. Compare *American Express Co.* v. *South Dakota*, 244 U. S. 617, 627; *Illinois Cent. R. R. Co.* v. *Public Utilities Commission*, 245 U. S. 493, 509-510.

In *Virginian Ry. Co.* v. *United States*, 272 U. S. 658, 675, and in *Lawrence* v. *St. Louis-San Francisco Ry. Co., supra*, we called attention to the importance to the parties, to the public and to this Court of supporting the decree, in cases of this character, by an opinion which shall state fully the reasons for setting aside a commission's order.

Reversed.

GORIEB *v.* FOX ET AL.

CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

No. 799. Submitted April 25, 1927.—Decided May 31, 1927.

1. Whether a provision of a city ordinance fixing a building line with relation to the location of a specified percentage of existing houses on the block is so vague in its general, or in some particular, applications as to amount to a denial of due process of law, is a question which can not be considered in a case where, upon the special facts, it was definite enough, and where the lot-owner had been excepted from the provision by the city council. P. 605.

2. Reservation of authority in a city council to make exceptions, in cases of exceptional hardship, from a regulation confining the construction of buildings to a building line set back from the street, does not violate the Equal Protection Clause. P. 607.
3. Arbitrary or unfair use of such authority is not to be presumed. P. 607
4. State ordinances requiring lot owners, when constructing new buildings, to set them back a reasonable distance from the street lines of their lots, may have substantial relation to the public safety, health, morals, and general welfare, and, not being clearly arbitrary or unreasonable, do not deprive the lot owners of their property without due process of law. *Eubank* v. *Richmond,* 226 U. S. 137, distinguished. P. 608.

145 Va. 554, affirmed.

CERTIORARI (273 U. S. 687) to a judgment of the Supreme Court of Appeals of Virginia, which affirmed a judgment denying the petitioner a writ of mandamus against the city council of Roanoke.

Messrs. W. V. Birchfield, Jr., and *G. A. Wingfield* were on the brief for petitioner.

Mr. Robert C. Jackson was on the brief for respondents.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

For the declared purpose of establishing building lines and regulating and restricting the construction and location of buildings, and for other purposes, an ordinance of Roanoke, Virginia, divides the city into "business" and "residential" districts. Another ordinance, as amended July 11, 1924, creates a set-back or building line, with relation to the street, to which all buildings subsequently erected must conform. The line must be at least as far from the street as that occupied by sixty per cent. of the existing houses in the block, the word "block" being de-

fined to mean only that portion on the same side of the street where the new building is proposed, bounded by the nearest intersecting streets to the right and left thereof. The city council by a proviso reserved to itself the authority to make exceptions and permit the erection of buildings closer to the street.

Petitioner owns several building lots within the residential district upon one of which he has a dwelling house. He applied to the city council for a permit to erect a brick store building upon an adjoining lot, and, after investigation, the council by resolution gave him permission to erect a brick store thirty-four and two-thirds feet back from the street line. He thereupon sought by mandamus to compel the council to issue a permit to occupy the lot for his building up to the street line, alleging the unconstitutionality of the set-back ordinance. The judgment of the court of first instance was against him, sustaining the validity of the ordinance and the action of the council. This judgment was affirmed by the state supreme court, 145 Va. 554, which held that the ordinance was valid and within the legislative grant of power. Acts of the Assembly, 1922, p. 46.

The ordinances summarized above were those in effect when the permit was granted by the council, and they alone are involved in this inquiry. The attack here is upon the set-back ordinance, and that is assailed as contravening the due process of law and equal protection clauses of the Fourteenth Amendment to the federal Constitution.

It is said, first, that the standard furnished is so vague and uncertain as in reality to be no standard at all, since the houses, or sixty per cent. of them, in any block may stand at a variety of distances from the street, in which event it cannot be determined from the ordinance whether

sixty per cent. of the houses nearest to the street or sixty per cent. of those farthest from the street or some other method of calculation is to govern. But in the present case this contention may be put aside, since (a) the permit was granted and the building line fixed under the proviso which reserved to the council in appropriate cases authority to fix the building line without reference to this limitation, and (b) as to the existing houses in the block in question, the actual differences in respect of the building lines upon which more than sixty per cent. of them stood are so slight as to be entirely negligible upon the question of certainty.

The evidence shows that the variation in the location of eighty per cent. of the existing houses was only one-tenth of a foot and, ignoring this inconsequential difference, the established building line was slightly over forty-two feet back from the street. The line designated for petitioner's building was substantially more favorable to him than this, being more than seven feet nearer the street. Whether the provision of the ordinance, fixing the line with relation to the location of sixty per cent. of the existing houses, in its general, or in some other specific, application is so vague as to amount to a denial of due process, is a question which does not concern petitioner, since, as applied to the facts in the present case, it is definite enough, and since, in any event, he has been excepted from the operation of the provision; and it does not appear that the alleged unconstitutional feature of which he complains has injured him or operated to deprive him of any right under the federal Constitution. *Oliver Iron Co.* v. *Lord,* 262 U. S. 172, 180–181; *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1, 42; *Dahnke-Walker Co.* v. *Bondurant,* 257 U. S. 282, 289; *Jeffrey Mfg. Co.* v. *Blagg,* 235 U. S. 571, 576; *Plymouth Coal Co.* v. *Pennsylvania,* 232 U. S. 531, 544–545.

The proviso, under which the council acted, also is attacked as violating the equal protection clause on the ground that such proviso enables the council unfairly to discriminate between lot owners by fixing unequal distances from the street for the erection of buildings of the same character under like circumstances. We cannot, of course, construe the ordinance as meaning that the power may be thus exerted; nor may we assume in advance that it will be exercised by the council capriciously, arbitrarily, or with inequality. It will be time enough to complain when, if ever, the power shall be thus abused.

The proviso evidently proceeds upon the consideration that an inflexible application of the ordinance may under some circumstances result in unnecessary hardship. In laying down a general rule, such as the one with which we are here concerned, the practical impossibility of anticipating and providing in specific terms for every exceptional case which may arise, is apparent. And yet the inclusion of such cases may well result in great and needless hardship, entirely disproportionate to the good which will result from a literal enforcement of the general rule. Hence the wisdom and necessity here of reserving the authority to determine whether, in specific cases of need, exceptions may be made without subverting the general purposes of the ordinance. We think it entirely plain that the reservation of authority in the present ordinance to deal in a special manner with such exceptional cases is unassailable upon constitutional grounds. *Wilson* v. *Eureka City,* 173 U. S. 32, 36–37; *In re Flaherty,* 105 Cal. 558, 562; *Ex parte Fiske,* 72 Cal. 125, 127.

Yick Wo v. *Hopkins,* 118 U. S. 356, upon which petitioner relies, is not to the contrary. The ordinance there involved vested uncontrolled discretion in the board of supervisors, and this discretion was actually exercised for the express purpose of depriving the petitioner in that

case of a privilege that was extended to others. See *Crowley v. Christensen,* 137 U. S. 86, 94.

The remaining contention is that the ordinance, by compelling petitioner to set his building back from the street line of his lot, deprives him of his property without due process of law. Upon that question the decisions are divided, as they are in respect of the validity of zoning regulations generally. But, after full consideration of the conflicting decisions, we recently have held, *Euclid* v. *Ambler Co.,* 272 U. S. 365, that comprehensive zoning laws and ordinances, prescribing, among other things, the height of buildings to be erected (*Welch* v. *Swasey,* 214 U. S. 91) and the extent of the area to be left open for light and air and in aid of fire protection, etc., are, in their general scope, valid under the federal Constitution. It is hard to see any controlling difference between regulations which require the lot-owner to leave open areas at the sides and rear of his house and limit the extent of his use of the space above his lot and a regulation which requires him to set his building a reasonable distance back from the street. Each interferes in the same way, if not to the same extent, with the owner's general right of dominion over his property. All rest for their justification upon the same reasons which have arisen in recent times as a result of the great increase and concentration of population in urban communities and the vast changes in the extent and complexity of the problems of modern city life. *Euclid* v. *Ambler Co., supra,* p. 386. State legislatures and city councils, who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character and degree of regulation which these new and perplexing conditions require; and their conclusions should not be disturbed by the courts unless clearly arbitrary and unreasonable. *Zahn* v. *Board of Public Works, ante,* p. 325 and authorities cited.

The property here involved forms part of a residential district within which, it is fair to assume, permission to erect business buildings is the exception and not the rule. The members of the city council, as a basis for the ordinance, set forth in their answer that front-yards afford room for lawns and trees, keep the dwellings farther from the dust, noise and fumes of the street, add to the attractiveness and comfort of a residential district, create a better home environment, and, by securing a greater distance between houses on opposite sides of the street, reduce the fire hazard; that the projection of a building beyond the front line of the adjacent dwellings cuts off light and air from them, and, by interfering with the view of street corners, constitutes a danger in the operation of automobiles. We cannot deny the existence of these grounds—indeed, they seem obvious. Other grounds, of like tendency, have been suggested. The highest court of the state, with greater familiarity with the local conditions and facts upon which the ordinance was based than we possess, has sustained its constitutionality; and that decision is entitled to the greatest respect and, in a case of this kind, should be interfered with only if in our judgment it is plainly wrong, *Welch* v. *Swasey, supra,* p. 106, a conclusion which, upon the record before us, it is impossible for us to reach.

The courts, it is true as already suggested, are in disagreement as to the validity of set-back requirements. An examination discloses that one group of decisions holds that such requirements have no rational relation to the public safety, health, morals, or general welfare, and cannot be sustained as a legitimate exercise of the police power. The view of the other group is exactly to the contrary. In the *Euclid* case, upon a review of the decisions, we rejected the basic reasons upon which the decisions in the first group depend and accepted those upon which rests the opposite view of the other group.

Nothing we think is to be gained by a similar review in respect of the specific phase of the general question which is presented here. As to that, it is enough to say that, in consonance with the principles announced in the *Euclid* case, and upon what, in the light of present day conditions, seems to be the better reason, we sustain the view put forward by the latter group of decisions, of which the following are representative: *Windsor* v. *Whitney,* 95 Conn. 357; *Matter of Wulfsohn* v. *Burden,* 241 N. Y. 288, 303; *Lincoln Trust Co.* v. *Williams Bldg. Corp.,* 229 N. Y. 313.

Eubank v. *Richmond,* 226 U. S. 137, which is petitioner's main reliance upon this point, presented an altogether different question. The ordinance there considered *required* the committee on streets to fix a building line upon the *request* of the owners of two-thirds of the property abutting on any street. The ordinance was held bad by this court (p. 143) because it left no discretion in the committee. "The action of the committee is determined by two-thirds of the property owners. In other words, part of the property owners fronting on the block determine the extent of use that other owners shall make of their lots, and against the restriction they are impotent. This we emphasize. One set of owners determine not only the extent of use but the kind of use which another set of owners may make of their property." And the court expressly declined (p. 144) to consider the power of a city to establish a building line or regulate the structure or height of buildings.

Since upon consideration we are unable to say that the ordinance under review is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare," we are bound to sustain it as constitutional. *Euclid* v. *Ambler Co., supra,* p. 395.

Judgment affirmed.

MERRITT & CHAPMAN DERRICK & WRECKING COMPANY *v.* UNITED STATES.

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

No. 214. Argued March 10, 1927.—Decided May 31, 1927.

The aid or benefit to a ship resulting incidentally and indirectly from efforts to extinguish fire on a nearby wharf, put forth for the purpose of saving property not related to her, will not sustain a claim for salvage in the absence of any request for or acceptance of the service on her behalf. P. 613.

Affirmed.

Error to a decree of the District Court dismissing the petition in a suit for salvage brought against the United States under the Tucker Act.

Mr. Dudley C. Smith, with whom *Mr. O. D. Duncan* was on the brief, for plaintiff in error.

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

MR. JUSTICE BUTLER delivered the opinion of the Court.

Plaintiff in error sued under the Tucker Act, c. 359, 24 Stat. 505, upon a claim for salvage on account of service alleged to have been rendered the Steamship Leviathan owned by the defendant in error. *United States* v. *Cornell Steamboat Co.,* 202 U. S. 184, 189. On defendant's motion the court, May 7, 1925, dismissed the petition on the ground that it fails to state a cause of action. The case is here on writ of error to that court. *J. Homer Fritch, Inc.* v. *United States,* 248 U. S. 458.

The petition alleges the following. August 24–25, 1921, at Hoboken, there was a fierce and extensive fire on

Pier 5. The Leviathan lay bow in at the south side of Pier 4. She could not be towed out. She had only a skeleton crew, and it would have required a large number to man her and many hours of preparation to get up sufficient steam and move her by means of her own engines. The fire started at half after six in the evening and was not extinguished until seven in the morning. A part of the time it covered the whole length of Pier 5, the bulkhead and adjacent houses. The wind was from the south and tended to carry the fire across the slip and onto the Leviathan. Her port side was considerably scorched, and several times fire broke out on her superstructure. Ammunition was stored in a building near the bulkhead, and the possibility of an explosion added to the danger. Plaintiff's steamers Commissioner and Chapman Brothers were powerful boats, specially built, equipped and manned for salvage and fire fighting service. The former from seven until half after nine in the evening and the latter from about seven in the evening until seven in the morning continuously fought the fire. They played heavy streams of water on the burning pier where the fire threatened the Leviathan. And, by way of conclusion, it is stated that "The service was a direct aid and benefit to the steamer Leviathan in preventing the spread of flames from Pier 5 to that vessel, and had it not been for the said service great damage to, if not total loss of, the said steamship would have resulted." Limiting the general statement by the specific, in accordance with the context, (*United States* v. *Union Pacific R. Co.*, 169 Fed. 65, 67, and cases cited) the substance of the allegation is that plaintiff in error, by preventing the spread of the fire from the pier to the Leviathan, rendered her direct aid and benefit.

There is no claim that the Leviathan, or any one in her behalf, requested or accepted assistance from plaintiff in

error, or that its fireboats played any water on that vessel or did anything to extinguish fire thereon or to give her any assistance other than that involved in fighting the fire on and about Pier 5. The distance between the Leviathan and that fire is not stated, and there is nothing to indicate that she did not have adequate protection from other sources. Indeed, the circumstances disclosed by the petition rather tend to show that she did not need any assistance from plaintiff in error.

While salvage cannot be exacted for assistance forced upon a ship (*The Bolivar* v. *The Chalmette,* 1 Woods C. C. 397), her request for or express acceptance of the service is not always essential to the validity of the claim. It is enough if under the circumstances any prudent man would have accepted. *The Annapolis,* (In the Privy Council), Lushington 355, 375. Plaintiff in error claims as a volunteer salvor going at his own risk to the assistance of the ship on the chance of reward in case of success, and not as one employed rendering service for pay according to his effort or the terms of his contract. *The Sabine,* 101 U. S. 384, 390. It did not communicate with or enter into the service of the Leviathan. Its fireboats did not put water upon her. The fires that started on her were put out by other means. All effort of plaintiff in error was put forth directly for the purpose of extinguishing fire at and about Pier 5 and to save property not at all related to the Leviathan. The elimination of that fire contributed mediately to her safety. But, whatever the aid or benefit resulting to her, it was incidental and indirect for which, in the absence of request for or acceptance of the service, a claim for salvage cannot be sustained. *The Annapolis, supra; The City of Atlanta,* 56 Fed. 252, 254; *The San Cristobal,* 215 Fed. 615; 230 Fed. 599.

Judgment affirmed.

STEWART & COMPANY *v.* RIVARA.

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

No. 290. Argued April 22, 1927.—Decided May 31, 1927.

Section 65 of the New York Personal Property Law, provides that, whenever articles sold on condition that the title shall remain in the vendor until payment of the price are retaken by the vendor, they shall be retained for thirty days during which the vendee may comply with the contract and recover the property; that after expiration of that period, if the contract is not complied with, the vendor may cause the articles to be sold at public auction; and that, unless sold within thirty days after expiration of such period, the vendee may receive the amount paid on the articles under the contract. *Held,* as applied to a vessel documented as a vessel of the United States and enrolled for the coastwise trade:

1. The state law does not interfere with the use of such vessels as instrumentalities of interstate commerce. P. 617.

2. In a suit by a vendee against a vendor to recover the amount paid on account of purchase price, the question whether the statute might conflict with enforcement of maritime liens of third parties in the federal admiralty jurisdiction, is not involved. P. 618.

3. The statute does not conflict with the federal Recording and Enrollment Acts, Rev. Stats. §§ 4192, 4311. P. 618.

4. The regulation is valid as applied to enrolled vessels engaged in interstate commerce, in the absence of legislation by Congress in respect of the matter. P. 618.

241 N. Y. 259, affirmed.

ERROR to a judgment of the Supreme Court of New York entered after affirmance by the Court of Appeals, awarding recovery to Rivara in a suit under the New York Personal Property Law for the amount paid by him on account of the price of a vessel which he had bought from the Stewart Company upon conditional sale and which the vendor retook when the vendee defaulted. See also 214 App. Div. 737.

Messrs. John M. Woolsey and *Harrington Putnam,* with whom *Mr. L. deGrove Potter* was on the brief, for plaintiff in error.

Mr. James M. Gorman, with whom *Mr. Pierre M. Brown* was on the brief, for defendant in error.

MR. JUSTICE BUTLER delivered the opinion of the Court.

April 17, 1919, the company made a contract to sell Rivara a tugboat. The vessel had been documented by the company in the Custom House in New York as a vessel of the United States and was enrolled for coasting voyages between ports of the United States. It was operated in interstate and intrastate commerce. The purchase price was to be paid in installments, and title was not to pass until all was paid. When the contract was made, the buyer paid part and the seller delivered the tug to him. The contract provided that in case of default the seller might take possession of the tug and that all payments on the purchase price should be applied solely as rental. The buyer agreed, pending the fulfillment of the contract, properly to maintain the tug, to keep it free from libels and to pay for insurance. After making some additional payments on the purchase price, the buyer defaulted. The seller instituted proceedings in admiralty for possession; and, pursuant to a decree dated April 7, 1921, obtained the tug subject to any rights or accountability which it might be under by reason of the New York Sales Act or any other law. In January, 1922, the buyer brought this action to recover the amount paid on the purchase price. The basis of his claim was that, although he did not comply with the contract or make good his default, the seller failed to sell the tug, or to give notice of sale, in accordance with §§ 65 and 66 of the Personal Property Law of New York. The seller answered that the state law did not apply to vessels documented in accordance with federal law and set up counterclaims for amounts paid by it to or for the buyer. The case was tried without a jury; the court found the amount of the buyer's payments with interest, the rental

value of the tug and the amount paid by the seller for maintenance and insurance. It held that the conditional sale was subject to the state law; that the seller was not entitled to credit for the rental value, and gave the buyer judgment for the amount of his payments with interest less the sums paid by the seller. The judgment was affirmed in the Appellate Division, 214 App. Div. 737, and in the Court of Appeals. 241 N. Y. 259.

Plaintiff in error contended in the Court of Appeals and here insists that, as applied in this case, § 65 interferes with interstate commerce because it requires the vessel to be withdrawn from service for more than thirty days, and infringes the exclusive admiralty jurisdiction of the United States because during the same period it conflicts with the enforcement of maritime liens; that, by the Enrollment Act, R. S. § 4311, and the Recording Act, § 4192, Congress created a form of property known as "vessels of the United States," and brought such property within its exclusive jurisdiction under the commerce clause; and that the state law conflicts with the Acts of Congress and therefore cannot be given effect.

The contract was made before the passage of the Jones Act, approved June 5, 1920, c. 250, 41 Stat. 988, 1000. Section 4311, Revised Statutes, provides that vessels of twenty tons or upward enrolled in pursuance of this title [L] and having licenses in force as required by this title shall be deemed vessels of the United States, entitled to the benefits and privileges appertaining to such vessels employed in the coasting trade.[1] And § 4192 provides that no bill of sale, mortgage, hypothecation, or conveyance of any vessel of the United States shall be valid against any persons, other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice

[1] Act of February 18, 1793, c. 8, § 1, 1 Stat. 305; U. S. C. Tit. 46, § 251.

thereof, unless recorded in the office of the collector of the customs where such vessel is registered or enrolled.[2]

Article 4 of the New York Personal Property Law regulates contracts for conditional sale of goods and chattels. Section 65 relates to the sale of property retaken by the conditional vendor. It provides that whenever articles sold on the condition that the title shall remain in the vendor until payment of the purchase price, are retaken by the vendor, they shall be retained for thirty days during which the vendee may comply with the contract and receive the property; that after the expiration of that period, if the contract is not complied with, the vendor may cause the articles to be sold at public auction, and that, unless they are so sold within thirty days after the expiration of such period, the vendee may recover the amount paid on such articles under the contract. The Court of Appeals held that § 65 applies to the enrolled tugboat; and, unless that construction brings the state law into conflict with the Constitution or Acts of Congress, it will be followed by this Court.

Clearly there is nothing in the state law to interfere with the use of such vessels as instrumentalities of interstate commerce. Its enforcement does not require that the tugboat be withdrawn from service after retaking by the conditional vendor; and the change of possession would not necessarily interfere with its use in interstate commerce. And, if interpreted to require the vessel to be withdrawn from service for a time, the law would not for that reason be invalid. *Martin* v. *West,* 222 U. S. 191, 197, 198; *Davis* v. *C. C. C. & St. L. Ry.,* 217 U. S. 157, 174, *et seq.; The Winnebago,* 205 U. S. 354, 362; *Johnson* v. *Chicago and Pacific Elevator Co.,* 119 U. S. 388, 400.

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[2] Act of July 29, 1850, c. 27, § 1, 9 Stat. 440. See also Merchant Marine Act, June 5, 1920, c. 250, § 30 C (a) and (x), 41 Stat. 988, 1000, 1006; Home Port Act, February 16, 1925, c. 235, § 2, 43 Stat. 948; U. S. C. Tit. 46, § 1012.

Counsel for plaintiff in error argues that, during the period which the state law requires property retaken to be retained, persons having claims against such vessels for supplies, salvage, wages of seamen and the like cannot proceed *in rem* to enforce their maritime liens. But the controversy in this case is exclusively between the buyer and seller. No third person is here asserting rights as a purchaser or as a maritime lien claimant. And we need not consider what effect, if any, enforcement of the provisions of § 65 would have in a case where such rights are in issue. *Goreib* v. *Fox. et al., ante,* p. 603.

The Recording Act was passed to furnish information as to title and to protect bona fide purchasers. *White's Bank* v. *Smith,* 7 Wall. 646, 655. The Act expressly declares that it does not affect the title to vessels as between the parties to the transactions to which it applies. Congress has not undertaken to regulate contracts for conditional sales of vessels or other property used to carry on interstate commerce. It has not entered the field occupied by the state law in question. The purpose of the enrollment of vessels is to give to them the privileges of American vessels as well as the protection of our flag. There is no foundation for the contention earnestly urged by plaintiff in error that Congress by these Acts created "a new form of property known as vessels of the United States" or that enrolled vessels are "nationalized or federalized" in respect of conditional sale contracts such as the one here involved. The enrollment of such vessels is not inconsistent with the application of the state law. Its provisions are not directed against interstate commerce or any regulations concerning it. As interpreted and applied by the state court, it merely regulates contracts for conditional sale of an enrolled vessel used in interstate commerce. In the absence of legislation by Congress in respect of the matter, the

power of the State to enforce such a law cannot be doubted. *Sherlock* v. *Alling,* 93 U. S. 99, 104; *Bulkley* v. *Honold,* 19 How. 390; *The Winnebago, supra,* 362; *Smith* v. *Maryland,* 18 How. 71, 74, 75; *City of New York* v. *Independent Steam-Boat Co.,* 22 Fed. 801, 802.

Judgment affirmed.

FEDERAL TRADE COMMISSION *v.* EASTMAN KODAK COMPANY ET AL.

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

No. 215. Argued March 10, 11, 1927.—Decided May 31, 1927.

1. The Federal Trade Commission can exercise only the administrative functions delegated to it by statute, not judicial power; and the Circuit Court of Appeals, on a petition for review, may not sustain or award relief beyond the authority of the Commission. P. 623.
2. The Commission has no authority, under § 5 of the Federal Trade Commission Act, to require a corporation to divest itself of physical property which it acquired prior to any action by the Commission, even though the acquisition and retention of the property were part of, or a step in, an unfair method of competition. P. 624.

7 F. (2d) 994, affirmed.

CERTIORARI (269 U. S. 546) to a decree of the Circuit Court of Appeals which set aside in part an order of the Federal Trade Commission, in a proceeding under § 5 of the Federal Trade Commission Act against the Eastman Kodak Company, the Allied Laboratories Association, and other parties. The order required them to desist from acts held by the Commission to constitute unfair methods of competition in the manufacture and sale of positive cinematograph films in interstate and foreign commerce. The decree below set it aside in so far as it required the Eastman Company to sell certain laboratories.

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

Mr. John W. Davis, with whom *Messrs. Clarence P. Moser* and *Harold G. Hathaway* were on the brief, for respondents.

Mr. Justice Sanford delivered the opinion of the Court.

This writ brings up for review a decree of the Circuit Court of Appeals setting aside in part an order of the Federal Trade Commission, entered after a due hearing in a proceeding instituted by it under § 5 of the Federal Trade Commission Act,[1] by which the Eastman Kodak Company, the Allied Laboratories Association, Inc., and others were required to desist from acts held by the Commission to constitute unfair methods of competition in the manufacture and sale of positive cinematograph films in interstate and foreign commerce.

These positive films are raw materials used by film laboratories in making positive prints of motion pictures that are thrown upon the screen. The Eastman Company originated the commercial manufacture of such films many years ago. In 1920 it manufactured and sold 94 per cent. of those used in the United States; but in 1921, owing to competition by importers of films manufactured in foreign countries, its sales decreased to 81 per cent. Upon an agreed statement of facts, and the inferences which it drew therefrom, the Commission found, in effect, that thereafter the Eastman Company, with the purpose and intent of maintaining its monopoly and lessening competition in the sale of such films, acquired three laboratories used in making motion picture prints, whose combined capacity exceeded that of all the other laboratories

[1] 38 Stat. 717, c. 311; U. S. C., Tit. 15, § 45.

east of Chicago, and announced its intention of entering upon the manufacture of such prints; that this constituted an effective threat of overpowering competitive force which compelled the members of the Allied Laboratories—an association of manufacturers of such prints—to enter into an agreement or understanding with the Eastman Company that the members of the Allied Laboratories would use American-made films only, to the exclusion of foreign-made films, so long as the Company did not compete with them in manufacturing prints, and that the company—which continued to maintain its laboratories in readiness for operation—would not manufacture prints in competition with them so long as they used American-made films exclusively; that this agreement or understanding had the effect of lessening competition in the sale of the films in interstate and foreign commerce and sustaining the monopoly of the Company therein; and that its ownership of the three laboratories and their maintenance in condition for operation, continued to have the effect of inducing and compelling the manufacturers of prints to use only the films made by the Company.

On these and subsidiary findings, the Commission entered an order requiring the defendants to cease and desist from combining and coöperating in restraining competition in the manufacture and sale of positive films and maintaining the monopoly of the Eastman Company in their sale in interstate and foreign commerce, by the agreement and understanding that the members of the Allied Laboratories would use American-made films exclusively, provided the Company would not operate its laboratories in competition with them, and that the Company would not operate its laboratories for the manufacture of prints in competition with them, provided they used and continued to use American-made films exclusively; and by other incidental means. And the Com-

mission further ordered that for the purpose of preventing the maintenance of the monopoly of the Eastman Company in the manufacture and sale of positive films and restoring competitive freedom in their distribution and sale, the Company should with due diligence sell and convey its three laboratories to parties not directly connected, or indirectly interested, with it.

On a petition by the Eastman Company and the Allied Laboratories for a review of this order, the Circuit Court of Appeals—without referring specifically to the purpose for which the Eastman Company acquired and maintained the three laboratories—held, in substance, that the reciprocal agreement or understanding between the Eastman Company and the Allied Laboratories that their members would use only American-made films in the manufacture of prints, and the Company would not operate its laboratories for the manufacture of prints, was an unfair method of competition which the Commission had authority to prevent; but that—one judge dissenting—it was not unlawful for the Eastman Company to equip itself to enter upon the business of manufacturing prints, there being nothing unfair in its going into this business, and the Commission had no authority to order the Company to divest itself of the laboratories which it had lawfully acquired. 7 Fed. (2d) 994. A decree was accordingly entered affirming the order of the Commission in so far as it required the Eastman Company and the Allied Laboratories to desist from their agreement or understanding in reference to the use of American-made films and the operation of the Eastman Company's laboratories, but setting aside the order in so far as it required the Eastman Company to sell its laboratories, and in other incidental respects.

This writ of certiorari was then granted on a petition by the Commission which challenged the correctness of the decree of the Court of Appeals only in respect to the

setting aside of so much of the order as required the Eastman Company to dispose of its laboratories.

For present purposes we do not find it necessary to determine the questions whether the finding of the Commission as to the purpose for which the Eastman Company acquired the three laboratories—based in part at least upon inferences from the agreed statement of facts—was correct, and whether, in any event, it was conclusive upon the Court of Appeals; but, in the absence of any specific reference to this matter by the Court of Appeals, we shall assume the correctness of the Commission's finding, and proceed, on that assumption, to the consideration of the only other question presented in the petition for the writ of certiorari and pressed in this Court, namely, whether the Commission had authority to order the Eastman Company to sell and convey its laboratories to other parties.

The proceeding before the Commission was instituted under § 5 of the Federal Trade Commission Act, and its authority did not go beyond the provisions of that section. By these the Commission is empowered to prevent the using of "unfair methods of competition" in interstate and foreign commerce, and, if it finds that "any unfair method of competition" is being used, to issue an order requiring the offender "to cease and desist from using such method of competition." The Commission exercises only the administrative functions delegated to it by the Act, not judicial powers. *National Harness, etc. Association* v. *Federal Trade Commission* (C. C. A.), 268 Fed. 705, 707; *Chamber of Commerce* v. *Federal Trade Commission* (C. C. A.), 280 Fed. 45, 48. It has not been delegated the authority of a court of equity. And a Circuit Court of Appeals on a petition to review its order is limited to the question whether or not it has properly exercised the administrative authority given it by the Act, and may not sustain or award relief beyond

the authority of the Commission; such review being appellate and revisory merely, and not an exercise of original jurisdiction by the court itself.

The question here presented is in effect ruled by *Federal Trade Commission* v. *Western Meat Co.*, 272 U. S. 554, 561, 563, in which the decisions in *Federal Trade Commission* v. *Thatcher Mfg. Co.* (C. C. A.), 5 F. (2d) 615, and *Swift & Co.* v. *Federal Trade Commission* (C. C. A.), 8 F. (2d) 595, that were relied upon by the Commission in its petition for the writ of certiorari, were reversed by this Court. In that case it was held that—although the Commission, having been granted specific authority by § 11 of the Clayton Act [2] to require a corporation that had acquired the stock of a competitive corporation in violation of law "to cease and desist from such violations, and divest itself of the stock held," might require the corporation to divest itself of such stock in a manner preventing its use for the purpose of securing the competitor's property—it could not, after the corporation by the use of such stock had acquired the property of the competitor, require it to divest itself of the property thus acquired so as to restore the prior lawful condition. As to this we said: "The Act has no application to ownership of a competitor's property and business obtained prior to any action by the Commission, even though this was brought about through stock unlawfully held. The purpose of the Act was to prevent continued holding of stock and the peculiar evils incident thereto. If purchase of property has produced an unlawful status a remedy is provided through the courts." And they "must administer whatever remedy there may be in such situation." Distinct reference was there made (p. 561) to § 15 of the Clayton Act, where express provision is made for the invocation of judicial remedies as need therefore may arise.

[2] 38 Stat. 730, c. 311; U. S. C., Tit. 15, § 21.

So here, the Commission had no authority to require that the Company divest itself of the ownership of the laboratories which it had acquired prior to any action by the Commission. If the ownership or maintenance of these laboratories has produced any unlawful status, the remedy must be administered by the courts in appropriate proceedings therein instituted.

The decree of the Circuit Court of Appeals is accordingly

Affirmed.

MR. JUSTICE STONE, dissenting.

I am unable to agree that the Federal Trade Commission, in the performance of its duties under the Federal Trade Commission Act, lacks the power to order the divestment of physical property, or that the decision in *Federal Trade Commission* v. *Western Meat Company,* 272 U. S. 554, forecloses our consideration of that question here. In the *Thatcher* and *Swift* cases considered in that opinion, the stock of competing corporations had been acquired in violation of § 7 of the Clayton Act, which prohibits the acquisition by one corporation of the capital stock of another " where the effect of such acquisition may be to substantially lessen competition." The stock control having been followed by purchase of the physical assets of the competing corporations, the Commission, proceeding under §§ 7 and 11, ordered the offending corporations to divest themselves of both the stock and the physical property. In deciding that the Commission had exceeded its authority, so far as the property was concerned, the Court expressly limited its consideration to the grant of power under §§ 7 and 11 of the Clayton Act, § 11 in terms authorizing the Commission to make an order " requiring such person to cease and desist from such violations, and divest itself of the stock held . . . contrary to the provisions of section 7 . . ."

The effect of § 5 of the Federal Trade Commission Act, dealing with the different subject of unfair competition, was put to one side, the Court saying: "This section (referring to § 5) is not presently important; the challenged orders sought to enforce obedience to § 7 of the Clayton Act." (p. 557.) The scope of the decision was thus stated: "When the Commission institutes a proceeding based upon the holding of stock contrary to § 7 of the Clayton Act, its power is limited by § 11 to an order requiring the guilty person to cease and desist from such violation, effectually to divest itself of the stock, and to make no further use of it." (p. 561.)

It was not held that the Commission under no circumstances could compel the sale of physical property, and there was in fact a clear intimation in the opinion that under § 7 of the Clayton Act the acquisition of the property after a complaint had been filed against the corporation for illegal stock purchases would not find the Commission powerless.

Section 5 of the Trade Commission Act, with which we are now concerned, declares unlawful "unfair methods of competition in commerce," and empowers and directs the Commission to prevent the use of such methods. The Commission is directed upon finding that the method of competition under investigation is prohibited by the Act, to issue its order "requiring such person, partnership or corporation to cease and desist from using such method of competition."

The powers thus broadly given sharply contrast with the specific enumeration of §§ 7 and 11 of the Clayton Act. As was pointed out in the *Western Meat Co.* case, the Clayton Act prohibits only the acquisition of stock and not the assets of the competing corporation, and in terms merely authorizes an order requiring the corporation "to cease and desist from such violations, and divest itself of the stock held. . . ." For that reason alone,

the majority of the Court thought that the language of these provisions was not broad enough to enable the Commission to order the corporation to divest itself of the physical assets thus acquired, although their acquisition aggravated and brought to its final consummation the very evil aimed at by the statute.

The comprehensive language of § 5 neither invites nor supports a narrow construction. It is general in terms, and in the authorized prevention of unfair methods of competition the Commission is not limited to any particular method of making its orders effective. The power does not any the less exist because the Commission framed the present order in part in affirmative terms specifying the manner in which the company should abandon the unfair method of competition it found had been practiced. Nor does the fact that the Commission is not a court of equity lessen the power conferred upon it by the statute. It is of course essentially an administrative agency. Its orders never have the effect of an injunction and are enforcible only by proceedings instituted in the appropriate circuit court of appeals. Its powers are not enhanced by the circumstance that its orders are enforcible in courts having in their own right equity powers. But it is likewise true that it cannot be denied powers granted by Congress merely because its orders resemble in form familiar equitable decrees. To make its want of equity powers ground for limiting those expressly conferred by the statute is to condemn all the orders ever made by the Commission. Orders compelling the sale of stock, preventing price cutting, local price discrimination, resale price maintenance, exclusive dealing arrangements, boycotting, blacklisting, disparagement of competitor's wares, misrepresentation, misbranding, adulteration, dishonest advertising, espionage, commercial bribery, coercion, threats, intimidation, the use of "fighting brands" or bogus independents, to mention

only a few of the practices which the Commission has forbidden, remind of equitable relief no less than an order compelling the sale of physical property, the very acquisition and continued possession of which may be the indispensable element in a scheme of unfair competition.

The conclusion seems to me unavoidable, therefore, that this case cannot be disposed of without determining whether the acquisition and retention of the film laboratories by the Eastman Company, under the circumstances disclosed by the record, constituted in itself or was a part of or a step in an unfair method of competition. Until that is determined we cannot say that the Commission was without power under § 5 to make any appropriate order to prevent the use of such methods.

That ruinous competition, or the threat of it, when the aim is monopoly or the suppression of competition, may be the dominant factor in a violation of the Sherman Act is no longer fairly open to question. But, in determining the meaning of "unfair methods of competition," it should be borne in mind that the Trade Commission's function is to discourage certain trade tendencies before violations of the Sherman Act have occurred. The advised use of the phrase "unfair methods of competition" for the more familiar "unfair competition" of the common law indicates an unmistakable Congressional intent to confer on the Commission the power, subject of course to the judicial review provided for in the Act, to prevent unfair trade practices not included in the prohibition of the Sherman Act and of the common law. See Henderson, Federal Trade Commission, 36; cf. *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U. S. 483.

In that part of its order which now remains undisturbed, and which is not questioned here, the Commission has found and forbidden the agreement between the Eastman Company and the Association that the members of the Association would use American raw film, of which

it appears ninety-four per cent. of that used in the United States is produced by the Eastman Company, to the exclusion of foreign-manufactured film, provided the Eastman Company would not operate its laboratories commercially to produce positive prints in competition with the members of the Association.

The majority, not having found it necessary to consider whether the stipulated facts established unfair methods of competition because of the Commission's supposed want of power, any extended review of them here is uncalled for. But the evidence is sufficient to justify the inference drawn by the Commission that suppression of competition in the sale of foreign films, consummated by this agreement, was accomplished in part at least by the acquisition and retention of these laboratories as a constant and imminent threat to members of the Association of competition in the business field they occupy.

Superficial examination might suggest that the respondent's course of conduct involves nothing more than the innocuous process of extending its business to include an allied trade, but the matter may not be thus lightly disposed of. We may lay aside the question whether one already possessing monopoly powers in one field, especially where as here there is no available substitute for his products, may make use of his strategic position to dominate all phases of the industry from production to consumption. For here it seems fairly inferable from the stipulated facts that there was no intention of permanent expansion. The Eastman Company threatened to engage in temporary competition with the manufacturers of prints in order to attain its objective—the suppression of foreign competition in raw film. When that was attained, the laboratories were allowed to remain idle, and the assumed advantages to the public from permanent competition were lacking. I have no difficulty in concluding that this threat of temporary competition was unfair to the Eastman Company's purchasers and to its

foreign competitors, and was an unfair method of competition within the meaning of § 5. Compare *Tuttle* v. *Buck,* 107 Minn. 145; *Dunshee* v. *Standard Oil Co.,* 152 Ia. 618, 626–627; *United States* v. *Corn Products Refining Co.,* 234 Fed. 964, 984, 1010; *United States* v. *Central West Publishing Co.,* Decrees and Judgments in Federal Anti-Trust Cases, 359, 360, 362; *Thomsen* v. *Cayser,* 243 U. S. 66, 87; for cases which, although not exactly in point, lend support to this view.

It would seem that that part of the order which still stands, forbidding the agreement for the suppression of competition, is futile if the Eastman Company may retain the laboratories as a threat to compel the manufacturers of prints to do that which they could not lawfully agree to do. In my view, the decree below should be reversed and the order of the Commission upheld.

MR. JUSTICE BRANDEIS joins in this dissent.

PORTNEUF-MARSH VALLEY CANAL COMPANY *v.* BROWN ET AL., TRUSTEES.

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

No. 252. Argued March 18, 1927.—Decided May 31, 1927.

1. The Act of Congress known as the Carey Act, as amended, which declares that liens are authorized to be created by a State on lands granted it by the Act, and when created shall be valid on the separate legal divisions reclaimed, for the actual cost and necessary expenses of reclamation, etc., is an enabling act empowering the State to provide for liens by appropriate legislation. P. 637.
2. The construction of state statutes providing for such liens, and the status of liens created under them, are local questions which, in the absence of controlling authority from the highest court of the State, this court must decide for itself. P. 637.
3. The plan of a Carey Act project contained provisions, effective simultaneously on allotment of land to any purchaser of water

rights, whereby shares to be issued to him in an operating company, and representing such rights, should become subject to a lien in favor of the company constructing the works and providing the water supply, as security for deferred payments on the water rights, and also to a lien, in favor of the operating company, for maintenance and operation charges. The first lien was to attach on allotment of his land; the second necessarily later when water was furnished on it.

Held that the priority of the liens *inter sese*, in the absence of any specific provision defining it, was to be resolved, not by priority of time merely, but by examination of the entire plan for establishing the irrigation system, in the light of applicable statutes. P. 636.

4. Under § 3019, Comp. Stats. of Idaho, 1919, a company furnishing water for a Carey Act project by constructing an irrigation system and selling water rights, is entitled to a lien for deferred payments on such rights, superior to liens of an operating company for subsequent maintenance and operation charges. P. 638.

5 F. (2d) 895, affirmed.

CERTIORARI (270 U. S. 637) to a decree of the Circuit Court of Appeals, which reversed one by the District Court, in a foreclosure proceeding, (299 Fed. 338), adjudging that the above-named petitioner, a company operating the irrigation system of a Carey Act project, was entitled to a lien on certain of its shares, as security for maintenance charges, prior to the lien set up by the respondents, trustees for bondholders of the company that constructed the system.

Mr. T. C. Coffin, with whom *Messrs. D. C. McDougall, I. E. McDougall, H. O. McDougall,* and *J. H. Peterson* were on the brief, for petitioners.

Mr. Edwin Snow, with whom *Messrs. John A. Marshall, W. Rodman Peabody,* and *Howard W. Brown* were on the brief, for respondents.

MR. JUSTICE STONE delivered the opinion of the Court.

The question presented by this record is one of priority of liens upon shares of stock representing water rights in an irrigation project organized and created under the Act of Congress known as the Carey Act, August 18, 1894, c. 301, § 4, 28 Stat. 372, 422, as amended June 11, 1896, c. 420, 29 Stat. 413, 434, and under concurrent legislation of the State of Idaho, title 26, c. 136, § 2996, *et seq.* The present suit was begun in the district court for Idaho by respondents, citizens of Massachusetts, for the foreclosure of a deed of trust, of which they are trustees. The defendants are two Idaho corporations, the Portneuf-Marsh Valley Irrigation Company and the Portneuf-Marsh Valley Canal Company, the petitioner here, referred to respectively in this opinion as the construction company and the operating company. The district court entered a decree for the defendants on the issues now presented, 299 Fed. 338, which was reversed by the court of appeals for the ninth circuit. 5 Fed. (2d) 895. This Court granted certiorari. 270 U. S. 637.

Proceeding under the applicable legislation, the construction company entered into a contract, on June 3, 1908, with the State of Idaho, for the construction of an irrigation system to supply water to certain arid lands within the State, set apart for that purpose by the federal government under the provisions of the Carey Act. The contract provided that the construction company should sell water rights in the irrigation system to such settlers as should receive from the state allotments of the designated lands, and fixed maximum rates and terms of sale. A water right was defined as the right to receive sufficient water from the system to irrigate one acre of land, and represented a proportionate interest in the irrigation works. The contract contemplated vesting the control of the irrigation system in the settlers through the me-

dium of an operating company, to be organized by the construction company as soon as the lands were thrown open to settlement. It provided that the operating company should issue one share of stock for each water right sold to settlers, and that the remainder should be issued to the construction company pending further sale of water rights, and that the irrigation system when completed should be transferred to the operating company in return for its capital stock so issued. The contract stipulated also that the interest of the construction company in the irrigation system and the lands within the project might be mortgaged in accordance with the Carey Act and the statutes of Idaho, and these laws were specifically made a part of the contract.

Pursuant to the statutes and the contract with the state, the construction company sold water rights to settlers, undertaking to deliver to them a like number of shares of stock in the operating company. The purchasers agreed that their interest in the lands to be acquired from the state, to which the water rights were to be appurtenant, and the shares of stock, should be security for the deferred installment payments; and default in payment of any installment was to accelerate the maturity of the purchase price. Appropriate mortgages and assigments, to be first liens upon the land, were to be given for that purpose. The agreement also provided that the operating company should have power to levy all necessary tolls, charges, and assessments, which the purchasers of the water rights, represented by the stock, agreed to pay, and that the contracts for the sale of water rights might be assigned by the construction company.

To finance the project, the construction company authorized a bond issue secured by the present mortgage of the irrigation system then being constructed. The deed provided that until default the construction company might sell water rights to entrymen, and required

that, before bonds were issued, the construction company deposit with the trustees as further security the contracts for the sale of water rights, as described, and other security obtained from the purchasers.

In compliance with the statutes and contracts, steps necessary to launch the system were taken. Water rights were sold, the designated lands were allotted to entrymen, their contracts of purchase were pledged by the construction company under its mortgage, and the irrigation system was conveyed to the operating company, subject to the mortgage.

The project did not flourish. Some of the settlers having failed to make payment of installments due on the contracts of purchase, respondents acquired their land, water rights, and stock, in some cases by foreclosure and in others by quit-claim deeds. The construction company defaulted in payment of interest on its bonds. The present suit was brought by respondents to foreclose the mortgage on the irrigation system and to foreclose any claims that the two companies might make to the land, water rights, and stock acquired by respondents in the enforcement of their rights against the entrymen under the contracts of purchase. The construction company, being insolvent, made no defense, and the case was disposed of below on the theory that the trustees, as against the operating company, so far as the water rights and stock were concerned, stood in the position of the construction company. The operating company, as a defense, set up by answer its ownership of some of the stock in controversy, acquired under a lien alleged to be superior to that of respondents. This contention was based upon the following facts.

The certificate of incorporation of the operating company authorizes it to levy and collect tolls, charges, and assessments to defray the expense of maintenance and operation of the irrigation system, and its by-laws, con-

cededly in accordance with the contracts and applicable statutes, require the certificates of stock to describe the lands to which the shares and water rights relate, and declare that they shall be appurtenant to such lands, unless forfeited for nonpayment of assessments. In the event of default in payment of assessments by stockholders, the operating company under local statutes may sell the stock at public auction. In the case of the stock in question the assessments had not been paid by the entrymen. The stock was sold at public auction, the operating company becoming the purchaser.

By stipulation the decree of foreclosure was limited to the stock in the operating company, acquired by it in the manner already described, and as to that stock the decree gave priority to the maintenance liens.

It will be observed that out of the complicated transactions by which the irrigation system was created and made appurtenant to lands set apart by the government for that purpose, two distinct classes of liens were created with respect to the stock and water rights, in addition to the general mortgage lien on the irrigation system as a whole. There were (a) the liens for maintenance and operating charges in favor of the operating company, created under its charter and by-laws by the acquisition and acceptance of its stock by the several purchasers and their failure to pay assessments; (b) the purchase money liens in favor of the construction company on the stock and water rights and on the entrymen's land, created by the sales contracts which had been pledged to respondents.

The charter and by-laws of the operating company provided that the construction company should not be liable for assessments for the expense of maintenance and operation while it held the stock before sale. As no charges could be levied upon the purchasers of the water rights to whom the construction company delivered the

equivalent shares of stock until they received allotments of land, and as the acquisition of the water rights and stock in the operating company by purchasers was conditioned upon their receiving allotments of land, it is apparent that the provisions for maintenance liens in favor of the operating company and the lien stipulations in the sales contracts became effective simultaneously on the allotment of lands to purchasers of water rights. But as the liens for maintenance came into existence only with the furnishing of water to allottees after they had acquired their land, those liens were subsequent in point of time to the purchase money liens which attached as soon as the lands were acquired.

Usually liens which are prior in time are prior in equity, but where as here each is stipulated for in contemplation of the creation of the other, the question of priority must be resolved by ascertaining the true meaning and effect of the stipulations themselves. And as the documents here contain no specific provision giving preference to the one class of liens or the other, the question of priority now presented must be resolved by an examination of the entire plan for establishing the irrigation system, in the light of the applicable statutes.

Legislation permitting, a scheme for the creation of such a system might undoubtedly provide that liens for maintenance should take precedence over a general mortgage given to finance its construction. Such is the recognized order of priority in admiralty and to a more limited extent in receiverships in equity and in foreclosure proceedings. The trial court stated persuasively the contentions made here that hardship to individuals and danger to the unity and continuity of the system in event of foreclosure, if maintenance charges are not thus given the preference, are considerations which might well turn the scales in favor of that class of liens if the stat-

utes, or the controlling documents in the absence of statutory provision, were silent or ambiguous.

But we think the statutes here are neither silent nor ambiguous. Reading together the documents embodying the plan of organization, which specifically incorporated the provisions of the statutes, the question may be resolved without exclusive reliance upon implications to be found in the general nature and purpose of the plan itself.

The Carey Act as amended declares, "a lien or liens is hereby authorized to be created by the State to which such lands are granted and by no other authority whatever, and when created shall be valid on and against the separate legal subdivisions of land reclaimed, for the actual cost and necessary expenses of reclamation and reasonable interest thereon. . . ." This statute is an enabling act, empowering the state to provide for liens by appropriate legislation. The construction of state statutes so enacted, and the status of liens created under them are local questions (*Equitable Trust Co.* v. *Cassia County,* 15 Fed. (2d) 955) which, in the absence of controlling authority by the highest court of the state, we must determine for ourselves. *Risty* v. *Chicago, R. I. & Pac. Ry.,* 270 U. S. 378. By the act of the Idaho legislature accepting the benefits of the Carey Act (§ 3019 Comp. Stat. 1919), it is provided:

"Any person, company or association, furnishing water for any tract of land, shall have a first and prior lien on said water right and land upon which said water is used, for all deferred payments for said water right; said lien to be in all respects prior to any and all other liens created or attempted to be created by the owner and possessor of said land; said lien to remain in full force and effect until the last deferred payment for the water right is fully paid and satisfied according to the terms of the contract under which said water right was acquired."

The construction company was a company furnishing water within the meaning of the section, and the liens for the deferred payments now asserted by respondents are liens in its favor, authorized by the statute and reserved by its contracts with the purchasers. But it is argued, notwithstanding the broad language of the statute, that its application is limited by the second clause: "said lien to be in all respects prior to any and all other liens created or attempted to be created by the owner and possessor of said land." It is insisted, as the district court held, that by reason of this clause the liens to secure deferred payments do not take priority over the liens for maintenance because the latter are not liens created by the land owners, which alone are subordinated to the purchase contract liens.

But we think the quoted clause cannot be thus narrowly construed. It is not in terms a limitation on the general language of the section but an amplification of it. Its apparent purpose is to make certain that entrymen, in the process of acquiring their lands and making the water rights appurtenant to them, may not by any legal device create liens which shall come ahead of the purchase contract liens given to secure the deferred payments. The clause provides that the authorized liens on the water rights and lands shall have priority over all liens created by the land owners themselves, but that is not equivalent to saying that they shall be prior to no others. It is of course an implied term of every lien statute that the lien authorized is subordinate to liens for taxes. *Continental & Commercial Trust & Savings Bank* v. *Werner,* 36 Idaho 601, 602. If the meaning here contended for were given to the statute, liens for the unpaid purchase price would be subject to subsequent materialmen's and mechanics' liens and those of attachment and levy of execution. The statute obviously

could not be so interpreted without thwarting its plain purpose and destroying its effective operation.

Its primary object was to secure the requisite capital for the creation of costly irrigation systems by which arid public lands could be brought under cultivation. It could not have been contemplated that the "first and prior" liens authorized by the statute to secure the repayment of such capital should be subsequent to every other lien which might be placed upon the property except those formally executed by the land owners or that a "first lien" of that character would attract capital into a new and hazardous enterprise. The concluding clause of the section "said lien to remain in full force and effect until the last deferred payment . . . is fully paid and satisfied," can only mean that the liens for purchase money which were first when created, remain so despite maintenance liens which may later come into operation as a result of the non-payment of assessments.

The provisions of the various instruments for establishing the irrigation system, while not explicit, are entirely consistent with the view which we take of the meaning and effect of the statute. The contract between the two companies provided in substance, as did the by-laws of the operating company specifically (Art. V, § 8) that all shares of stock "shall be held subject to the rights of" the construction company "until the amount due such Company its successors or assigns, shall have been fully . . . paid, as provided in the contract between said corporation and the purchaser of shares. . . ."

It is significant also that c. 138 of the Compiled Statutes of Idaho, which provides for the regulation of Carey Act operating companies, contains specific provisions for establishing maintenance liens on Carey Act lands to which the water rights are appurtenant, by filing a notice of lien with the county recorder, §§ 3040, 3042, a proce-

dure which does not seem to have been followed here. There are provisions for foreclosure and sale of the land with appurtenant water rights, §§ 3045, 3046. Section 3040 describes the maintenance lien as a "first and prior lien," but it is expressly provided, § 3049, that this article shall not affect "any other lien or right of lien given by the laws of this state, or otherwise," thus in terms giving the lien authorized by § 3019 priority. Section 5631 is not applicable since it does not pertain to water rights or stock.

We therefore conclude that the contract liens are superior to the maintenance liens asserted by petitioner, a conclusion which makes it unnecessary for us to consider the validity of the maintenance liens challenged by respondents.

Decree affirmed.

INDEPENDENT COAL & COKE COMPANY ET AL. *v.* UNITED STATES ET AL.

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

No. 300. Argued April 26, 1927.—Decided May 31, 1927.

1. A bill in the nature of a supplemental bill is appropriate for securing the benefits of a former decree when further relief to that end is made necessary by subsequent events. P. 647.
2. In determining the scope of such a bill and the relief that may be given upon it, the pleadings and proceedings of the earlier suit may be considered, when their nature is disclosed by the former decree and opinion, set up in the supplementary bill. P. 647.
3. One who, by fraudulent misrepresentation, induced a State to select, and the Government to convey to it, public lands of a kind not subject to such selection, and obtained the equitable title from the State; who was perpetually enjoined, in a suit by the United States, to which the State was not a party, from setting up or making any claim to the lands, by decree establishing the fraud

and declaring the United States the owner; and who subsequently, by a conveyance from the State, acquired the legal title, holds that title as a constructive trustee for the United States, even assuming that it was unassailable in the hands of the State because of the statute of limitations. P. 647.

4. Unless *bona fide,* a purchaser under a title which has been acquired by fraud takes subject to the equities of the defrauded owner. P. 649.
5. *Bona fide* purchase is an affirmative defense. P. 650.
6. Statutes of limitation against the United States are strictly construed. P. 650.
7. Whether a certification of public land is within the statute limiting suits by the United States to vacate or annul patents—not decided. P. 650.
8. Where land has been certified to and sold by a State, a suit by the United States to regain the title from the purchaser because of fraud in procuring the certification is not a suit to cancel it. P. 650.

9 F. (2d) 517, affirmed.

CERTIORARI (270 U. S. 639) to a decree of the Circuit Court of Appeals, which reversed a decree of the District Court dismissing a bill brought by the United States to impress a constructive trust on the legal title to coal lands which had been certified to the State of Utah as agricultural, and sold. It was in aid of a former suit (228 Fed. 431) in which the United States was decreed to be the owner of the equitable title, upon the ground that the certification had been procured by fraud.

Mr. Mahlon E. Wilson, with whom *Messrs. William D. Riter* and *Albert R. Barnes* were on the brief, for petitioner Independent Coal & Coke Co.

Mr. Frank K. Nebeker, with whom *Mr. Samuel A. King* was on the brief, for petitioner Carbon County Land Co.

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

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Messrs. Harvey H. Cluff, Attorney General of Utah, and *W. Halverson Farr,* Assistant Attorney General, filed a brief as *amici curiae* on behalf of the State of Utah, by special leave of Court.

Mr. Justice Stone delivered the opinion of the Court.

This is a second suit by the United States, and is in aid of the first, for the restoration to the government of some fifty-five hundred acres of public lands located in Utah, title to which was procured by a fraud perpetrated upon the land officers of the United States. The first suit, which resulted in a judgment for the government (affirmed 228 Fed. 431), was predicated upon the following circumstances.

The United States, in 1894, made a grant of public lands to the State of Utah to aid in the establishment of an agricultural college, certain schools and asylums and for other purposes. (§§ 8 and 10, Act of July 16, 1894, c. 138, 28 Stat. 107, 109, 110.) Mineral lands were not included. See *Milner* v. *United States,* 228 Fed. 431, 439; *United States* v. *Sweet,* 245 U. S. 563; *Mullan* v. *United States,* 118 U. S. 271, 276; § 2318 R. S. The grant was not of lands in place. Selections were to be made by the state with the approval of the Secretary of the Interior, from unappropriated public lands, in such manner as the legislature should provide. The legislature (Laws, Utah, 1896, c. 80) later created a board of land commissioners with general supervisory powers over the disposition of the lands and with authority to select particular lands under the grants.

During the period from December 10, 1900, to September 14, 1903, Milner and others, the predecessors in interest of the Carbon County Land Company, one of the petitioners, made several applications to the State Commission to select and obtain in the name of the state the lands now in question, and at the same time entered

into agreements with the Commission to purchase the lands from the state. In aid of the applications and agreements, Milner and his associates filed affidavits with the Commission stating that they were acquainted with the character of these lands which they affirmed were non-mineral and did not contain deposits of coal. They also deposed that the applications were not made for the purpose of fraudulently obtaining mineral holdings, but to acquire the land for agricultural use. The applicants were obviously aware that the affidavits or the information contained in them would in due course be submitted to the Land Office of the United States with the State Commission's selections, as they were in fact. On the faith of these and other documents, the selections were approved by the Secretary of the Interior and the tracts in question were certified to the state on various dates, the last being in December, 1904. Certification was the mode of passing title from the United States to the state.

In January, 1907, the United States brought the first suit, against Milner and his associates and the Carbon County Land Company, which had been organized by Milner to take over the land, and was controlled by him. The suit was founded on the charge that the certifications were procured by the fraudulent misrepresentations of Milner and the others since they knew at the time of the applications that the lands contained coal deposits. Although the bill in the present case states that the relief asked was the cancellation of the contracts between the state and Milner and his associates, this allegation is apparently inadvertent, for the record elsewhere indicates that the bill in fact sought the quieting of the government's title. It affirmatively appears that on June 8, 1914, the district court entered a decree declaring that the United States "is the owner" and "entitled to the possession" of the lands in question and that the de-

fendants "have no right, title or interest, or right of possession," and perpetually enjoining them "from setting up or making any claim to or upon said premises." The Court of Appeals, in affirming the decree, held that "the whole transaction was a scheme or conspiracy on the part of Milner to fraudulently obtain the ownership of the lands from the United States."

In bringing suit in this form without making the State of Utah a party, it is evident that the government relied on the principles announced in *Williams* v. *United States*, 138 U. S. 514. In that case it was held, on a similar state of facts, that the State of Nevada was not a necessary party to the suit and that the contract between it and its purchaser operated to vest the equitable interest in the lands in him, the legal interest being retained as security for the purchase price. This Court said:

"The State of Nevada might have intervened. It did not; doubtless, because it felt it had no real interest. It was no intentional party to any wrong upon the general government. If its agency had been used by the wrong-doer to obtain title from the general government; if, conscious of no wrong on its part, it had obtained from the general government the legal title and conveyed it away to the alleged wrong-doer, it might justly say that it had no interest in the controversy, and that it would leave to the determination of the courts the question of right between the government and the alleged wrong-doer, and conform its subsequent action to that determination. That certainly is the dignified and proper course to be pursued by a State, which is charged to have been the innocent instrumentality and agent by which a title to real estate has been wrongfully obtained from the general government." (Pp. 516–517.)

The present suit is founded on the allegation that the State of Utah, not conforming its action to the decision in the first suit, despite the decree and the findings of

fraud upon which it was based, has conveyed the legal title to the fraudulent purchasers. The bill was filed in May, 1924, against the Carbon County Land Company and the Independent Coal & Coke Company, petitioners here, and others whose interests are not now material. It sets up the equitable title or interest of the United States in the land, based upon the decree in the first suit, a copy of which, with the opinion of the circuit court of appeals in that case, it incorporated; the conveyance by patent of the state's legal interest to petitioner, the Carbon County Land Company; and explains that the Independent Coal & Coke Company was made a party as it claims an interest in a part of the lands, the full nature and extent of which is unknown to plaintiff. The relief asked is that a trust be impressed in favor of plaintiff; that defendants be ordered to convey whatever title they have, subject only to any mortgages the state may have retained in conveying the legal title; and that they be enjoined from mining coal.

The defendants separately moved to dismiss the bill on the ground that it failed to state a cause of action against any of them and that the action was barred by the Statute of Limitations, § 8, Act of March 3, 1891, c. 561, 26 Stat. 1095, 1099, limiting suits by the United States to vacate and annul patents to six years from the date of issue. The judgment of the district court dismissing the bill as barred by the statute was reversed by the court of appeals for the eighth circuit. 9 Fed. (2d) 517. This Court granted certiorari. 270 U. S. 639.

Petitioners maintain that the bill fails to allege any facts showing that the Carbon County Land Company is a trustee of the lands or bound in equity to surrender them to the government. Conceding the full force and effect of the decree in the first suit, they assert that the State of Utah was not a party to it or bound by its decree; that the title of the state, if ever open to attack by

the United States, ripened into an indefeasible title by lapse of time under the six year statute of limitations and that petitioners may clothe themselves with the protection of that title despite the decree in the earlier suit.

We may assume for the purposes of the present case, without deciding, that the state officials were not cognizant of the fraud perpetrated upon the United States and that the legal title of the state was not affected by the decree in the first suit, although the United States in an appropriate proceeding might have procured the annulment of the certification, at least within the period of limitations. Cf. *United States* v. *Sweet, supra; Mullan* v. *United States, supra.* But it does not follow that the defendants in the first suit could receive from the state the fruits of their fraud free of an equitable obligation to make restitution to the government or that the United States could not avail itself of all that was adjudged in its favor by the decree in the first suit, even if its original cause of action against the state were barred. By the contracts of purchase Milner and his associates acquired an equitable interest in the land, *Williams* v. *United States, supra.* Their interest was transferred to the Carbon County Land Company, created and controlled by them for that purpose, as a part of the fraudulent conspiracy condemned in the first suit. The decree in that suit is conclusive that the company was a party to the fraudulent scheme or conspiracy to acquire title to the public lands by using the state and its officials as agencies to procure the transfer. The decree not only established that the United States was the true and full owner of the land to the exclusion of the defendants, but perpetually enjoined them from setting up or making any claim to the lands. This and the issues of fact there resolved in favor of the United States and pleaded here, lead to the conclusion that none of the defendants, nor any claiming under them with notice, could by any legal

device, however ingenious, acquire title from the state free from the taint of their fraud.

The suit is in the nature of a supplemental bill in aid of the former decree and is an appropriate method of securing the benefit of the first decree when subsequent events have made necessary some further relief in order that the plaintiff may enjoy the full fruits of the victory in the first suit. Cf. *Root* v. *Woolworth,* 150 U. S. 401; *Shields* v. *Thomas,* 18 How. 253, 262; *Thompson* v. *Maxwell,* 95 U. S. 391; Story, Equity Pleading, 10th ed., §§ 338, 339, 345, 351(b), 353, 429, 432. Cooper, Equity Pleading, 74, 75. In determining the scope of the present bill and the relief which may be given upon it, we may consider the pleadings and proceedings in the earlier suit, the nature of which are fully disclosed in the opinion and decree in that suit, which are pleaded here.

It is ancient and familiar learning that one who fraudulently procures a conveyance may not defeat the defrauded grantor or protect himself from the consequences of his fraud by having the title conveyed to an innocent third person. Cf. *Merry* v. *Abney,* Freem. C. C. 151; *Moore* v. *Crawford,* 130 U. S. 122, 128; *Girard Co.* v. *Lamoureux,* 227 Mass. 277; *McDaniel* v. *Sprick,* 297 Mo. 424. Equity may follow the property until it reaches the hands of an innocent purchaser for value. Even then the wrongdoer may not reacquire it free of the obligation which equity imposes on one who despoils another of his property by fraud or a breach of trust. The obligation *in personam* to make restitution persists and may be enforced by compelling a return of the property itself whenever and however it comes into his hands. *Bovey* v. *Smith,* 1 Vern. 60; *Kennedy* v. *Daly,* 1 Sch. & L. 355, 379; *Williams* v. *Williams,* 118 Mich. 477; *Talbert* v. *Singleton,* 42 Cal. 390; *Schutt* v. *Large,* 6 Barb. 373, 380; *Church* v. *Ruland,* 64 Pa. St. 432, 444; *Troy City Bank* v. *Wilcox,* 24 Wis. 671; Lewin, Trusts, 12th ed., 1102.

So also, a purchaser with notice of an outstanding equity, despite a transfer to an innocent purchaser for value, may not on a later repurchase hold free of the equity. *Clark* v. *McNeal,* 114 N. Y. 287; *McDaniel* v. *Sprick, supra,* 439; *Phillis* v. *Gross,* 32 S. D. 438, 449; *Yost* v. *Critcher,* 112 Va. 870, 876; 2 Pomeroy, Equity, § 754. So here the obligation, having its inception in the fraud which was established in the first suit, has been confirmed by the decree and persists as to every interest acquired by petitioners under the contracts with the state or which may be enjoyed by them as the fruit of their fraud, even though we assume for the moment that the title acquired by them could not have been challenged while in the hands of the state.

It having been adjudicated that the government is the true owner of whatever rights the Land Company acquired under the earlier contracts with the state, the decree must be deemed either to have transferred those rights to the government or to have determined that the government is equitably entitled to have them so transferred. If the former, the government may assert the rights under the contract against the Land Company, as holder of the legal title, as it might against any other purchaser of the land from the state with notice. *Bird* v. *Hall,* 30 Mich. 374. If the latter, the Land Company could not acquire the lands even through a new and independent contract without a surrender of such rights as it had under the earlier contracts; and it could not make the surrender effective against the United States, the real owner, without its assent, unless the state stood in the position of a purchaser for value without notice. To these rights the government is equitably entitled, and hence may at its election claim the benefit of their proceeds in the hands of the Land Company. Cf. *United States* v. *Dunn,* 268 U. S. 121; *Taylor* v. *Kelly,* 56 N. C. 240; *Haughwout & Pomeroy* v. *Murphy,* 22 N. J. Eq., 531, 547.

Even if the title acquired were through a new and independent contract and even though it were not in a strict sense proceeds of the earlier contracts, the relation of the Land Company and its equitable obligation to the government, and its duty under the decree in the first suit, are such as to preclude the acquisition of any outstanding interest in the land in violation of the decree, free of that obligation and duty. Cf. *Keech* v. *Sandford,* Sel. Cas. *61; *Lurie* v. *Pinanski,* 215 Mass. 229; *Anderson* v. *Lemon,* 8 N. Y. 236; *Holridge* v. *Gillespie,* 2 Johnson's Ch. 30; *Griffith* v. *Owen,* L. R. [1907] 1 Ch. 195; *Phillips* v. *Phillips,* L. R. 29 Ch. Div. 673; but cf. *Bevan* v. *Webb,* L. R. [1905] 1 Ch. 620; and see also, *Fair* v. *Brown,* 40 Ia. 209; *Kezer* v. *Clifford,* 59 N. H. 208; *Hall* v. *Westcott,* 15 R. I. 373; *Middletown Savings Bank* v. *Bacharach,* 46 Conn. 513.

We need not inquire now whether there may be defenses to the cause of action stated in the bill. It is enough for present purposes that, despite unskilled draftsmanship, it sets out facts sufficient, on a motion to dismiss, to support the relief prayed.

But it is argued that there are no allegations showing that petitioner, Independent Coal & Coke Company, is a party to the fraud or what interest it claims in the lands, or that it acquired any interest from or under any other party to the transaction. But we think it fairly inferable from the bill, taken as a whole, that the interest alleged to be claimed by the Coal Company was one arising subsequent to the conveyance by the state to the Land Company. The bill sets up title in the United States and its transfer to the state and alleges that the State of Utah, in making its transfer to the Coal Company, relied on the fact that it had not parted with the legal title to the lands at the time of the decree. This in effect is an averment that the interest claimed by the

Coal Company was acquired subsequent to the certification by the United States to the state. Whatever interest it acquired after that event, it took subject to the equities of the United States, and if from the Land Company, subject also to all of the equities against that company, unless the purchase was *bona fide*. *Bona fide* purchase is an affirmative defense. *Wright-Blodgett Co.* v. *United States*, 236 U. S. 397, 403.

The Statute of Limitations relied on provides that suits by the United States "to vacate and annul any patent . . . shall only be brought within six years after the date of the issuance of such patents." A point much argued here was whether a certification of public lands is a patent within the meaning of the statute. But that is a question which we need not decide. Statutes of limitation against the United States are to be narrowly construed. *United States* v. *Whited & Wheless*, 246 U. S. 552, 561. And we think it plain that the present suit, founded on equitable grounds, to compel a conveyance of title derived from a certification by the government is not a suit to cancel the certification. See *United States* v. *New Orleans Pacific Ry.*, 248 U. S. 507, 510, 518.

We hold that the acquisition of the title of the lands by the Land Company as set out in the bill was in violation of equitable principles and of the decree enjoining the defendants in the first suit "from setting up or making any claim to the premises," and that a proper case was stated for the imposition on both petitioners of a constructive trust with respect to the lands acquired by them. As the bill is not well drafted, respondent should have leave to perfect it. This will promote an orderly and intelligent disposition of the case.

Affirmed.

MR. JUSTICE MCREYNOLDS, MR. JUSTICE SUTHERLAND, and MR. JUSTICE BUTLER dissent.

Counsel for Parties.

FOX RIVER PAPER COMPANY ET AL. *v.* RAILROAD COMMISSION OF WISCONSIN.

ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

No. 492. Argued April 11, 12, 1927.—Decided May 31, 1927.

1. The jurisdiction of this Court to review a judgment of a state court is not affected by the circumstance that the right for which constitutional protection is claimed depends on the state law. P. 654.
2. When there is no question of evasion of the constitutional issue furnishing the basis for review of the judgment of a state court of last resort, this Court must accept as final the rulings of that court on all matters of state law. P. 655.
3. The nature and extent of the rights of the State and of riparian owners in navigable waters within the State, and to the soil beneath, are matters of state law to be determined by the statutes and judicial decisions of the State. P. 655.
4. Where, by the law of the State, a riparian owner on a navigable river, though having title to the bed of the stream, can gain no right in the water power created by erecting a dam without the consent of the State, a refusal by the State to permit maintenance and repair of a dam so erected except upon conditions giving the State an option to acquire in the future, at a non-compensatory price, all the property used and useful under the permit, does not deprive the owner of property in violation of the Fourteenth Amendment. P. 656.

189 Wis. 626, affirmed.

ERROR to a judgment of the Supreme Court of Wisconsin, which sustained, by an equally divided court, dismissal of a suit, in the nature of mandamus, to compel the Railroad Commission to issue to the plaintiffs, permits to repair and maintain a dam, under § 31.09 Wis. Stats., 1925.

Messrs. Moses Hooper and *Edward J. Dempsey,* with whom *Mr. John F. Kluwin* was on the briefs, for plaintiffs in error.

Messrs. R. M. Rieser and *Adolph Kanneberg,* with whom *Mr. John W. Reynolds,* Attorney General of Wisconsin, and *Messrs T. L. McIntosh* and *Michael J. Dunn, Jr.,* Assistant Attorneys General, were on the brief, for defendant in error.

Mr. Justice Stone delivered the opinion of the Court.

Plaintiffs in error are riparian owners of land bordering on the Fox River, a navigable stream. They own a dam at Appleton, Wisconsin, which has been maintained since its construction in 1878 without permission from any state authority. Since 1841 the statutes of the territory, and later of the state, have forbidden the building of a dam on any navigable river without legislative consent. Laws, 1841, No. 9; R. S. 1849, c. 34; R. S. 1858, c. 41, § 2; 1 Wis. Stat., 1898, c. 70, § 1596; 1 Wis. Stat., 1925, § 30.01 (2).

By § 31.02, Wis. Stat., 1925, the state railroad commission was given supervisory power over the navigable waters of the state, and control of the construction and maintenance of dams in navigable rivers. Section 31.07 authorizes it to grant permits to applicants to operate and maintain existing dams. By § 31.09 every applicant for a permit is required to file with his application proposals in writing, consenting, among other things, to the grant of a permit subject to the condition " that the state of Wisconsin, if it shall have the constitutional power, or any municipality, on not less than one year's notice, at any time after the expiration of thirty years after the permit becomes effective, may acquire all of the property of the grantee, used and useful under the permit, by paying therefor, the cost of reproduction in their then existing condition of all dams, works, buildings, or other structures or equipment, used and useful under the permit, as determined by the commission, and by paying in addition thereto the value of the dam site and all flowage

rights and other property as determined by the commission prior to the time the permit was granted, as provided in subsection (1), plus the amounts paid out for additional flowage rights, if any, acquired after the valuation made by the commission as provided in subsection (1); and that the applicant waives all right to any further compensation."

Plaintiffs in error petitioned the commission for permits to maintain and repair their dam, which, they asserted, " does not materially obstruct navigation or violate other public or private rights or endanger life, health or property." The application was rejected by the commission solely for want of jurisdiction, since the applicants had omitted to file the proposals required by § 31.09. Plaintiffs brought suit in the nature of a mandamus proceeding in the circuit court of Dane County, Wisconsin, to compel the commission to take jurisdiction of the application and to proceed to a hearing. The bill drew in question the validity of § 31.09 under the due process clause of the Fourteenth Amendment, alleging that the determination of the commission acting under the statute operated to deprive plaintiffs of their property without due process of law. The commission answered, admitting the allegations of fact of the bill, setting up that plaintiffs' dam had been constructed and was maintained without a permit from the state, and that the application had been dismissed for want of jurisdiction. The trial court gave final judgment on the pleadings for defendant in error, upholding the validity of this act. The Supreme Court of Wisconsin affirmed by an evenly divided court. 189 Wis. 626. The case is here on writ of error. Jud. Code, § 237 (a), as amended.

The right set up in the bill is one under the Federal Constitution. Whether the state court denied that right or failed to give it due recognition is a question upon which the plaintiffs are entitled to invoke the judgment

of this Court. Our jurisdiction is not affected because the existence of the right for which constitutional protection is claimed depends upon state law. Cf. *West Chicago R. R.* v. *Chicago,* 201 U. S. 506; *Ward* v. *Love County,* 253 U. S. 17, 22; *Chicago, Burlington and Quincy Ry.* v. *Drainage Commissioners,* 200 U. S. 561; *Appleby* v. *City of New York,* 271 U. S. 364, 380.

Plaintiffs' case rests on the contention that by the law of Wisconsin the rights vested in riparian owners include the right to use the water power and for that purpose to dam the river, subject only to the exercise by the state of its police power to regulate the use of navigable waters in the public interest, and to protect public health and safety; that to withhold from plaintiffs, as the state does under the statute, the right to use their own property unless they agree to surrender it to the state at a price which may prove at the time of transfer to be less than its true value, is a taking of property without due process, prohibited by the Fourteenth Amendment.

We do not pass upon the sufficiency of the compensation provided for by the statute. For the purpose of decision, it may be assumed that the recapture provisions go too far, if the rights of plaintiffs are as described. Hence the point first to be determined is whether plaintiffs' description is accurate. The trial court, the only state court to express an opinion on this question, held that the right of the riparian owner to make use of the water power in a navigable river by maintaining a dam is subordinate to the plenary power of the state to regulate the use or obstruction of navigable waters; that the state may forbid all obstruction by dam or otherwise; hence, the right of the riparian owner to develop water power by the construction of the dam remains inchoate until the state has given its consent. "If the legislature may wholly refuse permission to erect a dam or other structure in the navigable waters of the state, it follows that it may

grant such permission upon such terms as it shall determine will best protect the interests of the public. The legislature could impose the condition that the dam should be removed when it obstructed navigation or that it should be removed at the end of a definite period of time, for example, thirty years."

There being no question of evasion of the constitutional issue, *Nickel* v. *Cole,* 256 U. S. 222, 225; *Union Pac. R. R.* v. *Public Service Commission,* 248 U. S. 67; *Ward* v. *Love County, supra,* 22; *Long Sault Development Co.* v. *Call,* 242 U. S. 272, this Court on writ of error must accept as final the ruling of the state court of last resort on all matters of state law. *Sauer* v. *New York,* 206 U. S. 536; *Kaukauna Co.* v. *Green Bay, &c. Canal,* 142 U. S. 254, 272, 277. Although presumptively title to the soil under navigable waters within the state is in the state, *Massachusetts* v. *New York,* 271 U. S. 65, 89; *United States* v. *Holt State Bank,* 270 U. S. 49, 54, the nature and extent of the rights of the state and of riparian owners in navigable waters within the state and to the soil beneath are matters of state law to be determined by the statutes and judicial decisions of the state. *Kaukauna Co.* v. *Green Bay, &c. Canal, supra,* 272; *Packer* v. *Bird,* 137 U. S. 661, 669; *Hardin* v. *Jordan,* 140 U. S. 371, 382; *Barney* v. *Keokuk,* 94 U. S. 324, 338. If the state chooses to resign to the riparian proprietor sovereign rights over navigable rivers which it acquired upon assuming statehood, it is not for others to raise objections. *Barney* v. *Keokuk, supra,* 338. We assume, although judicial expression is not entirely consistent, that by the law of Wisconsin, in the absence of special circumstances, title to the bed of navigable rivers is in the riparian owner. *Kaukauna Co.* v. *Green Bay, &c. Canal, supra,* 272; *Willow River Club* v. *Wade,* 100 Wis. 86, 95; *Wisconsin River Improvement Co.* v. *Lyons,* 30 Wis. 61; cf. *Merwin* v. *Houghton,* 146 Wis. 398, 409. But defend-

ant contends that in any case the rights of plaintiffs are subordinate to the state control of navigable waters, and as was held in effect by the state court in this case, the riparian owner can have no right in the water power created by damming a navigable river, so long as the state withholds its consent to the construction or maintenance of the dam. *Wisconsin River Improvement Co.* v. *Lyons, supra,* 67.

In so holding it does not appear that the court below ran counter to any established rule of property of the state. An examination of the earlier state decisions discloses no such conflict of authority or inconsistency of judicial opinion on this subject as even to suggest that the court below adopted its view in order to evade the constitutional issue. *Nickel* v. *Cole, supra.* The state's consent is necessary for the construction of a bridge or dam in a navigable river, subject to the superior power of the United States over navigation, *Barnes* v. *City of Racine,* 4 Wis. 454; *Wisconsin River Improvement Co.* v. *Lyons, supra;* and plaintiffs concede that the maintenance of a dam without such permission constitutes a public nuisance. 1 Wis. Stat., 1925, § 31.25; cf. *In re Eldred,* 46 Wis. 530. Riparian use is subject also to the public right of navigation, *Cohn* v. *Wausau Boom Co.,* 47 Wis. 314, 325; fishing, *Willow River Club* v. *Wade, supra;* and possibly to the right to establish a public water supply by damming the river. Cf. *Wisconsin* v. *City of Eau Claire,* 40 Wis. 533. That the holding below presents no novel view appears from the opinion of the Supreme Court of Wisconsin in the *Water Power Cases,* 148 Wis. 124, where the court specifically pointed out (p. 149) that neither the riparian owner nor the state could develop water power by placing a dam in a navigable river resting upon its banks without the consent of the other, and that the state might withhold its permission or grant it on conditions. Cf. *Black River Improve-*

ment Co. v. *LaCrosse Co.*, 54 Wis. 659; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53.

We are not concerned with the correctness of the rule adopted by the state court, its conformity to authority, or its consistency with related legal doctrine. *Sauer* v. *New York, supra.* It is for the state court in cases such as this to define rights in land located within the state, and the Fourteenth Amendment, in the absence of an attempt to forestall our review of the constitutional question, affords no protection to supposed rights of property which the state courts determine to be non-existent.

We accept as conclusive the state court's view of the nature of the rights of riparian owners. We therefore find in the refusal of the commission to grant the permit no denial of the property rights of plaintiffs and hence no violation of the Fourteenth Amendment. Compliance with § 31.09 is the price which plaintiffs must pay to secure the right to maintain their dam. Cf. *Booth Fisheries* v. *Industrial Commission*, 271 U. S. 208.

Judgment affirmed.

WEEDIN, COMMISSIONER OF IMMIGRATION, *v.* CHIN BOW.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 237. Argued March 16, 1927.—Decided June 6, 1927.

1. Under Rev. Stats. § 1993, which provides: "All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States," citizenship attaches only where the father has resided in the United States before the birth of the child. Pp. 660, 666, 675.

2. The section is so legislatively constructed by the Act of March 2, 1907, c. 2534, § 6. P. 667.
7. F. (2d) 369, reversed.

CERTIORARI (269 U. S. 550) to a judgment of the Circuit Court of Appeals, which affirmed an order of the District Court in *habeas corpus* discharging a Chinese boy, who had applied for admission to the United States and was held for deportation by the immigration authorities.

Mr. Alfred A. Wheat, Special Assistant to the Attorney General, with whom *Solicitor General Mitchell* and *Mr. Frank M. Parrish,* Attorney in the Department of Justice, were on the brief, for petitioner.

Mr. Charles E. Hughes, with whom *Mr. Clement L. Bouvé* was on the brief, for respondent.

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

This is a writ of certiorari to review a judgment of the United States Circuit Court of Appeals for the Ninth Circuit affirming an order of the District Court for the Western District of Washington allowing a writ of *habeas corpus* for Chin Bow, a Chinese boy ten years of age, and granting him a discharge. The petition for certiorari was filed October 29, 1925, and granted December 7, 1925, 269 U. S. 550, under § 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936.

Chin Bow applied for admission to the United States at Seattle. The board of special inquiry of the Immigration Bureau at that place denied him admission on the ground that, though his father is a citizen, he is not a citizen, because at the time of his birth in China his father had never resided in the United States. Chin Bow was born March 29, 1914, in China. His father, Chin Dun,

was also born in China, on March 8, 1894, and had never been in this country until July 18, 1922. Chin Dun was the son of Chin Tong, the respondent's grandfather. Chin Tong is forty-nine years old and was born in the United States.

The Secretary of Labor affirmed the decision of the Board of Inquiry, and the deportation of the respondent was ordered. He secured a writ of *habeas corpus* from the District Court. Upon a hearing, an order discharging him was entered without an opinion. On appeal by the United States, the Circuit Court of Appeals affirmed the judgment of the District Court, 7 F. (2d) 369, holding him to be a citizen under the provisions of § 1993 of the Revised Statutes, which is as follows:

"All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States."

The rights of Chin Bow are determined by the construction of this section. The Secretary of Labor, April 27, 1916, asked the opinion of Attorney General Gregory whether a rule of the Chinese regulations of his Department, which denied citizenship to foreign-born children of American Chinese, was a valid one. He advised that it was not, because § 1993 applied to all children and therefore included Chinese children as well. The second question was whether foreign-born children of American-born Chinese fathers were entitled to enter the United States as citizens thereof, when they had continued to reside for some time in China after reaching their majorities, without any affirmative action on their part indicating an intention to remain citizens of the United States; and the Attorney General advised that they were, in spite of

these circumstances, entitled to enter the United States as citizens thereof, 30 Op. A. G. 529.

The United States contends that the proviso of § 1993 "but the rights of citizenship shall not descend to children whose fathers never resided in the United States" must be construed to mean that only the children whose fathers have resided in the United States before their birth become citizens under the section. It is claimed for the respondent that the residence of the father in the United States at any time before his death entitles his son, whenever born, to citizenship. These conflicting claims make the issue to be decided.

The very learned and useful opinion of Mr. Justice Gray, speaking for the Court in *United States* v. *Wong Kim Ark,* 169 U. S. 649, establishes that, at common law in England and the United States, the rule with respect to nationality was that of the *jus soli,*—that birth within the limits of the jurisdiction of the Crown, and of the United States, as the successor of the Crown, fixed nationality, and that there could be no change in this rule of law except by statute; that by the statute of 7 Anne, (1708) c. 5, § 3, extended by the statute of 4 George II, (1731) c. 21, all children born out of the ligeance of the Crown of England whose fathers were or should be natural-born subjects of the Crown of England, or of Great Britain, at the time of the birth of such children respectively, were deemed natural-born subjects of that kingdom to all intents and purposes whatsoever. That statute was extended by the statute of 13 George III, (1773) c. 21, to foreign-born grandchildren of natural-born subjects but not to the issue of such grandchildren (169 U. S. 671). *De Geer* v. *Stone,* 22 Ch. D. 243, 252; Dicey, Conflict of Laws, 178, 781. The latter author says (p. 782) that British nationality did not pass by descent or inheritance beyond the second generation. These statutes applied to the colonies before the War of Independence.

The Act of March 26, 1790, entitled "An Act to establish an uniform Rule of Naturalization," 1 Stat. 103, c. 3, came under discussion in February, 1790, in the House, but the discussion was chiefly directed to naturalization and not to the status of children of American citizens born abroad. Annals of First Congress, 1109, 1110, *et seq.* The only reference is made by Mr. Burke (p. 1121), in which he says:

"The case of the children of American parents born abroad ought to be provided for, as was done in the case of English parents in the 12th year of William III. There are several other cases that ought to be likewise attended to."

Mr. Hartley said (p. 1125) that he had another clause ready to present providing for the children of American citizens born out of the United States. A select committee of ten was then appointed to which the bill was recommitted and from which it was reported. But no subsequent reference to the provision of the bill which we are now considering appears. The bill as passed was as follows:

"An Act to establish an uniform Rule of Naturalization.

"Sec. 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any alien, being a free white person, who shall have resided within the limits and under the jurisdiction of the United States for the term of two years, may be admitted to become a citizen thereof, on application to any common law court of record, in any one of the states wherein he shall have resided for the term of one year at least, and making proof to the satisfaction of such court, that he is a person of good character, and taking the oath or affirmation prescribed by law, to support the constitution of the United States, which oath or affirmation such court shall administer;

and the clerk of such court shall record such application, and the proceedings thereon; and thereupon such person shall be considered as a citizen of the United States. And the children of such persons so naturalized, dwelling within the United States, being under the age of twenty-one years at the time of such naturalization, shall also be considered as citizens of the United States. And the children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural born citizens: *Provided,* That the right of citizenship shall not descend to persons whose fathers have never been resident in the United States: *Provided also,* That no person heretofore proscribed by any state, shall be admitted a citizen as aforesaid, except by an act of the legislature of the state in which such person was proscribed."

This Act was repealed by the Act of January 29, 1795, 1 Stat. 414, § 4, but the third section of that act reënacted the provisions of the Act of 1790 as to children of citizens born beyond the sea, in equivalent terms. The clauses were not repealed by the next Naturalization Act of June 18, 1798, 1 Stat. 566, but continued in force until the 14th of April, 1802, when an act of Congress of that date, 2 Stat. 153, repealed all preceding acts respecting naturalization. After its provision as to naturalization, it contained in its fourth section the following:

"That the children of persons duly naturalized under any of the laws of the United States, or who, previous to the passing of any law on that subject, by the government of the United States, may have become citizens of any one of the said states, under the laws thereof, being under the age of twenty-one years, at the time of their parents being so naturalized or admitted to the rights of citizenship, shall, if dwelling in the United States, be considered as citizens of the United States, and the children of persons who now are, or have been citizens of the

United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens of the United States: *Provided,* that the right of citizenship shall not descend to persons whose fathers have never resided within the United States."

No change was made in the law until 1855. Mr. Horace Binney had written an article, which he published December 1, 1853, for the satisfaction of fellow citizens and friends, whose children were born abroad during occasional visits by their parents to Europe. 169 U. S. 665, 2 Amer. Law Reg. 193. He began the article as follows:

" It does not, probably, occur to the American families who are visiting Europe in great numbers, and remaining there, frequently, for a year or more, that all their children born in a foreign country are aliens, and when they return home, will return under all the disabilities of aliens. Yet this is indisputably the case; for it is not worth while to consider the only exception to this rule that exists under the laws of the United States, viz., the case of a child so born, whose parents were citizens of the United States, on or before the 14th of April, 1802.

" It has been thought expedient, therefore, to call the attention of the public to this state of the laws of the United States, that if there are not some better political reasons for permitting the law so to remain, than the writer is able to imagine, the subject may be noticed in Congress, and a remedy provided."

Mr. Binney demonstrates that, under the law then existing, the children of citizens of the United States born abroad, and whose parents were not citizens of the United States on or before the 14th of April, 1802, were aliens, because the Act of 1802 only applied to such parents, and because, under the common law which applied in this country, the children of citizens born abroad were not citizens but were aliens. Mr. Binney was not interested

in the citizenship of the second generation of children of citizens of the United States born abroad, and nothing in this article was directed to the question of the meaning of the words contained in the Act of 1802, "Provided that the right of citizenship shall not descend to persons whose fathers have never resided within the United States."

The Act of February 10, 1855 (10 Stat. 604), passed presumably because of Mr. Binney's suggestion, was entitled "An Act to secure the right of citizenship to children of citizens of the United States born out of the limits thereof," and read as follows:

"That persons heretofore born, or hereafter to be born, out of the limits and jurisdiction of the United States, whose fathers were or shall be at the time of their birth citizens of the United States, shall be deemed and considered and are hereby declared to be citizens of the United States: *Provided however,* That the rights of citizenship shall not descend to persons whose fathers never resided in the United States.

"SEC. 2. That any woman who might lawfully be naturalized under the existing laws, married, or who shall be married to a citizen of the United States, shall be deemed and taken to be a citizen."

The part of the Act of 1855 we are interested in was embodied in the Revised Statutes as § 1993.

It is very clear that the proviso in § 1993 has the same meaning as that which Congress intended to give it in the Act of 1790, except that it was then retrospective, as it was in the Act of 1802, while in the Act of 1855 it was intended to be made prospective as well as retrospective. What was the source of the peculiar words of the proviso there seems to be no way of finding out, as the report of the discussion of the subject is not contained in any publication brought to our attention. It is evident, how-

ever, from the discussion in the First Congress, already referred to, that there was a strong feeling in favor of the encouragement of naturalization. There were some Congressmen, although they did not prevail, who were in favor of naturalization by the mere application and taking of the oath. The time required for residence to obtain naturalization was finally limited to two years. In the Act of 1795 this was increased to five years, with three years for declaration of intention. Congress must have thought that the questions of naturalization and of the conferring of citizenship on sons of American citizens born abroad were related.

Congress had before it the Act of George III of 1773, which conferred British nationality not only on the children but also on the grandchildren of British-born citizens who were born abroad. Congress was not willing to make so liberal a provision. It was natural that it should wish to restrict the English provision because at the time that this phrase was adopted there were doubtless many foreign-born children of persons who were citizens of the seceding colonies with respect to whose fathers there was a natural doubt whether they intended to claim or enjoy American citizenship or indeed were entitled to it. The last provision of the Act of 1790 manifested this disposition to exclude from the operation of the Act those who were citizens or subjects in the States during the Revolution and had been proscribed by their legislatures. It is not too much to say, therefore, that Congress at that time attached more importance to actual residence in the United States as indicating a basis for citizenship than it did to descent from those who had been born citizens of the colonies or of the states before the Constitution. As said by Mr. Fish, when Secretary of State, to Minister Washburn, June 28, 1873, in speaking of this very proviso, " the heritable blood of citizenship

was thus associated unmistakeably with residence within the country which was thus recognized as essential to full citizenship." Foreign Relations of the United States, Pt. 1, 1873, p. 259. It is in such an atmosphere that we are to interpret the meaning of this peculiarly worded proviso.

Only two constructions seem to us possible, and we must adopt one or the other. The one is that the descent of citizenship shall be regarded as taking place at the birth of the person to whom it is to be transmitted, and that the words "have never been resident in the United States" refer in point of time to the birth of the person to whom the citizenship is to descend. This is the adoption of the rule of *jus sanguinis* in respect of citizenship, and that emphasizes the fact and time of birth as the basis of it. We think the words "the right of citizenship shall not descend to persons whose fathers have never been resident in the United States" are equivalent to saying that fathers may not have the power of transmitting by descent the right of citizenship until they shall become residents in the United States. The other view is that the words "have never been resident in the United States" have reference to the whole life of the father until his death, and therefore that grandchildren of native-born citizens, even after they, having been born abroad, have lived abroad to middle age and without residing at all in the United States, will become citizens, if their fathers, born abroad and living until old age abroad, shall adopt a residence in the United States just before death. We are thus to have two generations of citizens who have been born abroad, lived abroad, the first coming to old age and the second to maturity and bringing up of a family, without any relation to the United States at all until the father shall, in his last days, adopt a new residence. We do not think that such a construction accords with the probable attitude of Congress at the time of the adoption of this proviso into the statute. Its con-

struction extends citizenship to a generation whose birth, minority and majority, whose education, and whose family life, have all been out of the United States and naturally within the civilization and environment of an alien country. The beneficiaries would have evaded the duties and responsibilities of American citizenship. They might be persons likely to become public charges or afflicted with disease, yet they would be entitled to enter as citizens of the United States. Van Dyne, Citizenship of the United States, p. 34.

As between the two interpretations, we feel confident that the first one is more in accord with the views of the First Congress. We think that the proviso has been so construed by a subsequent Act of Congress of March 2, 1907, c. 2534, § 6, 34 Stat. 1229, which provides:

"That all children born outside the limits of the United States who are citizens thereof in accordance with the provisions of section nineteen hundred and ninety-three of the Revised Statutes of the United States and who continue to reside outside the United States shall, in order to receive the protection of this Government, be required upon reaching the age of eighteen years to record at an American consulate their intention to become residents and remain citizens of the United States and shall be further required to take the oath of allegiance to the United States upon attaining their majority."

Now, if this Congress had construed § 1993 to permit the residence prescribed to occur after the birth of such children, we think that it would have employed appropriate words to express such meaning, as for example "All children born who are or may become citizens." The present tense is used, however, indicating that citizenship is determined at the time of birth. Moreover, such foreign-born citizens are required, upon reaching the age of eighteen years, to record their intention to become residents and remain citizens of the United States, and take

the oath of allegiance to the United States upon attaining their majority. If the residence prescribed for the parent may occur after the birth of the children, the father may remain abroad and not reside in the United States until long after such children attain their majority. Thus they could not register or take the oath of allegiance, because the rights of citizenship could not descend to them until their fathers had resided in the United States. This class of foreign-born children of American citizens could not, then, possibly comply with the provisions of the Act of 1907. Nor could such children "remain citizens," since they are expressly denied the rights of citizenship. We may treat the Act of 1907 as being *in pari materia* with the original act, and as a legislative declaration of what Congress in 1907 thought was its meaning in 1790. *United States* v. *Freeman,* 3 How. 556, 564, *et seq.; Cope* v. *Cope,* 137 U. S. 682, 688.

Counsel for the respondent insist that the Act of 1907 is not an act that reflects on the construction to be placed on § 1993; that there is a distinction between citizenship and the enjoyment of it in this country, on the one hand, and the rules that should limit the protection of it abroad by our Government on the other. This may well be conceded. It is illustrated in the opinion of Attorney General Hoar, 13 Op. A. G. 90, in which he advised that even if applicants were citizens they were not entitled to the protection of passports under the circumstances of that case. But we do not think that this distinction detracts from the argumentative weight of the Act of 1907 as a Congressional interpretation of the proviso of 1855, 1802 and 1790.

In answer to the reasons which influence us to the conclusion already indicated, counsel for the respondent say, first, that the hypothesis that the foreign-born fathers and sons may all live abroad from birth to middle age and

bring up families without any association with the United States, and that the sons may then become citizens by the ultimate residence of their fathers in the United States, is not a possible one, because such children must have signified their intention to become citizens when they reached eighteen years of age or at majority at any rate. But these provisions with respect to election of citizenship by those coming to majority were not in the statute when the proviso was enacted, and we must construe it as of 1790 with reference to the views that Congress may be thought to have had at that time.

Then, it is urged that the State Department has held that § 1993 refers only to children and not to adults. This would be a narrow construction of the proviso as it was intended to operate in 1790 when the act was passed, and although this was suggested as a possible view by Secretary of State Bayard, it would limit too much the meaning of the word " children " at a time when no provision had been made by law for election of citizenship by those coming of age. Nor does it seem to be in accord with Attorney General Gregory's opinion already referred to. 30 Op. A. G. 529.

It is said that it would be illogical and unnatural to provide that the father, having begotten children abroad before he lived in the United States at all, and then having gone to the United States and resided there and returned and had more children abroad, should have a family part aliens and part citizens. As this is entirely within the choice of the father, there would seem to be no reason why such a situation should be anomalous. As the father may exercise his option in accordance with the law, so citizenship will follow that option.

Counsel for the respondent, in their learned and thorough brief, have sought to sustain their conclusion in favor of the latitudinarian view of the proviso by many references, all of which we have examined. They point

to the language of Mr. Justice Gray in delivering the majority opinion in *United States* v. *Wong Kim Ark*, 169 U. S. 649. The majority in that case, as already said, held that the fundamental principle of the common law with regard to nationality was birth within the allegiance of the Government and that one born in the United States, although of a race and of a parentage denied naturalization under the law, was nevertheless under the language of the Fourteenth Amendment a citizen of the United States by virtue of the *jus soli* embodied in the Amendment. The attitude of Chief Justice Fuller and Mr. Justice Harlan was, that at common law the children of our citizens born abroad were always natural-born citizens from the standpoint of this Government, and that to that extent the *jus sanguinis* obtained here; that the Fourteenth Amendment did not exclude from citizenship by birth children born in the United States of parents permanently located here who might themselves become citizens; nor on the other hand did it arbitrarily make citizens of children born in the United States of adults who according to the will of their native government and of this Government are and must remain aliens. Section 1993 is referred to both in the majority opinion and in the minority opinion. Speaking of the Act of 1855, the majority opinion says (p. 674):

"It thus clearly appears that, during the half century intervening between 1802 and 1855, there was no legislation whatever for the citizenship of children born abroad, during that period, of American parents who had not become citizens of the United States before the act of 1802; and that the act of 1855, like every other act of Congress upon the subject, has, by express proviso, restricted the right of citizenship, thereby conferred upon foreign-born children of American citizens, to those children themselves, unless they became residents of the United States. Here is nothing to countenance the the-

ory that a general rule of citizenship by blood or descent has displaced in this country the fundamental rule of citizenship by birth within its sovereignty."

The minority opinion said (p. 714):

"Section 1993 of the Revised Statutes provides that children so born 'are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States.' Thus a limitation is prescribed on the passage of citizenship by descent beyond the second generation if then surrendered by permanent non-residence, and this limitation was contained in all the acts from 1790 down."

It is very clear that the exact meaning of the proviso upon the point here at issue was not before the Court. The section itself, and the policy of the United States in the sections that preceded it, were important in the discussion only in showing how restricted or otherwise was the application of the *jus sanguinis* in our law. There is nothing in the opinion of the Court that contains an intimation as to what period is covered by the expression "never resided in the United States." We can not regard such a doubtful expression as that of Chief Justice Fuller in his dissent as authoritative in respect to the issue here.

Reference is then made to the very admirable opinion presented by Secretary Fish to President Grant, on July 27, 1868, of the legislation afterwards embodied in the Revised Statutes, §§ 1999, 2000 and 2001, in reference to the right of expatriation, prompted by the Fenian and other international differences, and intended to apply especially to the expatriation of persons coming from European countries to the United States and seeking and receiving naturalization in the United States. U. S. Foreign Relations, 1873, Pt. II, pp. 1191, 1192. President Grant solicited opinions from all of his Cabinet officers. That of Secretary Fish is relied on in this discussion. We do not find it specifically directed to the issue here. It

is rather occupied in a consideration of the point which was then very much mooted, as to what constituted expatriation and what rules should be adopted in determining whether citizens or subjects of other countries coming to the United States were expatriated, and whether, after having been admitted to citizenship, they lost their rights of citizenship by reason of a return to the country of their birth and a residence there. The only important reference to the proviso of § 1993 is the suggestion by Secretary Fish that the proviso was a recognition by Congress of the right of foreign countries to fix for themselves what constituted allegiance to their country of persons living in their country, without regard to the laws of this country extending citizenship of this country to such persons within their allegiance. Nor do we find anything more definite upon the meaning of the proviso in § 1993 in the letter, already cited, of Secretary Fish to Mr. Washburn under date of June 28, 1873. Foreign Relations of the United States, 1873, Pt. I, p. 256. Reference is also made to the opinion of Attorney General Hoar, already cited, which was rendered to Secretary Fish in a case that did not present this question at all. 13 Op. A. G. 90. The Secretary asked the Attorney General whether four persons residing in the Island of Curacao, for whom application was made for passports, were citizens of the United States and entitled as such to have passports issued to them. They were over twenty-one years of age, and were born in the islands of Curacao. Four of them were children of native citizens of the United States domiciled at Curacao who had not resided in the United States since 1841 (the opinion was given in 1869), and it did not appear affirmatively that any of the applicants had resided or intended to reside in the United States, or that more than one of them had ever been in the country. The At-

torney General expressed the opinion that, if the fathers of the applicants at the time of their birth were citizens of the United States and had "*at some time*" resided within the United States, the applicants were citizens of the United States under the provisions of the statute and entitled to the privileges of citizenship. As their fathers were native-born citizens of the United States, the applicants were probably citizens under § 1993, whether their fathers at any time resided in the United States or not after the time of their birth. The point in the opinion by the Attorney General relied on by respondent's counsel is the intimation that these fathers should have "*at some time*" resided in the United States, without restricting that residence to the time before their birth. The conclusion was that, as these applicants had never been in the United States, there was no obligation to give them passports, even though they were citizens of the United States. We can hardly regard that as a decision upon the point we are considering.

In a work by Mr. Borchard, formerly Assistant Counselor of the State Department, we find this:

"To confer citizenship upon a child born abroad, the father must have resided in the United States. This limitation upon the right of transmitting citizenship indefinitely was intended to prevent the residence abroad of successive generations of persons claiming the privileges of American citizenship while evading its duties. It seems not to have been judicially determined whether the residence of the father in the United States must necessarily have preceded the birth of the child, but by the fact that the statute provides that citizenship shall not 'descend,' it is believed that the residence prescribed must have preceded the birth of the child, and such has been the construction of the Department." Diplomatic Protection of Citizens Abroad, (p. 609).

In his notes under this passage Mr. Borchard correctly points out that while the case of *State* v. *Adams*, 45 Iowa 99, cited for the respondent herein, may have presented facts involving the point we are considering, it was not considered or discussed by the Court.

Mr. Borchard also refers to special consular instructions of the State Department, No. 340, July 27, 1914, entitled "Citizenship of children born of American fathers who have never resided in the United States." These were instructions issued by Mr. Bryan, when Secretary of State, ruling on the question whether residence by the father in Jerusalem, where the United States exercised by treaty extraterritorial powers, was residence within the United States satisfying the requirement of § 1993, and it was held not to be so, reversing former rulings. In these instructions Mr. Bryan indicated his view that foreign-born persons claiming citizenship under § 1993 must fail if their fathers, citizens of the United States, had never resided in the United States when such persons were born, although this was not necessary to the decision he was making.

Mr. Bryan's instructions were based on an opinion of Mr. Cone Johnson, Solicitor of the State Department, printed at pages 41 and 42 of a compilation concerning citizenship issued by the Department in 1925, in which Mr. Johnson suggested that § 1993 might be construed to mean "all children heretofore or hereafter born out of the limits or jurisdiction of the United States whose fathers, having resided in the United States were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States."

Mr. Borchard's statement in his text that the construction of the Department has since been that the residence of the father must have preceded the birth of the child whose American citizenship is claimed, rests on his personal experience and knowledge as an official of the Department and not on any subsequent printed pub-

lication of the Department, to which we have been referred.

It would seem, then, that the question before us is one that has really not been authoritatively decided, except by two Circuit Courts of Appeals, that of the Ninth Circuit, which is here under review, and that of the Circuit Court of Appeals for the First Circuit (*Johnson* v. *Sullivan,* 8 F. (2d) 988) which adopted the view of the Ninth Circuit Court and followed it.

The opinion in the Ninth Circuit says (p. 369):

"The statute refers to the descent of the rights of citizenship. The term 'descend' has a well-defined meaning in law. As defined by Webster, it means: 'To pass down, as from generation to generation, or from ancestor to heir.' If the term 'descend' is given that meaning in this connection, the status of the appellee would not become definitely fixed until his father became a resident of the United States or died without becoming such. In the former event he would become vested with all the rights of citizenship as soon as his father became a resident, while in the latter event his claim to citizenship would be forever lost."

The expression "the rights of citizenship shall descend" can not refer to the time of the death of the father, because that is hardly the time when they do descend. The phrase is borrowed from the law of property. The descent of property comes only after the death of the ancestor. The transmission of right of citizenship is not at the death of the ancestor but at the birth of the child, and it seems to us more natural to infer that the conditions of the descent contained in the limiting proviso, so far as the father is concerned, must be perfected and have been performed at that time.

This leads to a reversal of the judgment of the Circuit Court of Appeals and a remanding of the respondent.

Reversed.

MAYOR AND BOARD OF ALDERMEN OF THE TOWN OF VIDALIA *v.* McNEELY, ADMINISTRATRIX.

McNEELY, ADMINISTRATRIX, *v.* MAYOR AND BOARD OF ALDERMEN OF THE TOWN OF VIDALIA.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA.

Nos. 140, 163. Argued January 26, 27, 1926.—Decided June 6, 1927.

1. Ferries operated across boundary waters between States simply as a means of transit from shore to shore are instruments of local convenience and subject to local regulation to the extent that, in the absence of Congressional action, each State may act with respect to the ferriage from its shore. P. 681.
2. But a State or its municipality may not make its license a condition precedent to the operation of such a ferry by one having full capacity to operate, and operating it serviceably. P. 683.
3. Landing places for competing ferries in a town may be designated in an equity suit, where the town has unlawfully refused to consider one of the ferries, upon the ground that it was not licensed, and assigned the place which it occupied to the competitor. P. 683.
4. In Louisiana, the banks of navigable streams are subject to a servitude permitting their use for public purposes, including those incident to navigation. The owner of riparian lots is not entitled to preference in the use of the adjacent bank for ferry landings; nor does prior use entitle him to exclude another ferry where there is room for both. P. 684.

6 F. (2d) 19; *id.* 21, affirmed.

Cross appeals from a decree of the District Court in a suit to restrain the Town of Vidalia, Louisiana, from interfering with the operation of a ferry.

Messrs. Hugh Tullis and *L. T. Kennedy,* with whom *Messrs. E. H. Ratcliff* and *W. H. Watkins* were on the briefs, for McNeely, Administratrix.

Mr. G. P. Bullis for the Town of Vidalia.

Messrs. John Brunini, James H. Price, and *Luther A. Whittington* filed a brief as *amici curiae,* by special leave of Court.

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

This is a suit to restrain the town of Vidalia, Louisiana, from unwarrantably interfering with the operation by the complainant of a public ferry from that town across the Mississippi River to Natchez, Mississippi. On a preliminary hearing the District Court awarded the complainant a temporary injunction, 6 Fed. (2d) 19. In the answer the defendant insisted that the complainant was without a license from it to operate the ferry and on that ground prayed that he be enjoined from continuing his operation. On the final hearing the temporary injunction was made permanent with a modification which will be noticed later, and the injunction prayed by the defendant was denied, 6 Fed. (2d) 21. The parties then were allowed cross appeals to this Court under § 238 of the Judicial Code as it stood at that time. The complainant died shortly thereafter and his administratrix was substituted as a party in his stead, but for convenience we shall state the case and discuss it as if he were still living. The material facts will be stated.

The complainant, McNeely, is a citizen and resident of Mississippi and for more than 20 years has been operating a public ferry from Vidalia across the Mississippi River to Natchez and from Natchez to Vidalia. He has three boats in the service and has floating steel docks and other equipment at both Vidalia and Natchez which he uses in making landings and in receiving and discharging passengers and freight. The value of the boats and equipment is $50,000 or more and the yearly income from

the ferry is about $5,000. At Vidalia his floating docks and landing equipment have been moored and maintained at and near the foot of Concordia street, which was designated by the town as the landing place for his ferry when he began operating it. The variation in the rise and fall of the river is about 55 feet, and a levee extends along the bank and across Concordia street. So it has been essential for him to construct and maintain a ramp or graduated approach from his docks to the intersection of the street and levee. While operating the ferry, he acquired and still holds the lots abutting on the river for several hundred feet on either side of Concordia street. Occasionally he has moved his docks and landing facilities to one side of the street or the other, but only in front of his own lots. His boats have been duly inspected, enrolled and licensed under the navigation laws of the United States and are manned and operated conformably to the requirements of those laws; but he now has no local license to operate the ferry.

The suit was begun in October, 1924. Theretofore the complainant had been operating the ferry under licenses granted by Vidalia and Natchez, but these licenses had then terminated. Early in 1924 the town of Vidalia adopted an ordinance specially granting to the city of Natchez and its assigns a license to operate a public ferry from Vidalia to Natchez and return for a period of ten years, on stated terms whereby the licensee was to have the use of all streets and public places on the river side of the levee at Vidalia for a landing place and approaches, was to pay to Vidalia $1,000 per year during the life of the license, and was to have a preference right to receive, without further payment, any license which Vidalia might conclude to give for another ferry to Natchez.

The license so granted to the city of Natchez was transfered by it to the Royal Route Company, a corporation. Vidalia recognized the transfer and then adopted a fur-

ther ordinance designating for such assignee the same landing place at the foot of Concordia street which it theretofore had designated for the complainant and which he was still using. This ordinance forbade any one other than such assignee to moor, tie, anchor or keep any craft or object of any kind in the river within 150 feet of that landing place, imposed a substantial penalty for every violation of that provision, and directed the mayor and marshal of the town to remove immediately any offending craft or object found within such limits. No provision of any kind was made for another landing place for the complainant or for the further operation of his ferry or for the operation of any ferry other than that of such assignee.

The complainant, believing that Vidalia had exceeded its power in the premises, continued to operate his ferry, whereupon the town proceeded to arrest and punish him under the provisions just described. He then brought this suit, charging in the complaint that the ordinances and action of the town constituted such an interference with interstate commerce as is forbidden to a State and its agencies by the commerce clause of the Constitution of the United States. The District Court, while recognizing that in the absence of controlling congressional legislation the town possesses a substantial power of regulation in respect of the operation of such a ferry, was of opinion that its action in this instance was in excess of its power and therefore that the complainant was entitled to an injunction. It was also of opinion that the river bank from the levee to the water, although belonging to the owner of the adjacent land, is under the law of the State subject to a servitude permitting its use for various public purposes including that of using it as a place of landing for ferry boats and for receiving and discharging passengers and freight carried thereon; and that, while the designation of landing places as between competing

ferries is a matter ordinarily resting with local municipal authorities, Vidalia's discriminatory action towards the complainant had been such as to justify the court in making the designation. It accordingly designated for the Royal Route Company 300 feet of the bank and water frontage beginning 10 feet north of the north line of Concordia street and extending thence upstream, and confined the complainant to the portion beginning 10 feet south of the south line of the street and extending thence downstream.

The town renews the contention made below that, consistently with the commerce clause, it may grant or withhold a license to operate such a ferry, guided only by its judgment of what is in keeping with the public interest, and may prohibit the operation of such a ferry without a license from it. The argument advanced in support of the contention is that if local authorities may not control ferriage over boundary streams like the Mississippi by granting or withholding licenses the ferriage will be subject to no restrictions and the public may suffer from extortionate rates and an absence of provisions for safe carriage, because the nature of the business and varying local conditions make it impracticable for Congress to prescribe effective general regulations. We think the argument confuses power to license and therefore to exclude from the business with power to regulate it, and also that the contention is unsound.

The transportation of persons and property from one State to another is none the less interstate commerce because conducted by ferry; and it does not admit of question that ferries so employed are subject to congressional regulation. Congress has adopted some measures to promote the safety of this form of transportation, Rev. Stat. §§ 4233 (Rule 7), 4426; and also a measure regulating rates on ferries operated in connection with railroads,

New York Central R. R. Co. v. *Hudson County,* 227 U. S. 248, 263.

But, while holding that such interstate transportation is subject to congressional regulation, this Court always has recognized that ferries operated across boundary waters between States simply as a means of transit from shore to shore should be deemed instruments of local convenience and subject to local regulation to the extent that in the absence of congressional action each State may act with respect to the ferriage from its shore. In *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U. S. 196, 206, where particular state action in respect of an interstate ferry was condemned as placing an inadmissible burden on interstate commerce, there was express recognition of the authority of the State to prescribe "such measures as will prevent confusion among the vessels, and collision between them, insure their safety and convenience, and facilitate the discharge or receipt of their passengers and freight." In *Port Richmond Ferry Co.* v. *Hudson County,* 234 U. S. 317, 332, which related to a ferry between two States, there was express affirmation of the authority of each State to fix reasonable rates for the ferriage from its shore. The Court said in that connection: "It has never been supposed that because of the absence of Federal action the public interest was unprotected from extortion and that in order to secure reasonable charges in a myriad of such different local instances, exhibiting an endless variety of circumstance, it would be necessary for Congress to act directly or to establish for that purpose a Federal agency. The matter is illuminated by the consideration of this alternative for the point of the contention is that, there being no Federal regulation, the ferry rates are to be deemed free from all control. The practical advantages of having the matter dealt with by the States are obvious and are illustrated

by the practice of one hundred and twenty-five years. And in view of the character of the subject, we find no sound objection to its continuance. If Congress at any time undertakes to regulate such rates, its action will of course control." But the Court was careful to indicate that the decision was not intended to give any sanction to "prohibitory or discriminatory requirements, or burdensome exactions," interfering with "the guaranteed freedom of interstate intercourse."

The case of *Sault Ste. Marie* v. *International Transit Co.*, 234 U. S. 333, is specially in point here. That was a suit by a Canadian corporation conducting a ferry between Sault Ste. Marie, Ontario, and Sault Ste. Marie, Michigan, to prevent the enforcement against it of an ordinance of the city of Sault Ste. Marie, Michigan, prohibiting the operation of a ferry from that city to the opposite shore of the St. Mary's River except under a license from that city and on the payment of a license fee of $50. The ordinance was assailed as being in conflict with the commerce clause of the Constitution and with a treaty with Great Britain. The Court sustained the constitutional objection and the plaintiff's right to an injunction without considering the treaty question. It said:

"The fundamental principle involved has been applied by this court in recent decisions in a great variety of circumstances, and it must be taken to be firmly established that one otherwise enjoying full capacity for the purpose cannot be compelled to take out a local license for the mere privilege of carrying on interstate or foreign commerce. [Citing cases.]

"Assuming that, by reason of the local considerations pertinent to the operation of ferries, there exists in the absence of Federal action a local protective power to prevent extortion in the rates charged for ferriage from the shore of the State, and to prescribe reasonable regulations

necessary to secure good order and convenience, we think that the action of the city in the present case in requiring the appellee to take out a license, and to pay a license fee, for the privilege of transacting the business conducted at its wharf, was beyond the power which the State could exercise either directly or by delegation."

The action of the town in this case is on the same plane. The complainant, according to the record, has full capacity to operate, and is operating, a serviceable ferry over the Mississippi and the town is attempting to exclude his ferry on the ground that he is operating it without a local license. The question is not whether the town may fix reasonable rates applicable to ferriage from its river front or may prescribe reasonable regulations calculated to secure safety and convenience in the conduct of the business, but whether it may make its consent and license a condition precedent to a right to engage therein. This we hold it may not do.

Both parties complain of the part of the decree designating the landing places to be used by the competing ferries—the town on the ground that it alone is clothed with authority to make such designations, and the complainant on the ground that the designation was made without proper regard for his ownership of the land or his prior use and improvements.

It must be conceded that the designation of places for ferry landings along the river bank within the town limits is a function which primarily belongs to the town and is not ordinarily subject to judicial control. But here the town proceeded on the erroneous theory that the complainant's ferry need not be considered. Not only was no new landing place assigned for his ferry, but the place theretofore and then in actual use for it was assigned to the competing ferry. In this the town plainly deviated from its duty in the premises, for it was under the same legal obligation to accord a landing place to

one ferry as to the other. We perceive no ground for holding that relief from such a deviation may not be had in a suit in equity. No case brought to our attention so holds. Certainly *Watson* v. *Turnbull,* 34 La. An. 856, cited by the town, does not do so.

The complainant's objection to the court's designation appears meritorious at first, but it is otherwise when consideration is given to the settled rule in Louisiana that the banks of navigable streams are subject to a servitude permitting their use for public purposes including those incident to navigation, and that "Riparian proprietors have no right to appropriate to their exclusive use these banks, and they have no private property in the use thereof, which is public." Rev. Civ. Code, articles 455, 457, 665; *Watson* v. *Turnbull, supra.* This servitude has existed in Louisiana since before the creation of the State and has been recognized by this Court and held consistent with the Fourteenth Amendment. *Eldridge* v. *Trezevant,* 160 U. S. 452. Thus the complainant's ownership of the adjacent lots does not entitle him to be preferred over others in the use of the bank as a landing place. Nor does his prior use entitle him to have the other ferry excluded; for the evidence indicates that there is sufficient room on the two sides of Concordia street for both. And so far as appears the ramp constructed by him still may be used in going to and from his docks. In these circumstances we think the court's designation of the landing places should not be disturbed.

Decree affirmed.

TWIST ET AL. *v.* PRAIRIE OIL & GAS COMPANY.

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

Nos. 301, 302. Argued April 28, 29, 1927.—Decided June 6, 1927.

1. When a suit, begun in a state court, on a cause of action at law joined with one for equitable relief concerning the same subject

matter, is treated after removal as a suit in equity, results in an equitable decree, and is appealed by both parties as equitable, it is reviewable as such, upon the assignments of error, and the statutory rule limiting the scope of review in jury-waived cases at law is not applicable. P. 688.

2. It is error to treat such a suit in the appellate court as one at law and affirm the decree without considering the assignments of error. P. 692.
3. The objection that the suit is not within the equity jurisdiction, whether taken in the trial court or the appellate court, does not go to the power of the court as a federal court. P. 690.
4. While ordinarily one out of possession may not bring in a federal court a bill to quiet title, against one in possession, because there is a full, adequate and complete remedy at law and the defendant is entitled to a jury trial, the suit is nevertheless within the jurisdiction—i. e., the power—of the federal court sitting in equity, and the objection of lack of equity jurisdiction may be waived. P. 691.

2 F. (2d) 347, 349, reversed.

CERTIORARI (270 U. S. 639, 640) to review decrees of the Circuit Court of Appeals, affirming decrees of the District Court in suits brought by Twist et al., to assert their interest in land covered by oil and gas leases held by the respondent Oil Company.

Mr. Paul Pinson, with whom *Messrs. James S. Watson* and *Daniel H. Linebaugh* were on the brief, for petitioners.

Mr. Preston C. West, with whom *Messrs. Thomas J. Flannelly* and *A. A. Davidson* were on the brief, for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

These cases are here on writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit. 270 U. S. 639, 640. That court had before it for review, on appeal and cross appeal, a final decree in equity of

the District Court for eastern Oklahoma. The case had been heard by the trial court on the evidence as a suit in equity; and had been treated as such in both courts by both parties. The Court of Appeals concluded that the trial court did not have jurisdiction in equity; ruled, of its own motion, that the case must be deemed to have been tried below as one at law on an oral waiver of jury; and that, since there had been no waiver filed with the clerk as provided in § 649 of the Revised Statutes and no bill of exceptions or special findings of fact as provided in § 700, the appellate court could not consider the errors assigned by the parties. It, therefore, affirmed the judgment on the pleadings. 6 F. (2d) 347, 349. Whether the Court of Appeals erred in so ruling is the only question requiring decision.[1]

In 1917 the Prairie Oil and Gas Company acquired by assignment an oil and gas lease, together with an extension thereof, and entered into possession of the land covered thereby. The lessor was William G. Twist, a citizen of the Cherokee Nation to whom the land had been allotted. After Twist's death and the expiration of the original lease, his children brought this suit in a state court of Oklahoma seeking relief on the ground that the extension was invalid because of fraud and also because certain statutory requirements had not been observed. Two causes of action were therein set forth. In one, damages were sought as for an alleged trespass. In the other, it was charged that the purported extension of the lease constitutes a cloud upon plaintiff's title; and the plaintiffs prayed for a declaration as to the ownership, for cancellation of the extension, for quieting of plaintiffs' title, and for an injunction against further trespass

[1] In No. 302 four cases, each concerning a different lease, were consolidated. The facts stated in the opinion are those of one of these. The same question is presented in No. 301 concerning a fifth lease.

or claim by defendant. Such joinder in a single suit of a cause of action at law with one in equity is permissible under the Oklahoma statute; and under the state law a suit to quiet title may apparently be brought by one out of possession against one in possession. Compiled Oklahoma Statutes, 1921, c. 3, Art. XIV.

The Company, the defendant below, removed the case to the federal court for eastern Oklahoma on the ground of diversity of citizenship. In the federal court the joinder of an action at law with one in equity is not allowable. *Hurt* v. *Hollingsworth,* 100 U. S. 100; *Cherokee Nation* v. *Southern Kansas Ry. Co.,* 135 U. S. 641, 651. Unless the first cause of action stated in the bill could have been construed as asking an accounting incidental to the equitable relief asked, the pleading should have been recast so as to separate the action at law from the suit in equity and each case should have proceeded separately according to its nature. Compare *Hatcher* v. *Hendrie & Bolthoff Mfg. & Supply Co.,* 133 Fed. 267, 271; *Knoxville* v. *Southern Paving Co.,* 220 Fed. 236, 238. Neither party sought to have this done. The defendant caused the case to be docketed as a case in equity; and filed a single answer to both causes of action. Therein, it objected that the petition did not state facts sufficient in law or in equity, to entitle the plaintiff to the relief prayed for, or to any relief; and then, taking up the several allegations of the petition, admitted some, denied others, and set up new matter. The answer prays that the petition be dismissed for want of equity; but also asks affirmative relief. It prays " that the court, by its decree, declare and determine that the defendant's title to said oil and gas lease, as modified and extended, is good, valid and subsisting as against the claim of the plaintiff, and that its title thereto be quieted as against said claims." A reply to the new matter was filed by plaintiffs.

The proceedings on the appeals were throughout those customary in an equity cause. The records were full and complete. They include, among other things, all of the evidence. The decree declared that the defendant is the owner of the extended oil and gas lease covering eleven-fifteenths interest in the described lands; that two of the plaintiffs are the owners of the remaining four-fifteenths interest; that these two plaintiffs recover four-fifteenths " of the net proceeds of the oil and gas produced from said land from September 29, 1919 to April 1, 1923 " (the amount of which was agreed upon); and that " the amount produced since April 1st, 1923 [be] reserved for further consideration." Both the plaintiffs and the defendant appealed to the Circuit Court of Appeals. Neither party assigned as error that there was lack of jurisdiction in equity or a lack of equity. The errors assigned disclosed claims that the District Court erred in admitting evidence; in excluding evidence; in refusing to set aside the extension; in making certain findings; in making certain rulings; in decreeing that the defendant was the owner of the eleven-fifteenths interest in the extended lease; in decreeing that two of the plaintiffs were the owners of four-fifteenths; in concluding that the extension of the lease held by the defendant constituted a cloud upon the title of these two and in decreeing the removal of that cloud; in concluding that they were entitled to two-fifteenths of the net proceeds and in ordering payment of the agreed amount.

The Court of Appeals held that it was without power to review the case as upon an appeal from an equity cause, or to consider any of the errors assigned. Because in its opinion there was a plain, adequate and complete remedy at law, it held that the case must be deemed to have been tried in the District Court as an action at law without a jury. And it applied the rule, that where an action at law is tried without a jury and there has been

no waiver of the jury in the manner prescribed by the statute and no special findings or bill of exceptions, the appellate court is without power to review any question except those which arise on the process, pleadings or judgment. See *Law* v. *United States,* 266 U. S. 494; *United States* v. *Archibald McNeil & Sons,* 267 U. S. 302; *Fleischmann Construction Co.* v. *United States,* 270 U. S. 349, 356; *Cleveland* v. *Walsh Construction Co.,* 279 Fed. 57. The statutory rule limiting the scope of review by an appellate court in jury-waived cases was not applicable to the case at bar. This is not an action at law.

In federal courts, as in others, a plaintiff has a right to choose whether he will seek to enforce a legal or an equitable cause of action and whether he will seek legal or equitable relief. He makes his election and proceeds at law or in equity at his peril. See *Perego* v. *Dodge,* 163 U. S. 160, 164. Formerly, if a plaintiff in a federal court sued in equity and the objection that there was a plain, adequate and complete remedy at law was sustained, the bill was necessarily dismissed. *Curriden* v. *Middleton,* 232 U. S. 633. And ordinarily the dismissal was required to be without prejudice to an action at law, *Horsburg* v. *Baker,* 1 Pet. 232, 237; *Thompson* v. *Railroad Companies,* 6 Wall. 134, 139; *Van Norden* v. *Morton,* 99 U. S. 378, 382; *Rogers* v. *Durant,* 106 U. S. 644; *Scott* v. *Neely,* 140 U. S. 106, 117; *Lacassagne* v. *Chapuis,* 144 U. S. 119, 126; though possibly such precaution was unnecessary. *Ash Sheep Co.* v. *United States,* 252 U. S. 159, 170. Now, under the Act of March 3, 1915, c. 90, § 274 a, 38 Stat. 956 and Equity Rules 22 and 23, if the suit was improperly brought in equity, either the trial court or the appellate court may transfer the case to the law side. Compare *Liberty Oil Co.* v. *Condon Bank,* 260 U. S. 235, 241-243; *Pierce* v. *National Bank of Commerce,* 268 Fed. 487, 489; *Equitable Trust Co.* v. *Denver & Rio Grande R. R. Co.,* 250 Fed. 327, 340. The practice is the same in suits re-

moved from a state court, except that the suit is remanded to the state court where the equitable relief sought, although beyond the equitable jurisdiction of the federal court, may be granted by the state court. Compare *Cates* v. *Allen,* 149 U. S. 451; *Knoxville* v. *Southern Paving Co.,* 220 Fed. 236, 237.

The parties cannot, of course, compel the trial court to hear in equity a suit which seeks a legal remedy for a legal cause of action. *Lewis* v. *Cocks,* 23 Wall. 446. Nor can the task of reviewing such a case as if it were actually an equity cause be imposed upon the appellate court through consent of the parties. See *Elkhart Carriage & Motor Car Co.* v. *Partin,* 9 F. (2d) 393. Either the trial court or the appellate may, of its own motion, take the objection that the case is not within the equity jurisdiction. Compare *Reynes* v. *Dumont,* 130 U. S. 354, 395. But that objection, whether taken in the trial court or in the appellate court, does not go to the power of the court as a federal court.

The decree in the case at bar rests upon the second cause of action set forth in the bill and the answer thereto. We must disregard, as the lower court and the parties did, the first cause of action. The features of the second cause of action are all those of a bill to remove a cloud and to quiet title. The bill prays for a declaration of the rights of the respective parties; for the cancellation of an agreement; for an injunction against the assertion of certain rights; and for general relief. The answer embodied what is in effect a cross-bill. The relief sought by the bill and the cross-bill is of a character within the recognized sphere of federal equity jurisdiction. See *United States* v. *Wilson,* 118 U. S. 86. The recovery, as upon an accounting, of the agreed amount of the net profits was a normal incident of such a bill.

Clarke v. *White,* 12 Pet. 178, 187–188; *Southern Pacific Co.* v. *United States,* 200 U. S. 341. Compare *The Salton Sea Cases,* 172 Fed. 792, 799–802; *Chicago, M. & St. P. Ry. Co.* v. *United States,* 218 Fed. 288, 301–302. It may be that the bill was fatally defective. But the proceeding was unmistakably a suit in equity. The plaintiffs attempted to state a cause of action cognizable by a court of equity. They sought equitable relief.

It is true that ordinarily one out of possession may not bring in a federal court a bill to quiet title, against one in possession, because there is a full, adequate and complete remedy at law and the defendant is entitled to a jury trial. See *Whitehead* v. *Shattuck,* 138 U. S. 146; *Black* v. *Jackson,* 177 U. S. 349, 363–364; *Lancaster* v. *Kathleen Oil Co.,* 241 U. S. 551, 555. But the suit is of a class within the jurisdiction—that is the power—of a federal court sitting in equity. There are cases in the federal courts in which suits in equity to quiet title brought by one out of possession against one in possession have been entertained, because of the special facts, or because of the particular relief sought, or because the defendant waived the objection of lack of equity jurisdiction. *Simmons Creek Coal Co.* v. *Doran,* 142 U. S. 417; *Schroeder* v. *Young,* 161 U. S. 334, 345. Compare *Stewart* v. *Masterson,* 131 U. S. 151; *Duignan* v. *United States, ante,* p. 195; *Jones* v. *Prairie Oil & Gas Co.,* 273 U. S. 195; *Kilgore* v. *Norman,* 119 Fed. 1006, aff'd 120 Fed. 1020; *Big Six Co.* v. *Mitchell,* 138 Fed. 279; *Continental Trust Co.* v. *Tallassee, etc. Co.,* 222 Fed. 694, 702. Such waiver is possible, because the objection that the bill does not make a case within the equity jurisdiction of a federal court goes not to the power of the court as a federal court, but to the merits. *Blythe* v. *Hinckley,* 173 U. S. 501; *Pusey & Jones Co.* v. *Hanssen,* 261 U. S. 491,

500. Compare *Burnrite Coal Briquette Co.* v. *Riggs, ante,* p. 208; *Duignan* v. *United States, supra.*

The Court of Appeals, being of opinion that the plaintiffs had not established a right to relief in equity, because there was a plain, adequate and complete remedy at law, might, on the undisputed facts, have reversed the decree on that ground without considering the specific errors assigned; and, rightly or wrongly, it might have ordered the bill dismissed without prejudice to the remedy at law; or might conceivably have ordered the case transferred to the law docket; or might have considered the case on the merits as on an equity appeal, in the view that at such stage of the proceedings it was desirable to hold that the objection to the equity jurisdiction had been waived. Compare *Southern Pacific Co.* v. *United States,* 200 U. S. 341. But it could not, while refusing to consider the errors assigned, retain the case and adjudicate the merits. This it did when it affirmed the decree. It was error to declare that this proceeding, which is a bill in equity in its nature as well as in its form, and which seeks relief that only a court of equity can give, *Lancaster* v. *Kathleen Oil Co.,* 241 U. S. 551, 555, shall be deemed an action at law, because the only remedy open to the plaintiffs was at law. Compare *Spring Garden Insurance Co.* v. *Amusement Syndicate Co.,* 178 Fed. 519, 530. The suit at bar is not like *Elkhart Carriage & Motor Car Co.* v. *Partin,* 9 F. (2d) 393, an action at law masquerading as a suit in equity.

Because the Court of Appeals should have considered the errors assigned as in an equity cause but did not, we reverse its judgment and remand the case to it for further proceedings in accordance with this opinion. See *Liberty Oil Co.* v. *Condon National Bank,* 260 U. S. 235, 245.

Reversed.

Syllabus.

UNITED STATES *v.* INTERNATIONAL HARVESTER COMPANY ET AL.

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

No. 254. Argued October 26, 1926.—Decided June 6, 1927.

1. In a suit under the Anti-Trust Act, against a corporation, which had combined others engaged separately in interstate trade in harvesting machines, a consent decree was entered requiring the defendant to limit its sales agencies and dispose of some of its lines to independent manufacturers, the decree declaring that the object to be attained under its terms was to restore competitive conditions, and providing that, in the event that such conditions should not have been established at the expiration of a specified period, the United States should have the right to such further relief in the case as should be necessary to restore them and to bring about a situation in harmony with law. The requirements having been complied with and lawful competitive conditions established,

   Held that to construe the decree as nevertheless entitling the United States to further relief by division of the defendant into separate and distinct corporations for the purpose of restoring the competitive conditions that existed sixteen years before the entry of the consent decree would be repugnant to the agreement embodied in the decree, which had become binding on all parties and upon which the defendant was entitled to rely. P. 702.
2. Statements in a report of the Federal Trade Commission to the Senate based upon an *ex parte* investigation, are not in themselves substantive evidence in a subsequent suit by the Government under the Anti-Trust Act. P. 703.
3. From the evidence the Court finds that competitive conditions in the trade in harvesting machines have been established in compliance with the consent decree herein. P. 704.
4. The law does not make the mere size of a corporation, or the existence of unexerted power on its part, an offense, when unaccompanied by unlawful conduct in the exercise of its power. P. 708.
5. The fact that competitors may see proper, in the exercise of their own judgment, to follow the prices of another manufacturer, does not establish any suppression of competition or show any sinister domination. P. 708.

10 F. (2d) 827, affirmed.

APPEAL from a decree of the District Court dismissing a supplemental petition of the United States for relief in addition to that granted by an earlier decree in a suit under the Anti-Trust Act. See 214 Fed. 987.

Assistant to the Attorney General Donovan, with whom *Solicitor General Mitchell* and *Mary G. Connor,* Special Assistant to the Attorney General, were on the brief, for the United States.

Mr. William S. Elliott, with whom *Messrs. Frank H. Scott* and *Victor A. Remy* were on the brief, for appellees.

MR. JUSTICE SANFORD delivered the opinion of the Court.

This is a direct appeal, under § 238 of the Judicial Code as amended by the Jurisdictional Act of 1925,[1] from a final decree of the District Court—specially constituted under the Expediting Act [2] and composed of three Circuit Judges—dismissing a supplemental petition of the United States to obtain further relief in addition to that granted by an earlier decree in the same case.

In the original petition, which was filed in 1912, the United States alleged that the International Harvester Company [3]—hereinafter referred to as the International Company—and other defendants were engaged in a combination restraining interstate trade and commerce in harvesting machines and other agricultural implements and monopolizing such trade in violation of the Anti-Trust Act;[4] that the International Company had been

[1] 43 Stat. 936, c. 229, § 1.

[2] 32 Stat. 823, c. 544; amended, 36 Stat. 854, c. 428.

[3] This name is used in the decrees and briefs as including both the original defendant and a new company of the same name, which took over in 1918 the property and business of the original company, and entered its appearance in the case as a defendant.

[4] 26 Stat. 209, c. 647; U. S. C., Tit. 15, § 1, *et seq.*

formed by certain of the other defendants in 1902, with a capital stock of $120,000,000, for the purpose of combining five separate companies then manufacturing and selling harvesting machinery, whose aggregate output exceeded 85 per cent. of such machinery produced and sold in the United States, and thereby eliminating competition between these companies, restraining and monopolizing the interstate trade in such machinery, and promoting a similar monopoly in other agricultural implements; that in pursuance of such purpose the International Company acquired in 1902 the entire property and business of these five companies; that it thereafter acquired the property and business of various competitors and the control of steel, coal and other subsidiary companies, added all other classes of agricultural implements to its lines, used various unfair trade methods and practices to destroy its competitors, closed the opportunities for new competitors in all lines of agricultural implements, and advanced the price of harvesting machinery; and that it was then producing at least 90 per cent. of the grain binders and 75 per cent. of the mowers produced and sold in the United States, and over 30 per cent. of all agricultural implements other than harvesting machinery.

After an extended hearing on the merits, the District Court held—one judge dissenting—that although it was not shown that there had been any unfair or unjust treatment by the International Company of its competitors and there was nothing in the history of its expanding lines which should be condemned, it had been, from its beginning in 1902, and then was, a combination violating the Anti-Trust Act, suppressing competition between the five original companies and directly tending to a monopoly, a condition that had been accentuated by its subsequent acquisition of competing plants and subsidiary companies; and that the entire combination and monop-

oly should be dissolved. 214 Fed. 987. By the decree as originally entered in August, 1914, it was "adjudged and decreed that said combination and monopoly be forever dissolved and to the end that the business and assets of the International Harvester Company be separated and divided among at least three substantially equal, separate, distinct, and independent corporations with wholly separate owners and stockholders," and that the defendants submit a plan of such separation for the consideration of the court; and jurisdiction was retained to make such additional decrees as might be necessary to secure the final dissolution of the combination and monopoly. This was subsequently modified by a decree entered in October, 1914, by which, pursuant to an agreement with the Attorney General of the United States, the provision requiring the business and assets of the International Company to be separated and divided among at least three distinct corporations was stricken out, and a provision was substituted requiring that its business and assets "be divided in such manner and into such number of parts of separate and distinct ownership as may be necessary to restore competitive conditions and bring about a new situation in harmony with law."

The defendants appealed from the final decree to this Court; but, before the case had been decided, dismissed their appeal, pursuant to an agreement between the parties. And after the case had been remanded to the District Court, upon a stipulation signed by the Attorney General of the United States and the solicitors for the defendants, a consent decree was entered therein, on November 2, 1918, which, after reinstating the former decree as modified, recited that, "the parties having agreed upon and submitted to the court a plan for carrying into effect the order contained in said decree that the combination and monopoly therein adjudged unlawful be dis-

solved, and the court having considered and approved the plan, it is further ordered, in accordance therewith, as follows": (a) The International Company is prohibited and enjoined from having more than one representative or agent in any city or town for the sale of harvesting machines and other agricultural implements; (b) It shall offer for sale to responsible manufacturers of agricultural implements, the harvesting machine lines made and sold by it under the trade names of Osborne, Milwaukee, and Champion, respectively, with the equipment specially used in their manufacture, and accept a reasonable price from any purchaser approved by the United States; (c) It shall also endeavor to sell in connection with said harvester lines the Champion and Osborne harvester plants, and accept a reasonable price therefor from the purchasers of said harvester lines; (d) If any of said harvester lines, including plant, etc., shall not have been sold within one year after the close of the existing war, then, upon request of the United States, the same shall be sold at public auction; (e) " The object to be attained under the terms of this decree is to restore competitive conditions in the United States in the interstate business in harvesting machines and other agricultural implements, and, in the event that such competitive conditions shall not have been established at the expiration of eighteen months after the termination of the existing war . . . then and in that case the United States shall have the right to such further relief herein as shall be necessary to restore said competitive conditions and to bring about a situation in harmony with law; and this court reserves all necessary jurisdiction and power to carry into effect the provisions of the decrees herein entered."

Thereafter, in 1920, after a hearing upon evidence, the court entered an order adjudging and decreeing, the United States consenting thereto, that the decree of 1918,

properly interpreted, did not require the International Company to offer for sale the Champion and Osborne harvester plants except in connection with sales of the respective harvester lines; and further adjudging and decreeing that inasmuch as the International Company had, pursuant to the provisions of said decree, "duly sold" the Champion and Osborne harvester lines to companies which did not desire to purchase the respective plants, the latter were not subject to sale under the provisions of said decree.

In July, 1923, more than eighteen months after the termination of the war, the United States filed in the District Court the supplemental petition here involved, for the purpose, as stated, of securing, in accordance with clause (e) of the decree of November 2, 1918, such further relief as should be "necessary to restore competitive conditions in interstate business in harvesting machines and other agricultural implements, and bring about a situation in harmony with law." This petition alleged that the output and sales of the Champion, Osborne and Milwaukee harvesting lines which the International Company had been required to sell under that decree, constituted such a small part of its total output and sales and such a negligible part of the total trade in harvesting machines in the United States, that the decree was inadequate to accomplish its declared purpose; that the sale of the Osborne and Champion lines had had little or no effect upon competitive conditions; that, although the Milwaukee line had not been sold, the United States had not requested its sale at public auction under clause (d) of the decree, as its separation could have no appreciable effect on competition; that the International Company's control of interstate trade in harvesting machines had increased from 1918 to 1922; that the number of independent manufacturers of harvesting machines was steadily shrinking, due to their inability to compete with the In-

ternational Company, which, with its large capital, credit, resources, profitable side lines and subsidiaries, was enabled, particularly in times of depression, to sell its harvesting machines at cost, generally lower than that of its competitors, and thus effectually eliminate competition and monopolize the business; that it had used its power in this manner, particularly since the decree of 1918, for the purpose and with the effect of restraining and monopolizing trade in harvesting machines by compelling its competitors to cease their manufacture and sale; and that unless the combination and monopoly that had been found to exist should be effectively dissolved by dividing the International Company into at least three separate concerns, its monopolistic control would increase and become complete.

The petition prayed that the court adjudge and decree that the International Company still was a combination and monopoly restraining interstate trade in harvesting machinery; that the decree of 1918 was inadequate to achieve its declared purpose and the United States was entitled to the further relief necessary to restore competitive conditions and bring about a situation in harmony with law; and that the business and assets of the International Company "be separated and divided among at least three separate, distinct and independent corporations of wholly separate owners, stockholders and managers, substantially as suggested by the Federal Trade Commission in its report to the Senate dated May 4, 1920," which was filed as an exhibit to the petition.

The report thus referred to had been made pursuant to a Senate Resolution of May, 1918, directing the Federal Trade Commission to investigate the causes for the high prices of agricultural implements, and any restraint of trade therein. The Commission had made an *ex parte* investigation, covering mainly the period from 1913 to 1918, and based largely upon data furnished by various

manufacturers of agricultural implements concerning their costs, profits, etc., the results of which were tabulated by its accountants, partly in connection with a previous report that had been made by the former Bureau of Corporations. In this report—made only a year and a half after the entry of the consent decree of 1918 and before the war had terminated—the Commission had expressed the opinion that this decree would fail of its purpose to restore competitive conditions and that further steps were necessary to secure its object; and had recommended that the business and assets of the International Company be divided among three new companies as therein outlined. A copy of this report had also been transmitted to the Attorney General; and thereafter the Government, adopting the recommendation of the Commission, filed this supplemental petition.

The petition was answered; an examiner appointed and evidence taken in 1924. In March of that year, as shown by the evidence, the International Company sold its Milwaukee line of harvesting machines, subject to the approval of the Attorney General or the court.

At the hearing, in 1925, the District Court found that the International Company had complied with the requirements of clauses (a), (b), (c) and (d) of the decree of 1918, and, without attempting to recite the evidence [5] on the disputed questions of fact arising under the Government's application for further relief under clause (e), stated its conclusions—two judges concurring—as follows: "The evidence in this case has convinced, not only that it fails to prove by a fair, or, any, preponderance thereof that the International Harvester Company, since the sale of the 'Osborne,' 'Milwaukee,' and 'Champion' lines and their appurtenances, has been or is unduly or

[5] This, which consisted of "many volumes," as condensed in the record in this Court, including tabulated statements and other documentary exhibits, covers about 600 printed pages.

unreasonably monopolizing or restraining interstate commerce in harvesting machines or their appurtenances in the United States; but in our opinion it conclusively proves that it has not done and is not doing so, that competition in the manufacture and sale of harvesting machines and their appurtenances in interstate commerce in the United States has been and is free and untrammeled, that the percentage of all such machines that were made and sold by the International Harvester Company has decreased from about 85 per cent. in 1902, to about 64 per cent. at the time of the decree of November 2, 1918, and ever since that powerful and successful independent competitors of the Harvester Company contest the field with it, and that in their presence it cannot and does not control or dictate the prices of the harvesting machines and their appurtenances which it and its competitors make and sell, that the prices of its machines and appurtenances to the dealers, and to the farmers who use them, in proportion to their costs, have decreased and are low. The purpose of preventing undue restraint of trade is to prevent unreasonably high prices to the purchasers and users of the articles traded in. The evidence in this case satisfies us that these objects have been successfully attained under the decree of November 2, 1918, the defendant's compliance with its requirements, and their conduct of their interstate commerce in harvesting machines and their appurtenances since the rendition of that decree." From these conclusions the third judge dissented, upon the ground that the evidence convinced him that the decree of 1918 had entirely failed to restore genuine competitive conditions; that the International Company had such advantages in resources, organization, selling mediums, production costs, manufacture of raw material, and volume and spread of business, as to be able completely to dominate the trade in harvesting machines; and that it did so control and dominate by

regulating prices, fixing the prices for its own machines, by which the other manufacturers were prudently governed. 10 F. (2d) 827. A decree was thereupon entered dismissing the supplemental petition.

It is clear that the charges of the supplemental petition relate solely to the interstate trade in harvesting machines, and that no issue is involved as to the other lines of agricultural implements. As to this the parties agree; the Government specifically stating in its brief that this "proceeding has to do only with an unlawful combination in harvesting machines."

The basic contention of the Government here is that the declared purpose of the decree of 1918 was to restore competitive conditions in the harvesting machine industry substantially as they had existed in 1902 before the International Company was formed by the combination of the five original companies, that is, to so increase the amount of competition and the number of competitors as to restore, in a "quantitative" sense, "the free and open competition which existed when the combination was formed"; and that therefore the sole test to be applied in determining whether the decree has accomplished its purpose, is whether it "has had the effect actually to restore in the harvesting machine industry the competitive conditions which obtained prior to 1902." We cannot sustain this contention. This is entirely inconsistent with the purpose of the consent decree, both as appears from its terms and as it was apparently construed by the District Court itself. Its plain and evident purpose was to substitute for the requirement in the previous decrees that the International Company be divided into separate and distinct corporations, the requirements that, in order to establish "competitive conditions" bringing about "a situation in harmony with law," the International Company should limit its sales agency in any town or city to a single representative, and should sell three of

its harvesting machine lines to independent manufacturers of agricultural implements; and to give the United States the right to further relief only "in the event" that within eighteen months after the termination of the war such competitive conditions had not been established. And a construction of this decree by which, although its requirements have been fully complied with and lawful competitive conditions established, the United States would nevertheless be entitled to further relief by the division of the International Company into separate and distinct corporations for the purpose of restoring the actual competitive conditions that had existed sixteen years before the entry of the consent decree, would plainly be repugnant to the agreement approved by the court and embodied in the decree, which has become binding upon all parties, and upon which the International Company has, in the exercise of good faith, been entitled to rely.

In support of its alternative contention that competitive conditions have not been established bringing about a situation in harmony with law, the Government relies in large measure upon various statements and tabulations contained in the report of the Federal Trade Commission, which was introduced in evidence over the objection of the International Company. But it is entirely plain that to treat the statements in this report—based upon an *ex parte* investigation and formulated in the manner hereinabove set forth—as constituting in themselves substantive evidence upon the questions of fact here involved, violates the fundamental rules of evidence entitling the parties to a trial of issues of fact, not upon hearsay, but upon the testimony of persons having first hand knowledge of the facts, who are produced as witnesses and are subject to the test of cross-examination. And no support for the Government's contention in this respect is afforded by *Chicago Board of Trade* v. *Olsen,*

262 U. S. 1, 13, 37, in which the reference to statements that had been made by the Federal Trade Commission in a report to the President prior to the passage of the Act of Congress whose constitutional validity was involved, was solely as an aid in determining whether this Court was warranted in rejecting as unreasonable a finding that had been made by Congress as to the necessity for the Act.

Without entering into a detailed statement of the evidence—which is so voluminous as to render this impracticable—we find, from the greater weight of the competent testimony, that competitive conditions in the trade in harvesting machines have been established in compliance with the requirements of the consent decree.

In the course of a general development that had taken place in the agricultural industry since 1902, the International Company and many of its principal competitors had extended their lines from implements used in particular seasons, such as harvesting machines, plows and seeders, and had become in 1918, when the consent decree was entered, "long-line" year-round companies, manufacturing and selling full lines of agricultural implements. This had led to cheaper production and distribution; and, the sale of one line helping to sell the others, had brought about a change in competitive conditions affecting generally all their lines. In distributing their products they had also generally adopted the plan of selling their implements to local retail dealers, who resold them to farmers; and these dealers had become, through their personal efficiency and the good will and the friendly relations which they had established with the farmers, factors of prime importance in distributing the implements of the different companies. Prior to 1912 the International Company had also adopted the general policy, when there was more than one implement dealer in any town, of distributing its various lines, especially its Mc-

Cormick and Deering harvesting machines, among different dealers; and by means of "exclusive" contracts made with such dealers, its competitors were frequently prevented from acquiring any adequate retail outlet for their implements. This was one of the practices which the Government had assailed in its original petition. Furthermore, as the International Company—having five different lines of harvesting machines, which were necessarily somewhat in competition among themselves—had laid chief stress upon its McCormick and Deering lines, the sales of its Champion, Osborne and Milwaukee lines, which were frequently combined in the hands of one dealer, had proportionately decreased; so that these three lines furnished in 1918 a comparatively small part of its harvesting machine business. This, however, was by no means negligible; and these three lines, which had been improved and kept up to date, still retained a well established reputation and a capacity for effective development.

In this situation the consent decree provided, as the means of establishing the competitive conditions which it sought to bring about, that the International Company should be limited to one sales representative in any town or city, and should sell its Champion, Osborne and Milwaukee harvesting lines to independent manufacturers of agricultural implements.

The International Company complied immediately with the single-dealer requirement in clause (a) of the consent decree. This has caused a drastic limitation upon its method of distribution, to which none of its competitors have been subjected. By such compliance it lost the services of almost 5,000 dealers, to whom it had sold in the preceding year implements to the amount of more than $17,000,000. Many of these were taken over by its competitors, who acquired the benefit of their experience, good will and standing among the farmers. It was also compelled to place its McCormick and Deering harvest-

ing lines, which usually had been handled by two dealers, with one of these dealers, who had developed a business in only one of them and was placed at a great disadvantage in handling them together; a difficulty which it has sought to overcome as far as possible by combining its McCormick and Deering lines into a new harvesting line that it has been attempting to introduce in the American market in place of the two separate lines. Further, being limited to one dealer in a town, and having its own tractor to sell in competition with the Fordson tractor, it has not been in a position to place its implements with Ford dealers, who have been available to its competitors as new and favorable outlets for their implements. And, in general, it clearly appears that the single-dealer limitation in the consent decree has greatly enlarged the field of activity of its competitors, and has proved to be, as had been anticipated, an effective means of providing competitive conditions.[6]

The International Company also complied with the requirements of clauses (b), (c) and (d) of the consent decree by selling its Champion, Osborne and Milwaukee harvesting lines to independent manufacturers of agricultural implements.[7]

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[6] Thus, the Vice President and sales manager of Deere & Co., a leading competitor, testified: "After the decree by which the Harvester Company was prevented from having more than one dealer in a town, a great many dealers who had formerly sold Deere plows and McCormick or Deering harvesters, and to whom we had been unable to sell our harvester line, took on the John Deere harvester line."—" my idea is that whoever made the provision that the Harvester Company should confine its operations to one dealer in a town struck the crux of the whole situation."—" we know positively that with the Harvester Company confined to one dealer in a town we can compete with them."

[7] The cause of the delay in selling the Milwaukee line is fully explained in the testimony; and the Government makes no complaint in regard thereto.

The purchasers—B. F. Avery & Son, the Emerson-Brantingham Company, and the Moline Plow Company—are old-established and well-known companies, and among the largest manufacturers of implements in the United States. The acquisition of these established lines of harvesting machinery, filling out and strengthening their other implement lines, has greatly increased their competitive strength as long-line companies. And although there was from 1921 to 1923 a period of great depression in the agricultural implement industry, corresponding to the general depression in agricultural conditions, which made it difficult to launch new lines and develop new business, the officers of each of these companies testified as to their entire satisfaction with their new lines, the resulting increase in their competitive ability, and their confidence that with the resumption of better conditions in the industry they would be able to compete energetically and successfully with the International Company in the harvesting machine business. And we cannot doubt, upon the entire evidence, that the provision of the consent decree by which these three established harvesting lines were taken away from the International Company, in whose hands they had not been developed, and transferred to the purchasing companies, whose long lines were filled out and strengthened, has constituted and will constitute in progressive degree, as the agricultural depression ceases, an effective means of increasing the competition in harvesting machinery as contemplated by that decree.

It does not appear that since the entry of the consent decree the International Company has used its capital and resources—which, although much larger than those of any single competitor, are but little larger than the aggregate capital and resources of all its competitors, and are in large part employed in its foreign trade—its subsidiary companies or incidental advantages, for the pur-

pose or with the effect of restraining and suppressing the interstate trade in harvesting machinery; that it has at any time reduced the prices of harvesting machines below cost, for the purpose of driving out its competitors; or that it has at any time controlled and dominated the trade in harvesting machinery by the regulation of prices. It is true that in 1921 and 1922, the period of acute depression in the agricultural implement industry—due chiefly to the depressed agricultural conditions and the diminished purchasing power of the farmers—not only the International Company but its competitors, in a movement initiated by the leading manufacturer of plows, for the purpose primarily of disposing of the surplus stocks which they had accumulated during the war period under high cost conditions, and as a necessary measure of self-protection, made generally material reductions in the prices of harvesting machines and other implements. But the International Company did not at any time reduce its prices below replacement cost; and its reduction in prices was not intended to eliminate competition and has not had that effect. It has not, either during those two years or since, attempted to dominate or in fact controlled or dominated the harvesting machinery industry by the compulsory regulation of prices. The most that can be said as to this, is that many of its competitors have been accustomed, independently and as a matter of business expediency, to follow approximately the prices at which it has sold its harvesting machines; but one of its competitors has habitually sold its machines at somewhat higher prices. The law, however, does not make the mere size of a corporation, however impressive, or the existence of unexerted power on its part, an offense, when unaccompanied by unlawful conduct in the exercise of its power. *United States* v. *Steel Corporation,* 251 U. S. 417, 451. And the fact that competitors may see proper, in the exercise of their own judg-

ment, to follow the prices of another manufacturer, does not establish any suppression of competition or show any sinister domination. *United States* v. *Steel Corporation, supra,* 448. And see *Cement Mfg. Protective Assoc'n* v. *United States,* 268 U. S. 588, 606.

We further find that while several of the competitors of the International Company in harvesting machines have retired from business since 1911, some during the period of depression commencing in 1921, these retirements were not due to inability to compete with the International Company, but to other causes for which it was in no way responsible; that the place of these retiring competitors has been taken by other and stronger competitors; and that in 1923 it not only had as many competitors in harvesting machines as in 1911, but competitors of greater strength and competitive efficiency.

We also find that the International Company's percentage of the interstate trade in harvesting machinery is not shown to have increased since 1918, as the Government alleged; but, on the contrary, appears to have already decreased. The evidence does not show with any definiteness the percentage of the International Company's trade in such machinery in 1918. This, as alleged in the supplemental petition, had been approximately 77 per cent. in 1911, the year before the original petition was filed. And the Government's own tabulations show that while in 1919, the year after the consent decree was entered, the International Company sold 66.6 per cent. of all the harvesting machines sold in the United States, in 1923 its percentage was only 64.1 per cent. We need not determine the disputed question whether, as the International Company contends, there had been in fact a larger decrease.

And, finally, the testimony, practically uncontradicted, of a great number of witnesses, including officers of competitive companies, competitive retail dealers who had

handled the International Company's lines before the single-dealer requirement was put into effect, and the officers of farmers associations, leaves no room to doubt that since the entry of the decree of 1918, there had been established, and then existed, a free, untrammeled, keen and effective competition in harvesting machinery that was in no wise restrained or suppressed by the International Company.

We conclude that not only has the International Company complied with the specific requirements of the consent decree, but that competitive conditions have been established in the interstate trade in harvesting machinery bringing about "a situation in harmony with law." The decree of the District Court dismissing the supplemental petition, is therefore

Affirmed.

MR. JUSTICE MCREYNOLDS, MR. JUSTICE BRANDEIS, and MR. JUSTICE STONE took no part in the consideration or determination of this cause.

DECISIONS PER CURIAM, FROM APRIL 12, 1927, TO AND INCLUDING JUNE 6, 1927, OTHER THAN DECISIONS ON PETITIONS FOR WRITS OF CERTIORARI.

No. —, original. EX PARTE: IN THE MATTER OF BARBER ASPHALT COMPANY. April 18, 1927. The motion for leave to file petition for writ of mandamus herein is denied. *Messrs. John W. Davis, Charles Neave, Samuel E. Hibben, Henry N. Paul,* and *Edward L. Patterson* for petitioner.

No. —, original. EX PARTE: IN THE MATTER OF LAKEWOOD ENGINEERING COMPANY. April 18, 1927. The motion for leave to file a petition for a writ of mandamus herein is denied without prejudice to the right to file a petition for a writ of certiorari. *Mr. Frank E. Dennett* for petitioner.

No. 220. FOSTER KELTON AND HERBERT KELTON *v.* WALLACE KELTON. Error to the Supreme Court of the State of Tennessee. Argued March 11, 1927. Decided April 18, 1927. *Per Curiam.* Dismissed on the authority of *Cuyahoga Power Co.* v. *Northern Realty Co.,* 244 U. S. 300, 302, 303; *Second National Bank* v. *First National Bank,* 242 U. S. 600, 602; *San Antonio & Aransas Pass Railway Co.* v. *Wagner,* 241 U. S. 476, 477. *Mr. Haskell B. Talley* for plaintiffs in error. No appearance for defendant in error.

No. 671. HUMBOLDT LAND & CATTLE COMPANY *v.* ROBERT A. ALLEN, STATE ENGINEER OF NEVADA, AND INDIVIDUALLY, ET AL. Appeal from the District Court of the United States for the District of Nevada. Argued April 11, 1927. Decided April 18, 1927. *Per Curiam.* Af-

firmed on the authority of *Chicago Great Western Railway Co.* v. *Kendall,* 266 U. S. 94, 100–101. *Mr. Henry A. Guiler,* with whom *Messrs. Jesse C. Adkins, Albert C. Aiken,* and *Sterling Carr* were on the brief, for appellant. *Mr. George B. Thatcher,* with whom *Mr. M. A. Diskin* was on the brief, for appellees.

No. 246. ALLAN PINKERTON, DOING BUSINESS AS PINKERTONS' NATIONAL DETECTIVE AGENCY, AND CORPORATIONS AUXILIARY COMPANY *v.* EUGENE WENGERT, JOHN W. WOLLER, GEORGE PAGE, AND CHARLES REICHENBACH. Appeal from the District Court of the United States for the Eastern District of Wisconsin. Argued March 17, 1927. Decided April 18, 1927. *Per Curiam.* Affirmed on the authority of *Lehon* v. *City of Atlanta,* 242 U. S. 53. *Mr. F. H. Wood,* with whom *Mr. Roberts Steinmetz* was on the brief, for appellants. *Mr. Eugene Wengert, pro se,* with whom *Mr. Daniel W. Sullivan* was on the brief, for appellees.

No. 14, original. STATE OF NEW YORK *v.* STATE OF ILLINOIS AND SANITARY DISTRICT OF CHICAGO. April 18, 1927. Upon consideration of several motions and suggestions filed in this cause by the respective parties, it is ordered:

1. The answer heretofore filed by the defendants in this cause to the bill of complaint in the related case of *State of Michigan* v. *State of Illinois and Sanitary District of Chicago* may and shall be accepted and treated as their answer to the bill of complaint in this cause, other than Paragraph III thereof;

2. The motion of the defendants in this cause to strike from the bill of complaint Paragraph III thereof is set down for hearing on Monday next, at the head of the cases assigned for that day; and

3. The motion of the complainants for an order requiring the defendants in this cause to answer Paragraph III of the bill of complaint is deferred until after the motion of the defendants to strike out that paragraph is heard and disposed of. See *ante,* p. 488.

No. 283. GOULD-MERSEREAU COMPANY *v.* WILLIAMS BROS. AIRCRAFT CORPORATION. Certiorari to the Circuit Court of Appeals for the Second Circuit. Argued April 21, 1927. Decided April 21, 1927. *Per Curiam.* The decree of the Circuit Court of Appeals is reversed upon the authority of *Alexander Milbourn Co.* v. *Davis-Bournonville Co.,* 270 U. S. 390, and the cause is remanded to that court for reconsideration with special regard to the decision in that case. *Mr. William S. Pritchard,* with whom *Mr. Ernest G. Metcalfe* was on the brief, for petitioner. *Messrs. D. A. Usina, Hervey S. Knight,* and *George L. Wilkinson* were on the brief for respondent.

No. 6, original. STATE OF OKLAHOMA *v.* STATE OF TEXAS, UNITED STATES, INTERVENER. April 25, 1927. The report filed herein March 14, 1927, by the boundary commissioners showing the work done, time employed and expenses incurred in the survey, marking and mapping of particular portions of the boundary between the States of Texas and Oklahoma along the south bank of the Red River, from the eastern limit of Lamar County, Texas, to the eastern boundary of the State of Oklahoma, pursuant to the decree of March 12, 1923, (261 U. S. 340) is approved and adopted. The compensation of the commissioners for the work done by them, as shown in such report, is fixed at $8,937.50 for Arthur D. Kidder, and at $11,525.00 for Arthur A. Stiles. The expenses incurred,

as shown in the report, and the compensation here allowed shall be charged as part of the costs in this cause and shall be borne and paid by the three parties to the cause in the proportions specified in said decree of March 12, 1923. The parties severally shall be credited with the amounts advanced by them, as shown in the report; and they shall advance additional amounts to pay the compensation of the commissioners, as here allowed, and the balance of $694.25 due to Arthur D. Kidder for expenses paid by him, as shown in the report.

No. 6, original. STATE OF OKLAHOMA *v.* STATE OF TEXAS, UNITED STATES, INTERVENER. April 25, 1927. On consideration of the fourth report of the commissioners, heretofore selected to run, locate and mark portions of the boundary between the States of Texas and Oklahoma along the south bank of the Red River, showing that they have run, located and marked particular portions of such boundary between the eastern limit of Lamar County, Texas, and the eastern boundary of the State of Oklahoma, which fourth report was presented herein February 21, 1927;

And no objection or exception to such report being presented, although the time therefor has expired;

It is now adjudged, ordered and decreed as follows:

1. The said report is in all respects confirmed;

2. The boundary line delineated and set forth in the said report and on the accompanying maps is established and declared to be the true boundary between the States of Texas and Oklahoma along the Red River at the several places designated in such report, subject, however, to such changes as hereafter may be wrought by the natural and gradual processes known as erosion and accretion as specified in the second, third and fourth

paragraphs of the decree rendered herein March 12, 1923, (261 U. S. 340).

3. The clerk of this Court shall transmit to the Chief Magistrates of the States of Texas and Oklahoma copies of this decree, duly authenticated under the seal of this Court, together with copies of the said fourth report and of the accompanying maps.

4. As it appears that the commissioners appointed to run, locate and mark portions of the boundary along the south bank of the Red River have completed their work conformably to the decree of March 12, 1923, the said commissioners are hereby discharged.

5. The clerk of this Court shall distribute and deliver to the Chief Magistrates of the States of Texas and Oklahoma and the Secretary of the Interior all copies of the first, second, third and fourth boundary reports made by the commissioners, with the accompanying maps, now in the clerk's hands, save that he shall retain twenty copies of each for purposes of certification and other needs that may arise in his office.

6. Except as otherwise specially ordered by this Court, the costs in this cause pertaining to the adjudication and settlement of the boundary between the two States along the Red River shall be borne in equal parts by the State of Oklahoma, the State of Texas and the United States.

No. 280. ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, *v.* LEAH M. GRAY, ADMINISTRATRIX OF THE ESTATE OF GLEN E. GRAY. Certiorari to the Circuit Court of Appeals for the First Circuit. Submitted April 19, 1927. Decided April 25, 1927. *Per Curiam.* Reversed on the authority of *Reading Co.* v. *Koons,* 271 U. S. 58. *Messrs. Merrill Shurtleff* and *Charles H. Blatchford* for petitioner. *Mr. Hollis R. Bailey* for respondent.

No. 278. SCHUMAN BROTHERS, A COPARTNERSHIP, CONSISTING OF MORRIS SCHUMAN AND JOSEPH M. SCHUMAN, *v.* FIRST NATIONAL BANK OF SKIATOOK. Error to the Supreme Court of the State of Oklahoma. Argued April 19, 1927. Decided April 25, 1927. *Per Curiam.* Writ of error dismissed under § 237 of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 936, and the writ treated as an application herein for a writ of certiorari is also denied. *Mr. C. L. Yancey,* with whom *Mr. Claude H. Rosenstein* was on the brief, for plaintiffs in error. *Messrs. Dale C. Dillon* and *B. A. Lewis* were on the brief for defendant in error.

No. 2, original. STATE OF NEW MEXICO *v.* STATE OF TEXAS. May 2, 1927. On consideration of the report of *Charles Warren, Esq.,* the special master herein, respecting the services rendered by him as such special master;

It is ordered and decreed by the Court that the amount of the compensation of such special master for his services rendered herein be fixed at the sum of thirty-five hundred dollars, and that one-half of the same be paid by each of the parties hereto.

No. 398. MANASSAS BATTLEFIELD CONFEDERATE PARK, INC., E. W. R. EWING, PRESIDENT, ETC., ET AL. *v.* B. LYNN ROBERTSON, W. E. TRUSSLER, ET AL. Error to the Supreme Court of Appeals of the State of Virginia. Motion to dismiss submitted April 25, 1927. Decided May 2, 1927. *Per Curiam.* Writ of error dismissed for want of a final judgment in the Supreme Court of Appeals of Virginia under § 237 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936, and on the authority of *Missouri & Kansas Interurban Railway* v. *City*

of Olathe, 222 U. S. 185. *Messrs. Morgan H. Beach, Thomas R. Keith,* and *Robert A. Hutchison* for defendants in error, in support of the motion. *Messrs. E. W. R. Ewing, pro se,* and *Charles A. Douglas* for plaintiffs in error, in opposition thereto.

No. —, original. Ex parte: Joseph G. Saunders. May 2, 1927. The motion for leave to file petition for a writ of mandamus herein is denied without prejudice to a petition for a writ of certiorari to be filed within the limitation of the statute. *Mr. Joseph G. Saunders, pro se.*

No. 583. Gilliland Oil Company *v.* State of Arkansas ex rel. H. W. Applegate, Attorney General. Error to the Supreme Court of the State of Arkansas. Submitted April 25, 1927. Decided May 2, 1927. *Per Curiam.* Affirmed on the authority of *Roberts & Schaefer Co.* v. *Emmerson,* 271 U. S. 50; *St. Louis Southwestern Ry. Co.* v. *Arkansas,* 235 U. S. 350; *Harris* v. *Bell,* 254 U. S. 103. *Mr. G. W. Hendricks* for plaintiff in error. *Messrs. J. S. Utley, H. W. Applegate,* and *William T. Hammock* for defendant in error.

No. 293. Investors Syndicate *v.* Adam McMullen, Governor of Nebraska, and Clarence G. Bliss, Secretary of Department of Trade & Commerce, etc. Error to the Supreme Court of the State of Nebraska. Argued April 25, 1927. Decided May 2, 1927. *Per Curiam.* Affirmed on the authority of *Bank of Augusta* v. *Earle,* 13 Pet. 519; *Paul* v. *Virginia,* 8 Wall. 168; and *Pembina Consolidated Silver Mining & Milling Co.* v. *Pennsylvania,* 125 U. S. 181. *Mr. Arthur C. Spencer,*

with whom *Messrs. C. Petrees Peterson, Robert W. Devoe,* and *Henry M. Isaacs* were on the brief, for plaintiff in error. *Messrs. O. S. Spillman, Geo. W. Ayres,* and *George L. Basye* were on the brief for defendants in error.

No. 294. HENRY CLAY PIERCE *v.* W. J. BARKER, J. W. TARTAR, AND INDUSTRIAL COMMISSION OF WISCONSIN. Error to the Supreme Court of the State of Wisconsin. Argued April 25, 1927. Decided May 2, 1927. *Per Curiam.* Affirmed on the authority of *Booth Fisheries Co.* v. *Industrial Commission of Wisconsin,* 271 U. S. 208. *Messrs. Clarence J. Hartley and J. A. Fowler* for plaintiff in error, submitted. *Mr. T. L. McIntosh,* with whom *Mr. Herman L. Ekern* was on the brief, for defendants in error.

No. 295. FORT WORTH & DENVER CITY RAILWAY *v.* STATE OF TEXAS. Error to the Court of Civil Appeals, Seventh Supreme Judicial District, State of Texas. Argued April 25, 1927. Decided May 2, 1927. *Per Curiam.* Dismissed as frivolous 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; and *Seaboard Air Line* v. *Padgett,* 236 U. S. 668, 671. *Mr. Rush H. Holland,* with whom *Messrs. Ellis Douthit, J. H. Barwise, George E. Strong,* and *J. D. Dooley* were on the brief, for plaintiff in error. *Messrs. Claude Pollard, Garnett May,* and *D. A. Simmons* were on the brief for the State of Texas.

No. 297. DAVID W. PHILLIPS, COLLECTOR OF INTERNAL REVENUE, *v.* INTERNATIONAL SALT COMPANY. Certiorari to the Circuit Court of Appeals for the Third Circuit.

Argued April 25, 1927. Decided May 2, 1927. *Per Curiam.* Reversed on the authority of *Edwards* v. *Chile Copper Co.*, 270 U. S. 452. *Assistant Attorney General Willebrandt,* with whom *Solicitor General Mitchell* and *Mr. Sewall Key* were on the brief, for petitioner. *Mr. Henry B. Twombly* for respondent. *Mr. E. Crosby Kindleberger,* and *Messrs. George E. Holmes* and *Randolph E. Paul,* filed briefs as *amici curiae* by special leave of Court.

No. 375. W. A. Frost, Doing Business Under the Name of Mitchell Gin Company *v.* Corporation Commission of Oklahoma, Fred Caphaw, et al., etc. Appeal from the District Court of the United States for the Western District of Oklahoma. Argued April 26, 27, 1927. Decided May 2, 1927. *Per Curiam.* Affirmed on the authority of *Chicago Great Western Railway Co.* v. *Kendall,* 266 U. S. 94, 100. *Messrs. Robert M. Rainey* and *Streeter B. Flynn,* with whom *Mr. George M. Green* was on the brief, for appellant. *Mr. E. S. Ratliff,* with whom *Mr. Edwin B. Dabney* was on the brief, for appellees.

No. 794. Will Norris *v.* State of Louisiana. Error to the Supreme Court of the State of Louisiana. Submitted April 27, 1927. Decided May 2, 1927. *Per Curiam.* Dismissed on the authority of (1) *Hebert* v. *Louisiana,* 272 U. S. 312, and (2) *Farrell* v. *O'Brien,* 199 U. S. 89, 100; *Toop* v. *Ulysses Land Co.,* 237 U. S. 580, 583; *Piedmont Power & Light Co.* v. *Town of Graham,* 253 U. S. 193, 195; *Seaboard Air Line* v. *Padgett,* 236 U. S. 668, 671. *Messrs. George W. Smith* and *A. Owsley Stanley* for plaintiff in error. *Messrs. E. R. Schowalter* and *M. M. Irwin* for defendant in error.

No. 880. JOSEPH B. FIFE AND WALTER W. FIFE *v.* LOUISIANA STATE BOARD OF MEDICAL EXAMINERS;

No. 881. JOSEPH B. FIFE AND WALTER W. FIFE *v.* STATE OF LOUISIANA; and

No. 882. JOSEPH B. FIFE AND WALTER W. FIFE *v.* STATE OF LOUISIANA. Error to the Supreme Court of the State of Louisiana. Argued April 27, 28, 1927. Decided May 2, 1927. *Per Curiam.* Affirmed on the authority of *Dent* v. *West Virginia,* 129 U. S. 114; *Douglas* v. *Noble,* 261 U. S. 165; and *Graves* v. *Minnesota,* 272 U. S. 425. *Mr. Donelson Caffery* for plaintiffs in error. *Messrs. M. M. Irwin, E. D. Saunders,* and *T. S. Walmsley,* with whom *Mr. Percy Saint* was on the brief, for defendants in error.

No. 317. BISSELL LUMBER COMPANY *v.* THEODORE FEHRMAN. Error to the Circuit Court of Lincoln County, State of Wisconsin. Submitted April 28, 1927. Decided May 2, 1927. *Per Curiam.* Dismissed on the authority of (1) *Pizitz Dry Goods Co.* v. *Yeldell, ante,* p. 112 and (2) *Farrell* v. *O'Brien,* 199 U. S. 89, 100; *Toop* v. *Ulysses Land Co.,* 237 U. S. 580, 583; *Piedmont Power & Light Co.* v. *Town of Graham,* 253 U. S. 193, 195; and *Seaboard Air Line* v. *Padgett,* 236 U. S. 668, 671. *Messrs. Theo. W. Brazeau* and *B. R. Goggins* for plaintiff in error. *Mr. F. J. Smith* for defendant in error.

No. 992. DAVID ATKINS *v.* STATE OF OHIO. Error to the Supreme Court of the State of Ohio. Argued April 28, 1927. Decided May 2, 1927. *Per Curiam.* Writ of error dismissed under § 237 of the Judicial Code as amended by the Act of Feburary 13, 1925, 43 Stat. 936, and, treating the writ of error as an application for a writ of certiorari, certiorari is denied. *Mr. E. L. Mills,* with

whom *Messrs. Smith W. Bennett* and *T. J. Denkenherd* were on the brief, for plaintiff in error. *Messrs. Edward C. Turner, Henry W. Harter, Jr.,* and *C. B. McClintock* were on the brief for the State of Ohio.

No. 308. MIDLAND OIL COMPANY *v.* BENJAMIN BALL. Error to the Supreme Court of the State of Oklahoma. Argued April 29, 1927. Decided May 2, 1927. *Per Curiam.* Writ of error 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. Samuel N. Hawkes,* with whom *Mr. Hayes McCoy* was on the brief, for plaintiff in error. *Messrs. J. I. Howard, Frank T. McCoy, E. E. Grinstead,* and *William S. Hamilton* were on the brief for defendant in error.

No. 154. W. T. PHILLIPS, JR., ET AL., ETC., SUBSTITUTED FOR OKLAHOMA NATURAL GAS COMPANY *v.* STATE OF OKLAHOMA. Error to the Supreme Court of the State of Oklahoma. Petition for certiorari submitted April 25, 1927. Decided May 2, 1927. *Per Curiam.* Writ of error dismissed under § 237 of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 936, and, treating the writ of error as an application for writ of certiorari, certiorari is denied. *Messrs. Streeter B. Flynn, Robert M. Rainey, David A. Richardson,* and *Samuel W. Hayes* for plaintiffs in error. *Messrs. Edwin D. Dabney, E. S. Ratliff,* and *George F. Short* for the State of Oklahoma.

No. 15, original. THOMAS CONTRERAS *v.* UNITED STATES. May 16, 1927. The motion for leave to file amended petition for a writ of mandamus herein is denied. *Mr. Thomas Contreras, pro se.* No appearance for the United States.

No. 579. 103 PARK AVENUE COMPANY *v.* EXCHANGE BUFFET CORPORATION, CITY OF NEW YORK, AND CHARLES L. CRAIG, COMPTROLLER OF THE CITY OF NEW YORK. Error to the Supreme Court of the State of New York. Motion to dismiss or affirm submitted May 2, 1927. Decided May 16, 1927. *Per Curiam.* Dismissed for lack of a federal question on 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. *Mr. Melville D. Church* in behalf of *Messrs. Clifton V. Edwards, George P. Nicholson,* and *J. Joseph Lilly* for defendants in error, in support of the motion. *Messrs. Spencer Gordon* and *James R. Deering* for plaintiff in error, in opposition thereto.

No. —, original. EX PARTE: IN THE MATTER OF HARRY B. STILZ. May 16. 1927. The motion for leave to file in the Court of Claims a petition in the nature of a bill of review is denied. *Mr. Harry B. Stilz, pro se.*

No. —. THOMAS DESMOND, SHERIFF, *v.* MILO EGGERS. May 16, 1927. The motion for a stay of execution in this case is denied. No appearance for appellant. *Messrs. John F. Dore* and *George F. Vandeveer* for appellee.

No. —, original. EX PARTE: IN THE MATTER OF JOSEPH Y. SAUNDERS. May 16, 1927. The motion for leave to file petition for writ of habeas corpus is denied without prejudice to the filing of a petition for writ of habeas corpus in the District Court of the United States for the District of Georgia. *Mr. Joseph Y. Saunders, pro se.*

No. 864. JAMES WILLOS *v.* STATE OF OREGON. Error to the Supreme Court of the State of Oregon. Argued April

27, 1927. Decided May 16, 1927. *Per Curiam.* Dismissed for lack of a federal question on the authority of *Kelley* v. *Oregon,* 273 U. S. 589. *Mr. Thomas Mannix* was on the brief for plaintiff in error. *Mr. John H. Carson* for the State of Oregon.

No. 313. REAL SILK HOSIERY MILLS *v.* CITY OF PIEDMONT, OLIVER ELLSWORTH, MAYOR, G. N. RICHARDSON, CITY ATTORNEY, ETC., ET AL. Certificate from the Circuit Court of Appeals for the Ninth Circuit. Argued April 29, 1927. Decided May 16, 1927. *Per Curiam.* Question No. 1 is answered *yes* on the authority of *Real Silk Hosiery* v. *City of Portland,* 268 U. S. 335. MR. JUSTICE BRANDEIS and MR. JUSTICE SANFORD dissent. In view of the answer to the first question, the second question needs none. *Mr. John G. Milburn,* with whom *Messrs. Ralph Bamberger, Henry B. Dinkelspeil,* and *Joseph W. Welsh* were on the brief, for appellant. *Mr. Edwin C. Brandenburg,* with whom *Messrs. G. N. Richardson, C. A. Brandenburg,* and *Louis M. Denit* were on the brief, for appellees.

No. —, original. EX PARTE: IN THE MATTER OF T. L. SMITH. May 31, 1927. The motion for leave to file petition for a writ of mandamus herein is denied. *Mr. A. D. Lipscomb* for petitioner.

No. —, original. EX PARTE: IN THE MATTER OF S. A. MOORE, TRUSTEE. May 31, 1927. The motion for leave to file petition for a writ of prohibition herein is denied. *Messrs. William T. George, Fred W. Goshorn, Claude L. Smith,* and *Wells Goodykoontz* for petitioner.

No. —, original. EX PARTE: IN THE MATTER OF E. L. BURGET. May 31, 1927. The motion for leave to file

petition for a writ of mandamus herein is denied. *Mrs. E. L. Burget, pro se.*

No. 749. STATE OF TEXAS *v.* DAVID FASKEN, A. FASKEN, ROBERT FASKEN, ET AL. Appeal from the District Court of the United States for the Western District of Texas. Motion to dismiss submitted May 16, 1927. Decided May 31, 1927. *Per Curiam.* Appeal dismissed for want of jurisdiction under the provisions of the Act of February 13, 1925, 43 Stat. 936. Motion of the appellant to transfer the case to the Circuit Court of Appeals for the Fifth Circuit is denied under the same Act. The motion in the alternative to docket as an original cause is denied without prejudice. *Mr. Charles L. Black* for appellees, in support of the motion. *Messrs. Dan Moody, Claude Pollard,* and *D. A. Simmons* for the State of Texas, in opposition thereto.

No. 903. ANNA E. HOLLOWAY NONES, INDIVIDUALLY AND AS EXECUTRIX OF EDWARD LEE HOLLOWAY, DECEASED, *v.* GRACE SUZANNE HOLLOWAY, INFANT, AND MARIE CALOU, GUARDIAN OF THE PERSON & ESTATE OF GRACE SUZANNE HOLLOWAY, INFANT, ET AL.;

No. 904. ANNA E HOLLOWAY NONES, INDIVIDUALLY AND AS EXECUTRIX OF EDWARD LEE HOLLOWAY, DECEASED, *v.* GRACE SUZANNE HOLLOWAY, INFANT, AND MARIE CALOU, GUARDIAN OF THE PERSON & ESTATE OF GRACE SUZANE HOLLOWAY, INFANT, ET AL.;

No. 905. CLARENCE J. HOLLOWAY *v.* GRACE SUZANNE HOLLOWAY, INFANT, AND MARIE CALOU, GUARDIAN OF THE PERSON & ESTATE OF GRACE SUZANNE HOLLOWAY, INFANT, ET AL.; and

No. 906. CLARENCE J. HOLLOWAY *v.* GRACE SUZANNE HOLLOWAY, INFANT, AND MARIE CALOU, GUARDIAN OF THE PERSON & ESTATE OF GRACE SUZANNE HOLLOWAY,

INFANT, ET AL. Error to the Court of Appeals of the State of Maryland. Motions to dismiss or affirm submitted April 30, 1927. Decided May 31, 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. *Messrs. Isaac L. Straus, Joseph C. France,* and *Charles McH. Howard* for defendants in error, in support of the motion. *Messrs. Edgar Allen Poe* and *E. Parkin Keech, Jr.,* for plaintiffs in error, in opposition thereto.

No. 996. E. J. ANGELO, HARRY PHILLIPS, AND C. E. WALL, TRADING, ETC., ET AL. *v.* CITY OF WINSTON-SALEM, THOS. BARBER, MAYOR, AND J. A. THOMAS, ETC. Error to the Supreme Court of the State of North Carolina. Motion to dismiss or affirm submitted May 16, 1927. Decided May 31, 1927. *Per Curiam.* Affirmed on the authority of *Natal* v. *Louisiana,* 139 U. S. 621. *Mr. Roy L. Deal* for defendants in error, in support of the motion. *Messrs. Oscar O. Efird, J. M. Wells, Jr.,* and *G. S. Ferguson, Jr.,* for plaintiffs in error, in opposition thereto.

No. —, original. UNITED STATES *v.* STATE OF IDAHO. June 6, 1927. The motion for leave to file bill of complaint is granted and process is ordered to issue returnable on Monday, October 3, next. *Attorney General Sargent* and *Solicitor General Mitchell* for the United States.

No. —, original. EX PARTE: IN THE MATTER OF APEX ELECTRIC MANUFACTURING COMPANY. June 6, 1927. The motion for leave to file petition for a writ of mandamus is denied without prejudice to an application for a writ of mandamus to the Circuit Court of Appeals for

the Seventh Circuit. *Messrs. Elwood G. Godman, Ralph E. Moody,* and *Bernard Barnard* for petitioner.

No. —, original. Ex Parte: In the Matter of Fairbanks, Morse & Co. and Sheffield Car Company. June 6, 1927. The motion for leave to file petition for a writ of mandamus is denied. *Messrs. Fred L. Chappell* and *Dwight B. Cheever* for petitioners.

No. 884. H. E. Taylor *v.* L. F. DeHart, J. C. Vaughan, and M. C. Wilcox. Error to the District Court of the United States for the Western District of Missouri. Motion to dismiss submitted May 31, 1927. Decided June 6, 1927. *Per Curiam.* Dismissed for want of jurisdiction under the Act of February 13, 1925, 43 Stat. 936. *Solicitor General Mitchell* for defendants in error, in support of the motion. *Messrs. I. N. Watson* and *R. E. Watson* for plaintiff in error, in opposition thereto.

No. 1096. State of Washington ex rel. McPherson Bros. Company *v.* Superior Court of the State of Washington in and for Douglas County, and Okanogan-Douglas Inter-County Bridge Company; and

No. 1097. State of Washington ex rel. McPherson Bros. Company *v.* Superior Court of the State of Washington in and for Okanogan County and C. H. Neal, Judge, et al. Error to the Supreme Court of the State of Washington. Motion to dismiss submitted May 16, 1927. Decided June 6, 1927. *Per Curiam.* Dismissed on the authority of *Grays Harbor Logging Co.* v. *Coats-Fordney Logging Co.*, 243 U. S. 251. *Messrs. John P. Hartman* and *Charles S. Thomas* for defendants in error, in support of the motion. *Mr. Frederic D. McKenney* for plaintiff in error, in opposition thereto.

PETITIONS FOR CERTIORARI GRANTED, FROM APRIL 12, 1927, TO AND INCLUDING JUNE 6, 1927.

No. 869. UNITED STATES *v.* OLE BERKENESS. April 18, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Solicitor General Mitchell, Assistant Attorney General Willebrandt,* and *Mr. Mahlon D. Kiefer* for the United States. No appearance for respondent.

No. 916. WESTERN UNION TELEGRAPH COMPANY *v.* C. H. PRIESTER. April 18, 1927. Petition for a writ of certiorari to the Court of Appeals of the State of Alabama granted. *Messrs. Francis R. Stark* and *Ray Rushton* for petitioner. *Mr. D. N. Powell* for respondent.

No. 958. WESTERN UNION TELEGRAPH COMPANY *v.* C. H. PRIESTER. April 18, 1927. Petition for a writ of certiorari to the Supreme Court of the State of Alabama granted. *Messrs. Francis R. Stark* and *Ray Rushton* for petitioner. *Mr. D. N. Powell* for respondent.

No. 929. FRED M. KIRBY *v.* UNITED STATES. April 18, 1927. Petition for a writ of certiorari to the Court of Claims granted. *Messrs. Edward Cornell* and *Martin A. Schenck* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Galloway* for the United States.

No. 930. JOSEPH E. MARRON *v.* UNITED STATES. April 18, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted. *Mr.*

Benjamin L. McKinley for petitioner. *Solicitor General Mitchell, Assistant Attorney General Willebrandt,* and *Mr. Mahlon D. Kiefer* for the United States.

No. 946. FORT SMITH, SUBIACO & ROCK ISLAND RAILROAD COMPANY *v.* EMMA MOORE, ADMINISTRATRIX OF THE ESTATE OF WILLIAM MOORE, DECEASED. April 18, 1927. Petition for a writ of certiorari to the Supreme Court of the State of Arkansas granted. *Mr. James B. McDonough* for petitioner. *Emma Moore, pro se.*

No. 948. SOUTHERN CALIFORNIA EDISON COMPANY *v.* AMELIA HERMINGHAUS, BERTHA GENEVIEVE BOTTOMS, ET AL. April 18, 1927. Petition for a writ of certiorari to the Supreme Court of the State of California granted. *Messrs. Edward F. Treadwell, George E. Trowbridge, William L. Conley,* and *John W. Davis* for petitioner. *Messrs. James F. Peck* and *Robert Duncan* for respondents.

No. 964. WILLIAM H. BLODGETT, TAX COMMISSIONER, *v.* ARTHUR SILBERMAN, CHARLES MOEBIUS, JOSEPH PLANT, ET AL., EXECUTORS. April 18, 1927. Petition for a writ of certiorari to the Superior Court of Fairfield County, State of Connecticut, granted. *Messrs. Charles E. Hughes, Farwell Knapp,* and *Lucius F. Robinson* for petitioner. *Messrs. Abraham L. Gutman* and *Kenneth Dayton* for respondents.

No. 969. BARBER ASPHALT PAVING COMPANY *v.* STANDARD ASPHALT & RUBBER COMPANY. April 18, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. John W. Davis, Henry N. Paul, Samuel E. Hibben,* and *Charles*

Neave for petitioner. *Messrs. Alex. F. Reichmann, Thomas G. Haight,* and *William F. Hall* for respondent.

No. 980. AGUSTIN SEGUROLA AND MANUEL SANTIAGO *v.* UNITED STATES. April 25, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Mr. E. B. Wilcox* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Willebrandt,* and *Mr. John J. Byrne* for the United States.

No. 981. SIOUX COUNTY, NEBRASKA, *v.* NATIONAL SURETY COMPANY. April 25, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Messrs. Charles S. Lobingier* and *Edwin D. Crites* for petitioner. No appearance for respondent.

No. 988. GEO. O. RICHARDSON MACHINERY COMPANY *v.* MRS. ANNIE SCOTT, ADMINISTRATRIX OF THE ESTATE OF JOHN A. SCOTT, DECEASED. April 25, 1927. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma granted. *Mr. D. H. Linebaugh* for petitioner. *Messrs. Jean H. Everest* and *Charles L. Moore* for respondent.

No. 990. LAKEWOOD ENGINEERING COMPANY AND EDWARD G. CARR *v.* A. W. FRENCH & CO., ALFRED W. FRENCH, EDWIN A. ALLEN, ET AL., ETC. April 25, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Mr. Frank E. Dennett* for petitioners. *Messrs. Rudolph W. Lotz* and *Arthur W. Nelson* for respondents.

No. 993. HENRY F. LONG, COMMISSIONER OF CORPORATIONS AND TAXATION OF MASSACHUSETTS *v.* GEORGE I.

ROCKWOOD. April 25, 1927. Petition for a writ of certiorari to the Superior Court for the County of Worcester, State of Massachusetts, granted. *Messrs. F. Delano Putnam* and *Alex. Lincoln* for petitioner. *Messrs. Thomas H. Gage* and *Merrill S. June* for respondent.

No. 994. HENRY F. LONG, COMMISSIONER OF CORPORATIONS AND TAXATION OF MASSACHUSETTS *v.* GEORGE I. ROCKWOOD. April 25, 1927. Petition for a writ of certiorari to the Superior Court for the County of Worcester, State of Massachusetts, granted. *Messrs. F. Delano Putnam* and *Alex. Lincoln* for petitioner. *Messrs. Thomas H. Gage* and *Merrill S. June* for respondent.

No. 1001. UNITED STATES *v.* AMALIA MANZI. April 25, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States. No appearance for respondent.

No. 1016. DAVID H. BLAIR, COMMISSIONER OF INTERNAL REVENUE *v.* OESTERLEIN MACHINE COMPANY. May 2, 1927. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia granted. *Solicitor General Mitchell, Mr. A. W. Gregg,* and *Mr. Charles T. Hendler* for petitioner. *Messrs. John J. Hamilton* and *Robert N. Miller* for respondent.

No. 1056. FANNIE E. UNTERMYER, EXECUTRIX, ETC. *v.* CHARLES W. ANDERSON, COLLECTOR, ETC. May 2, 1927. Petition for a writ of certiorari to the Circuit Court of

Appeals for the Second Circuit granted. *Mr. Louis Marshall* for petitioner. *Solicitor General Mitchell* for respondent.

No. 1015. V. L. HIGHLAND *v.* RUSSELL CAR & SNOW PLOW COMPANY. May 16, 1927. Petition for a writ of certiorari to the Supreme Court of the State of Pennsylvania granted. *Mr. Ira Jewell Williams* for petitioner. No appearance for respondent.

No. 1028. TEXAS & PACIFIC RAILWAY COMPANY *v.* BARRETT GIBSON, ADMINISTRATOR. May 16, 1927. Petition for a writ of certiorari to the Supreme Court of the State of Texas granted. *Mr. F. H. Prendergast* for petitioner. *Mr. S. P. Jones* for respondent. See *post*, P. 748.

No. 1029. HARRY LEVY, BANKRUPT, *v.* INDUSTRIAL FINANCE CORPORATION ET AL. May 16, 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 respondents.

No. 1031. LIBERTY NATIONAL BANK OF ROANOKE, VIRGINIA, *v.* JAMES A. BEAR, TRUSTEE IN BANKRUPTCY OF W. L. BECKER & COMPANY, ET AL. May 16, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Mr. James D. Johnston* for petitioner. *Mr. Harvey D. Apperson* for respondents.

No. 1035. D. B. HEINER, COLLECTOR OF INTERNAL REVENUE, *v.* COLONIAL TRUST COMPANY, EXECUTOR, ETC.; and

No. 1036. C. G. LEWELLYN, FORMER COLLECTOR OF INTERNAL REVENUE, *v.* COLONIAL TRUST COMPANY, EXECUTOR, ETC. May 16, 1927. Petition for writs of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Solicitor General Mitchell* and *Mr. A. W. Gregg* for petitioners. *Messrs. R. C. Allen, I. J. Underwood, Charles A. Jones,* and *M. W. Acheson, Jr.,* for respondent.

No. 1018. T. H. SMALLWOOD, W. F. SMALLWOOD, ET AL. *v.* JUAN G. GALLARDO, TREASURER OF PORTO RICO;

No. 1019. ADOLFO VALDES ORDONEZ, SALVADOR GARCIA, ET AL. *v.* JUAN G. GALLARDO, TREASURER OF PORTO RICO; and

No. 1020. INSULAR MOTOR CORPORATION *v.* JUAN G. GALLARDO, TREASURER OF PORTO RICO. May 16, 1927. The petition for writs of certiorari to the Circuit Court of Appeals for the First Circuit is granted and the cases are set for hearing on the first day of next term, Monday, October 3 next, after the cases heretofore assigned for that day, on the sole question whether they have become moot by virtue of the Act of March 4, 1927, amending § 48 of the Organic Act of Porto Rico. *Mr. Francis G. Caffey* for petitioners. *Mr. William C. Rigby* for respondent.

No. 1021. ADOLFO VALDES, PIO PEREZ, LUIS C. CUYAR, *v.* JUAN G. GALLARDO, TREASURER OF PORTO RICO;

No. 1022. FINLAY, WAYMOUTH & LEE, INC., *v.* JUAN G. GALLARDO, TREASURER OF PORTO RICO; and

No. 1023. ANGEL ABARCA PORTILLA, RAFAEL ABARCA PORTILLA, ET AL., *v.* JUAN G. GALLARDO, TREASURER OF PORTO RICO. May 16, 1927. The petition for writs of certiorari to the Circuit Court of Appeals for the First Circuit is granted and the cases are set for hearing on the

first day of next term, Monday, October 3 next, after the cases heretofore assigned for that day, on the sole question whether they have become moot by virtue of the Act of March 4, 1927, amending § 48 of the Organic Act of Porto Rico. *Mr. Carroll G. Walter* for petitioners. *Mr. William C. Rigby* for respondent.

No. 1060. M. O. Danciger and Emerich Oil Company *v.* N. K. Smith. May 31, 1927. Petition for a writ of certiorari to the Court of Civil Appeals, Fifth Supreme Judicial District, State of Texas, granted. *Messrs. W. G. Boatwright* and *I. J. Ringolsky* for petitioners. No appearance for respondent.

No. 1067. H. Plamals *v.* Steamship "Pinar Del Rio," her engines, boilers, etc. May 31, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. S. B. Axtell* for petitioner. *Messrs. Cletus Keating* and *Vernon S. Jones* for respondent.

No. 1071. Rosario Gambino and Joseph Lima *v.* United States. May 31, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Irving A. Baxter* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Willebrandt,* and *Mr. John J. Byrne* for the United States.

No. 1074. Cora B. Beatty, Executrix of the Last Will and Testament of John W. Beatty, deceased, *v.* D. B. Heiner, Collector of Internal Revenue. May 31, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. Mr.

CHIEF JUSTICE TAFT took no part in the consideration or decision of the application for a writ of certiorari in this case. *Messrs. W. D. Stewart, Earl F. Reed,* and *W. A. Seifert* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Willebrandt, Mr. Sewall Key, Mr. A. W. Gregg,* and *Mr. T. H. Lewis* for respondent.

No. 1077. NATIONAL LIFE INSURANCE COMPANY *v.* UNITED STATES. June 6, 1927. Petition for a writ of certiorari to the Court of Claims granted. *Messrs. J. Harry Covington, Moorfield Storey,* and *George B. Young* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Galloway, Mr. Alfred A. Wheat,* and *Mr. Alexander H. McCormick* for the United States.

No. 1079. LUCY B. BROOKE *v.* CITY OF NORFOLK, R. W. PEATROSS, A. PLUMMER PENNILL, ET AL. June 6, 1927. Petition for a writ of certiorari to the Supreme Court of Appeals of the State of Virginia granted. *Messrs. Robert B. Tunstall* and *Nathaniel T. Green* for petitioner. No appearance for respondents.

No. 1081. HENRY ELLISON, WILLIAM R. ELLISON, AND HOWARD B. ELLISON, JR., INDIVIDUALLY, ET AL., *v.* MAX KOSWIG, TRADING AS F. F. KOSWIG. June 6, 1927. Petition for a writ of certiorari to the Supreme Court of the State of Pennsylvania granted. *Mr. H. Edgar Barnes* for petitioners. No appearance for respondent.

No. 1087. TEXAS & NEW ORLEANS RAILROAD COMPANY *v.* NORTHSIDE BELT RAILWAY COMPANY. June 6, 1927. Petition for a writ of certiorari to the Circuit Court of Ap-

peals for the Fifth Circuit granted. *Messrs. H. M. Garwood* and *J. H. Tallichet* for petitioner. *Mr. John Walsh* for respondent.

No. 1115. J. W. HAMPTON, JR., & Co. *v.* UNITED STATES. June 6, 1927. Petition for a writ of certiorari to the Court of Customs Appeals granted. *Mr. Walter E. Hampton* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Lawrence,* and *Mr. Marion De Vries* for the United States.

No. 1143. FAIRBANKS, MORSE & CO., AND SHEFFIELD CAR COMPANY *v.* AMERICAN VALVE & METER COMPANY AND EDWARD E. JOHNSON. June 6, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Messrs. Dwight B. Cheever* and *Fred L. Chappell* for petitioners. *Mr. Frank A. Whiteley* for respondents.

PETITIONS FOR CERTIORARI DENIED OR DISMISSED, FROM APRIL 12, 1927, TO AND INCLUDING JUNE 6, 1927.

No. 1011. MERLE PHILLIPS *v.* W. I. BIDDLE, WARDEN. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit. April 18, 1927. 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 for the issuance of the writ of certiorari, 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. Frans E. Lindquist* for petitioner. No appearance for respondent.

No. 914. DAVID A. WRIGHT *v.* UNITED STATES. April 18, 1927. Petition for a writ of certiorari to the Court of Claims denied. *Mr. Ashby Williams* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Mr. Percy F. Cox* for the United States.

No. 924. GEORGE ORLOV *v.* HARRY SAWYER. April 18, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. George Orlov, pro se,* and *Walter B. Houghton* for petitioner. No appearance for respondent.

No. 927. REX AMUSEMENT COMPANY *v.* MARIANITA TRUSCHEL. April 18, 1927. Petition for a writ of certiorari to the Supreme Court of Appeals of the State of West Virginia denied. *Mr. Ralph S. Harris* for petitioner. *Mr. Benjamin L. Rosenbloom* for respondent.

No. 931. BOWMAN-HICKS LUMBER COMPANY *v.* GLENN W. ROBINSON. April 18, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. George T. Cochran* for petitioner. *Mr. Arthur I. Moulton* for respondent.

No. 939. DREW HAVEN DUNN *v.* UNITED STATES. April 18, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Edward F. Wehrle* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 943. WILLIAM L. BARNARD *v.* UNITED STATES. April 18, 1927. Petition for a writ of certiorari to the

Circuit Court of Appeals for the Ninth Circuit denied. *Mr. William E. Lady* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 945. GUSTAVE HENRY AND WILLIAM HENRY *v.* UNITED STATES. April 18, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Hugh L. Dickson* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 947. GRACE LISKA PONS, AGNES LOIS PONS, JESSIE KITTELL PONS, ETC., ET AL., *v.* STATE BANK & TRUST COMPANY, GUARDIAN, UNITED STATES, BUREAU OF WAR RISK INSURANCE. April 18, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Norman Farrell* for petitioners. *Messrs. Charles H. Rutherford* and *K. T. McConnico* for respondent State Bank. *Solicitor General Mitchell, Assistant Attorney General Farnum,* and *Mr. Thomas E. Rhodes* for the United States et al.

No. 950. SIGMUND STERN *v.* EMPIRE GAS & FUEL COMPANY. April 18, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Frank A. Boys, Arthur Mag,* and *Roy B. Thomson* for petitioner. *Messrs. Leslie J. Lyons* and *Warren T. Spies* for respondent.

No. 952. WESTERN WILLITE COMPANY *v.* TRINIDAD ASPHALT MANUFACTURING COMPANY. April 18, 1927. Petition for a writ of certiorari to the Circuit Court of

Appeals for the Eighth Circuit denied. *Messrs. Thomas J. Johnston, J. Granville Myers,* and *Delos G. Haynes* for petitioner. No appearance for respondent.

No. 953. ANDREW W. MELLON, AGENT, ETC. *v.* NEW JERSEY SHIPBUILDING & DREDGING COMPANY. April 18, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Evan Shelby* and *John E. Walker* for petitioner. *Mr. Mark Ash* for respondent.

No. 954. MAY BERG AND FREDERICK C. RAICHLEY *v.* HARRY J. MERCHANT AND CLYDE C. SMITH, EXECUTORS OF LAST WILL AND TESTAMENT OF BURR RAICHLEY, DECEASED, ET AL., ETC. April 18, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. H. W. Fraser* and *I. J. Ringolsky* for petitioners. *Mr. Hector S. Young* for respondents.

No. 957. ADELAIDE MCCOLGAN, ADMINISTRATRIX WITH THE WILL ANNEXED OF THE ESTATE OF DANIEL A. MCCOLGAN, DECEASED, *v.* CHARLES H. CLARK AND EDWARD BERGNER, TRUSTEES IN BANKRUPTCY OF ALBERT E. SNYDER, BANKRUPT. April 18, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Harold C. Faulkner* for petitioner. No appearance for respondents.

No. 959. ETHEL M. HOWE, ADMINISTRATRIX OF THE ESTATE OF FRED C. HOWE, DECEASED, *v.* MICHIGAN CENTRAL RAILROAD COMPANY. April 18, 1927. Petition for a writ of certiorari to the Supreme Court of the State

of Michigan denied. *Messrs. Thomas J. Bresnahan* and *Elmer H. Groefsema* for petitioner. *Mr. J. Walter Dohany* and *Frank E. Robson* for respondent.

No. 960. VERNON S. STORY v. UNITED STATES. April 18, 1927. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. James A. O'Shea* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 963. BROOKLYN EASTERN DISTRICT TERMINAL *v.* JOHN BUSCH. April 18, 1927. Petition for a writ of certiorari to the Supreme Court of the State of New York denied. *Messrs. Branch P. Kerfoot, Charles W. Stockton,* and *Henry B. Closson* for petitioner. *Mr. Ralph G. Barclay* for respondent.

No. 967. CHARLES WATSON *v.* UNITED STATES. April 18, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. T. C. Coffin* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 278. SCHUMAN BROTHERS, A COPARTNERSHIP, CONSISTING OF MORRIS SCHUMAN AND JOSEPH M. SCHUMAN, *v.* FIRST NATIONAL BANK OF SKIATOOK. See *ante,* p. 716.

No. 970. NATIONAL SPIRITUALISTS ASSOCIATION *v.* SARAH A. VESTAL, ROBERT INGERSOL JACKSON, WM. A. JACKSON, ET AL. April 25, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Will C. Austin* for petitioner. No appearance for respondents.

No. 971. MAGGIE KEMMERER, ADMINISTRATRIX, ETC., *v.* READING COMPANY. April 25, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Charles A. Ludlow* for petitioner. *Mr. William C. Mason* for respondent.

No. 972. MAGNETIC MANUFACTURING COMPANY AND JOHN P. BETHKE *v.* DINGS MAGNETIC SEPARATOR COMPANY. April 25, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. John F. Robb, Bert. M. Kent,* and *Harry C. Robb* for petitioners. *Messrs. George L. Wilkinson* and *Louis Quarles* for respondent.

No. 973. REDONDO STEAMSHIP COMPANY, INC., *v.* ARCHIBALD MCNEIL & SONS CO. April 25, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Edward H. Wilson* for petitioner. *Mr. Spencer Gordon* for respondent.

No. 974. STATE BOARD OF EQUALIZATION OF WYOMING, MAURICE GROSHON, E. J. CARROLL, *v.* NORTH SIDE CANAL COMPANY, LTD., AND UNITED STATES. April 25, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. W. C. Mentzer* and *Wilford W. Neilson* for petitioners. *Mr. James R. Bothwell* for respondents.

No. 975. STATE BOARD OF EQUALIZATION OF WYOMING, MAURICE GROSHON, E. J. CARROLL, *v.* TWIN FALLS CANAL COMPANY AND UNITED STATES. April 25, 1927. Petition

for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. W. C. Mentzer* for petitioners. No appearance for respondents.

No. 976. STATE BOARD OF EQUALIZATION OF WYOMING, MAURICE GROSHON, E. J. CARROLL *v.* NORTH SIDE CANAL COMPANY, LTD., AND UNITED STATES. April 25, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. W. C. Mentzer* and *Wilford W. Neilson* for petitioners. No appearance for respondents.

No. 977. STATE BOARD OF EQUALIZATION OF WYOMING, MAURICE GROSHON, E. J. CARROLL *v.* TWIN FALLS CANAL COMPANY AND UNITED STATES. April 25, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. W. C. Mentzer* for petitioners. No appearance for respondents.

No. 978. CONTINENTAL SECURITIES COMPANY *v.* MICHIGAN CENTRAL RAILROAD COMPANY AND NEW YORK CENTRAL RAILROAD COMPANY. April 25, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Frederick A. Henry* for petitioner. *Messrs. A. C. Angell* and *Frank E. Robson* for respondents.

No. 979. ALAMO FOODS COMPANY *v.* ALEXANDER S. WALKER, FORMERLY COLLECTOR OF INTERNAL REVENUE. April 25, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. S. G. Newton* for petitioner. *Solicitor General Mitch-*

ell, Assistant Attorney General Willebrandt, Mr. A. W. Gregg, and *Mr. Charles T. Hendler* for respondent.

No. 984. SHUR-ON OPTICAL COMPANY, INC., AND SHUR-ON STANDARD OPTICAL COMPANY, INC., *v.* AMERICAN OPTICAL COMPANY AND CHANNING M. WELLS, ET AL., ETC. April 25, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Drury W. Cooper* and *C. Schuyler Davis* for petitioners. *Messrs. Charles Neave* and *Harrison F. Lyman* for respondents.

No. 985. KIRSTEIN OPTICAL COMPANY, INC., AND SHUR-ON STANDARD OPTICAL COMPANY, INC. *v.* AMERICAN OPTICAL COMPANY AND CHANNING M. WELLS, ET AL., ETC. April 25, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Drury W. Cooper* for petitioners. *Messrs. Charles Neave* and *Harrison F. Lyman* for respondents.

No. 951. J. H. LANE & COMPANY *v.* UNITED STATES. April 25, 1927. Petition for a writ of certiorari to the Court of Claims denied. *Mr. William H. White, Jr.,* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Mr. Alexander H. McCormick* for the United States.

No. 956. CHARLES BOSSIO AND TONY BOSSIO *v.* UNITED STATES. April 25, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. W. L. Graves* for petitioners. *Solicitor General Mitchell* and *Assistant Attorney General Willebrandt* for the United States.

No. 987. JOHN O'FALLON *v.* UNITED STATES. April 25, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Neal E. McNeill* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 995. FIRST NATIONAL BANK IN ST. LOUIS AND JOSEPH D. BASCOM *v.* WM. BUDER, ASSESSOR OF THE CITY OF ST. LOUIS, ET AL. April 25, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. P. Taylor Bryan, Frank Sullivan,* and *Sam B. Jeffries* for petitioners. *Messrs. E. W. Foristel, Oliver Senti, North T. Gentry, Charles P. Williams, James T. Blair,* and *Julius T. Muench* for respondents.

No. 1008. FEDERAL TRADE COMMISSION *v.* MILLERS' NATIONAL FEDERATION ET AL. April 25, 1927. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Solicitor General Mitchell, Mr. Bayard T. Hainer,* and *Mr. Adrien F. Busick* for petitioner. *Messrs. Edward S. Rogers, Stephen A. Foster,* and *Karl D. Loos* for respondents.

No. 991. WALTER S. HOOPER *v.* UNITED STATES. April 25, 1927. The petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit in this case is denied for failure to file the petition within the time prescribed by the statute. *Mr. Clarence Wood* for petitioner. *Solicitor General Mitchell* for the United States.

No. 992. DAVID ATKINS *v.* STATE OF OHIO. See *ante,* p. 720.

No. 154. W. T. PHILLIPS, JR., ET AL., ETC., SUBSTITUTED FOR OKLAHOMA NATURAL GAS COMPANY *v.* STATE OF OKLAHOMA. See *ante*, p. 721.

No. 986. ROBERT P. SCRIPPS, EXECUTOR OF THE LAST WILL AND TESTAMENT OF E. W. SCRIPPS, DECEASED, *v.* ROBERT MORAN. May 2, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Charles F. Consaul* and *Charles C. Heltman* for petitioner. *Messrs. Robert A. Hulbert* and *Oscar Lawler* for respondent.

No. 997. LEROY ALLEBACH AND D. N. MOHLER *v.* S. B. THOMAS, TRUSTEE IN BANKRUPTCY FOR H. G. NICHOLSON. May 2, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. R. Kemp Morton* for petitioners. *Mr. T. C. Townsend* for respondent.

No. 998. FRANCESCO LIDONNICI, SERVERIO DESIDERIO, ET AL., *v.* JAMES J. DAVIS, SECRETARY OF LABOR, AND W. W. HUSBAND, COMMISSIONER OF IMMIGRATION. May 2, 1927. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Robert H. McNeill* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for respondents.

No. 1005. GEORGE APPELL *v.* UNITED STATES; and

No. 1007. CHARLES I. DANIELS *v.* UNITED STATES. May 2, 1927. Petition for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr.*

Ellwood P. Morey for petitioner in No. 1005. *Mr. R. P. Henshall* for petitioner in No. 1007. *Solicitor General Mitchell, Assistant Attorney General Willebrandt,* and *Mr. John J. Byrne* for the United States.

No. 1010. GREAT WESTERN POWER COMPANY *v.* NIPPON YUSEN KABUSHIKI KAISHA. May 2, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Ira S. Lillick* for petitioner. *Messrs. F. D. Madison, Alfred Sutro, H. D. Pillsbury,* and *Oscar Sutro* for respondent.

No. 1012. ROBERT G. MARTIN, EXECUTOR OF THE LAST WILL AND TESTAMENT OF JACOB RAHN, DECEASED, *v.* GEORGE AHRENS, GERMAN CONSUL GENERAL AT ST. LOUIS, MISSOURI, ET AL. May 2, 1927. Petition for a writ of certiorari to the Supreme Court of the State of Missouri denied. *Mr. William A. Franken* for petitioner. *Mr. William H. Davies* for respondents.

No. 1091. FRANK WHITE *v.* UNITED STATES; and

No. 1092. GEORGE NANCY AND CHARLES ZAHN *v.* UNITED STATES. May 16, 1927. Petitions for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit. Motions for leave to proceed further herein in forma pauperis are denied for the reason that the Court upon examination of the unprinted records herein submitted can find no grounds for the issuance of writs of certiorari, applications for which are 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 White, pro se, in No. 1091. *Mr. George Nancy, pro se,* in No. 1092. No appearance for the United States.

No. 955. EATON, BROWN & SIMPSON, INC. *v.* UNITED STATES. May 16, 1927. Petition for a writ of certiorari to the Court of Claims denied. *Messrs. Raymond N. Beebe, Joseph E. Davies,* and *Franklin D. Jones* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Mr. Percy M. Cox* for the United States.

No. 1013. TEXAS COMPANY AND ORANGE-CAMERON LAND COMPANY *v.* ROSENTHAL-BROWN FUR COMPANY, INC., AND CHARLES W. BROWN. May 16, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. A. P. Pujo, Hampden Storey,* and *Fred L. Williams* for petitioners. No appearance for respondents.

No. 1014. EDWARD A. MCLAUGHLIN, TRUSTEE, *v.* LEON M. PRINCE. May 16, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. Joseph Stein* and *Edward A. McLaughlin, pro se,* for petitioner. *Mr. Arthur M. Boal* for respondent.

No. 1024. PULLMAN COMPANY *v.* PAUL MONTIMORE. May 16, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. J. M. McCormick* for petitioner. *Messrs. Perry J. Lewis* and *H. C. Carter* for respondent.

No. 1026. BEAVER COUNTY *v.* SOUTH UTAH MINES & SMELTERS. May 16, 1927. Petition for a writ of cer-

tiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. William A. Hilton* for petitioner. *Messrs. A. C. Ellis, Jr., C. C. Parsons,* and *L. F. Adamson* for respondent.

No. 1027. GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY *v.* GILBERT J. CONTOIS. May 16, 1927. Petition for a writ of certiorari to the Supreme Court of the State of Texas denied. *Messrs. Sidney J. Brooks* and *Walter P. Napier* for petitioner. *Messrs. Perry J. Lewis* and *H. C. Carter* for respondent.

No. 1030. GUY K. MITCHELL, EXECUTOR OF ANNIE W. MITCHELL, *v.* NORMAN T. NELSON, TRUSTEE IN BANKRUPTCY OF THE ESTATE OF FRANK I. LOUCKES, BANKRUPT, ET AL. May 16, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Charles S. Hayden* for petitioner. No appearance for respondents.

No. 1034. MABEL LUDLAM *v.* LEIGH AREY CHANNON, EXECUTRIX OF THE WILL OF JAMES H. CHANNON, DECEASED. May 16, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Samuel Topliff, Homer H. Cooper,* and *William H. Wherry* for petitioner. *Messrs. Edwin H. Cassels* and *Ralph F. Potter* for respondent.

No. 1049. DINSHAH P. GHADIALI *v.* UNITED STATES. May 16, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Dinshah P. Ghadiali, pro se. Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 1028. TEXAS & PACIFIC RAILWAY COMPANY *v.* BARRETT GIBSON, ADMINISTRATOR. Certiorari to the Supreme Court of the State of Texas. May 31, 1927. The application for a writ of certiorari in this case was submitted prematurely in advance of the filing of the brief for respondent in opposition to the application and the writ was granted on May 16, 1927. Upon consideration of the brief filed by the respondent, the writ heretofore issued is revoked and the application for a writ of certiorari in this case is denied. *Mr. F. H. Prendergast* for petitioner. *Mr. S. P. Jones* for respondent.

No. 1025. THOMPSON-STARRETT COMPANY *v.* LABELLE IRON WORKS. May 31, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Charles H. Tuttle* and *Charles E. Hughes* for petitioner. *Messrs. Louis Marshall* and *W. D. Stewart* for respondent.

No. 1032. CHARLES FRISH AND EDWARD FRISH *v.* UNITED STATES. May 31, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Irene Rutherford O'Crowley* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Willebrandt,* and *Mr. K. L. Campbell* for the United States.

No. 1033. JOHN F. MILLIKEN AND NEPTUNE ASSOCIATION OF MASTERS AND MATES OF OCEAN AND COASTWISE STEAM VESSELS, INC., AND ALEX. SMITH *v.* HARLAN F. STONE, UNITED STATES ATTORNEY GENERAL, WILLIAM HAYWARD, U. S. ATTORNEY, ETC., ET AL. May 31, 1927. Petition for a writ of certiorari to the Circuit Court of

Appeals for the Second Circuit denied. *Mr. S. B. Axtell* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Willebrandt, Mr. Lucius H. Beers,* and *Mr. Allen E. Foster* for respondents.

No. 1037. AARON DRUMRIGHT, TRUSTEE, R. T. STUART AND R. T. STUART & COMPANY *v.* TEXAS SUGARLAND COMPANY AND GRAND LODGE, UNITED WORKMEN OF OKLAHOMA. May 31, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. George A. Hill* for petitioners. No appearance for respondents.

No. 1039. RAYMOND L. CHASE *v.* UNITED STATES. May 31, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Irving K. Baxter* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Willebrandt,* and *Louise Foster* for the United States.

No. 1040. ROBERT C. WHITNEY *v.* UNITED STATES. May 31, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Irving K. Baxter* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Willebrandt,* and *Mr. John J. Byrne* for the United States.

No. 1041. RIDLEY WATTS, CHARLES H. MURPHY, ARTHUR R. JOHNSON, ET AL., PARTNERS, ETC. *v.* SOUTHERN RAILWAY COMPANY. May 31, 1927. Petition for a writ of certiorari to the Supreme Court of the State of South Carolina denied. *Mr. William F. Stevenson* for peti-

tioners. *Messrs. Charles Clark, F. G. Tompkins,* and *S. R. Prince* for respondent.

No. 1042. EMPIRE COAL MINING COMPANY *v.* GODFREY UPDIKE, RECEIVER AND TRUSTEE OF THE ESTATE OF INDEPENDENT COAL CORPORATION, BANKRUPT. May 31, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Carroll G. Walter* and *Charles D. Francis* for petitioner. *Messrs. Frank M. Swacker* and *Isadore Shapiro* for respondent.

No. 1043. B. FRANK WOOD AND J. LEIGH NOURSE *v.* HENRY COOPER, U. S. MARSHAL; and

No. 1044. B. FRANK WOOD *v.* HENRY COOPER, U. S. MARSHAL. May 31, 1927. Petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Thomas P. Gore, James A. Reed,* and *Thomas H. Owen* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 1045. CLARA M. PITTMAN AND WILLIAM T. PITTMAN *v.* LAMAR LIFE INSURANCE COMPANY. May 31, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Alex W. Spence* for petitioners. No appearance for respondent.

No. 1046. JOHN PATTIS *v.* UNITED STATES. May 31, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. T. C. Coffin* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Willebrandt,* and *Mr. K. L. Campbell* for the United States.

No. 1047. CORNELL STEAMBOAT COMPANY *v.* JOHN J. COUGHLIN AND J. C. DAVIS, DIRECTOR GENERAL OF RAILROADS, ETC. May 31, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Robert S. Erskine* and *John M. Woolsey* for petitioner. *Messrs. George V. A. McCloskey, Mark Ash, Horace L. Cheyney,* and *P. M. Brown* for respondents.

No. 1048. CHATTANOOGA SAVINGS BANK, ADMINISTRATOR OF THE ESTATE OF JOHN D. KEY, DECEASED, *v.* L. P. BREWER, COLLECTOR OF INTERNAL REVENUE. May 31, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Charles S. Caffey* and *P. B. Mayfield* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Willebrandt* for the United States.

No. 1051. JOHN R. OSBORNE AND C. C. FITZPATRICK *v.* UNITED STATES. May 31, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Maynard F. Stiles* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Luhring, Mr. Alfred A. Wheat,* and *Mr. Harry S. Ridgely* for the United States.

No. 1052. CREEK NATION *v.* UNITED STATES. May 31, 1927. Petition for a writ of certiorari to the Court of Claims denied. *Messrs. Chester I. Long, George E. Chamberlain, Peter Q. Nyce,* and *E. J. Van Court* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Mr. George T. Stormont* for the United States.

No. 1053. HENRY L. SCHWARTZ *v.* UNITED STATES. May 31, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Susan Brandeis* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 1054. PERCY A. CLAREY *v.* UNITED STATES. May 31, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Robert Cowling* and *Percy A. Clarey, pro se,* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 1055. UNITED STATES, OWNER OF THE S. S. "FREDERICH DER GROSSE," *v.* TEXAS COMPANY, OWNER OF THE S. S. "TEXAS." May 31, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Solicitor General Mitchell, Assistant Attorney General Farnum,* and *Mr. J. Frank Staley* for the United States. *Mr. T. K. Schmuck* for respondent.

No. 1057. THOMAS F. BARRETT *v.* J. BRADY BIGGER, AGENT. May 31, 1927. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Robert H. McNeill* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for respondent.

No. 1061. CHARLES VERE *v.* FRANCISCO BIANCHI, JUAN BIANCHI, ROSARIO BIANCHI, ET AL. May 31, 1927. Pe-

tition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Martin Travieso* for petitioner. *Mr. Francis G. Caffey* for respondents.

No. 1062. HUNGERFORD BRASS & COPPER COMPANY *v.* TRAITEL MARBLE COMPANY. May 31, 1927. Petition for a writ of ceritorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Samuel E. Darby* for petitioner. *Mr. Robert W. Hardie* for respondent.

No. 1063. MISSOURI PACIFIC RAILROAD COMPANY *v.* BIRDIE STEEN, ADMINISTRATRIX OF THE ESTATE OF C. L. STEEN. May 31, 1927. Petition for a writ of certiorari to the Court of Civil Appeals, Sixth Supreme Judicial District, State of Texas, denied. *Messrs. Frank W. Wozencraft, Joseph D. Frank,* and *W. T. Henry* for petitioner. *Messrs. James M. Edwards* and *Fred V. Hughes* for respondent.

No. 1064. UNITED STATES *v.* NEW YORK & CUBA MAIL STEAMSHIP COMPANY, OWNER OF THE S. S. "ESPERANZA," and

No. 1065. UNITED STATES OWNER OF THE TORPEDO BOAT DESTROYER "CONNER," *v.* S. S. "ESPERANZA," ETC., NEW YORK & CUBA MAIL STEAMSHIP COMPANY. May 31, 1927. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Solicitor General Mitchell, Assistant Attorney General Farnum,* and *Mr. J. Frank Staley* for the United States. *Messrs. Chauncey I. Clark* and *Eugene Underwood* for respondent.

No. 1066. O. D. JENNINGS & COMPANY *v.* MABEL G. REINECKE, COLLECTOR OF INTERNAL REVENUE. May 31,

1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Everett Jennings* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Willebrandt,* and *Mr. Sewall Key* for respondent.

No. 1070. WALLACE B. CAMP *v.* UNITED STATES. May 31, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Benjamin D. Warfield* for petitioner. *Solicitor General Mitchell,* and *Assistant Attorney General Willebrandt* for the United States.

No. 1073. FRED OSTRANDER *v.* UNITED STATES. May 31, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Irving K. Baxter* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Willebrandt,* and *Mr. John J. Byrne* for the United States.

No. 1078. JOHN MACGREGOR GRANT, INC., *v.* BORIS TOPAS, ANAKEI NAFTANOVITCH, MOCHAIL TOPAS, ET AL., COPARTNERS, ETC., ET AL. May 31, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Bernard Hershkopf, Isador J. Kresel,* and *John P. Clarke* for petitioner. *Messrs. Maurice Leon* and *Joseph H. Choate, Jr.,* for respondents.

No. 1080. EVERETT FLINT DAMON, EX REL. KOCK TANG ET AL. *v.* JOHN P. JOHNSON, COMMISSIONER OF IMMIGRATION. May 31, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit

denied. *Mr. Everett F. Damon* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for respondent.

No. 1145. JAMES A. CARDIGAN *v.* THOMAS B. WHITE, WARDEN. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit. June 6, 1927. 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, can find no ground for the issuance of a writ of certiorari, 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. James A. Cardigan, pro se.* No appearance for respondent.

No. 1151. JOHN CARLTON DYSART *v.* UNITED STATES. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit. June 6, 1927. 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, can find no ground for the issuance of a writ of certiorari, 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 C. Dysart, pro se.* No appearance for respondent.

No. 1154. UNITED STATES EX REL. JOSEPH Y. SAUNDERS *v.* WALTER I. MCCOY, CHIEF JUSTICE, SUPREME COURT, DISTRICT OF COLUMBIA. Petition for writ of certiorari to

the Court of Appeals of the District of Columbia. June 6, 1927. 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, can find no ground for the issuance of a writ of certiorari, application for which is hereby also denied. The costs already incurred herein by the 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. Joseph Y. Saunders, pro se.* No appearance for respondent.

No. 1000. NEW YORK & PENNSYLVANIA RAILWAY COMPANY, BY HOWARD COBB AND FORDYCE A. COBB, ASSIGNEES *v.* UNITED STATES. June 6, 1927. Petition for a writ of certiorari to the Court of Claims denied. *Mr. Riley H. Heath* for petitioners. *Solicitor General Mitchell* and *Assistant Attorney General Galloway* for the United States.

No. 1050. NEW YORK TRUST COMPANY *v.* UNITED STATES. June 6, 1927. Petition for a writ of certiorari to the Court of Claims denied. *Mr. William F. Unger* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Mr. Fred K. Dyar* for the United States.

No. 1069. HAMMOND LUMBER COMPANY *v.* OSCAR SANDIN. June 6, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Harold M. Sawyer* for petitioner. No appearance for respondent.

No. 1075. WILLIAM V. DWYER AND EDWARD C. COHRON *v.* UNITED STATES. June 6, 1927. Petition for a writ of

certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Nathan Burkan* and *William J. Hughes, Jr.*, for petitioners. *Solicitor General Mitchell* and *Assistant Attorney General Willebrandt* for the United States.

No. 1076. BEN B. LINDSEY *v.* STATE OF COLORADO EX REL. ROYAL R. GRAHAM AND CHARLES L. LANEY ET AL. June 6, 1927. Petition for a writ of certiorari to the Supreme Court of the State of Colorado denied. *Messrs. Huston Thompson, James A. Marsh, Thomas Ward, Jr.*, and *Horace Hawkins* for petitioner. *Mary F. Lathrop* for respondents.

No. 1082. SUCESION FRANCISCA DE LOS REYES CORREA ET AL. *v.* WILLIAM P. KRAMER. June 6, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. R. H. Todd* and *Francisca R. Correa, pro se,* for petitioners. *Solicitor General Mitchell* and *Mr. William C. Rigby* for respondent.

No. 1083. SOUTHERN SIERRAS POWER COMPANY *v.* ARIZONA EDISON COMPANY. June 6, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Louis H. Chalmers* and *Thomas G. Nairn* for petitioners. *Messrs John M. Ross* and *Everett E. Ellinwood* for respondent.

No. 1084. CHARLES A. MCEUEN *v.* CITY OF NEWARK, HUGH F. COOK, MARGARET COOK, ET AL., ETC., and

No. 1085. CHARLES A. MCEUEN *v.* HUGH F. COOK, MARGARET COOK, PAUL BURNE, ET AL., ETC. June 6, 1927. Petition for writs of certiorari to the Court of Errors and Appeals of the State of New Jersey denied. *Mr. Cecil H.*

Mac Mahon for petitioner. *Mr. Robert H. McCarter* for respondents.

No. 1086. E. M. JEGGLE *v.* FRED MANSUR, TRUSTEE IN BANKRUPTCY OF WHITE STAR OIL & REFINING COMPANY, BANKRUPT. June 6, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Frank K. Nebeker, Hudson P. Hibbard,* and *Louis Kleindienst* for petitioner. *Messrs. Fred Mansur, pro se,* and *Byron C. Hanna* for respondent.

No. 1089. HIDALGO COUNTY WATER IMPROVEMENT *v.* WESTERN METAL MANUFACTURING COMPANY ET AL. June 6, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Don A. Bliss* for petitioner. No appearance for respondents.

No. 1093. LEONARD VAN NORDEN *v.* MCCORMICK LUMBER COMPANY. June 6, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Arthur I. Moulton* for petitioner. *Messrs. Wallace McCamant, Edward J. McCutchen,* and *Farnum P. Griffith* for respondent.

No. 1094. AMERICAN WHOLESALE CORPORATION *v.* STEPHEN STONE, TRUSTEE IN BANKRUPTCY OF THE ESTATE OF STEELE FURNITURE COMPANY, BANKRUPT. June 6, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. J. Julius Levy* for petitioner. *Mr. Clarence A. Fry* for respondent.

No. 1095. C. C. STEEN AND EDWARD R. HOLMES AND RALPH W. HOLMES, PARTNERS, ETC. *v.* VIOLA LEFLORE.

June 6, 1927. Petition for a writ of certiorari to the Supreme Court of the State of Oklahoma denied. *Messrs. Robert M. Rainey, Streeter B. Flynn,* and *A. A. McDonald* for petitioners. No appearance for respondent.

No. 1099. MORRIS DRUIN *v.* STATE OF NEW JERSEY. June 6, 1927. Petition for a writ of certiorari to the Court of Errors and Appeals of the State of New Jersey denied. *Messrs. Ralph J. Kelly, Joseph J. Weinberger,* and *Harry H. Weinberger* for petitioner. *Mr. J. Vincent Barnitt* for the State of New Jersey.

No. 1102. UNITED DREDGING COMPANY AND SOUTHERN CASUALTY COMPANY *v.* CARL LINDBERG AND LAWSON LINDBERG, BY THEIR NEXT FRIEND AND MOTHER MRS. G. LINDBERG. June 6, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Brantley Harris* and *Maco Stewart* for petitioners. No appearance for respondents.

No. 1105. EX PARTE MYRA L. GARLAND. June 6, 1927. Petition for a writ of certiorari to the Supreme Court of Probate of the State of Maine denied. *Mr. Harvey D. Eaton* for petitioner. *Mr. Edward F. Merrill* for respondent.

No. 1106. ALABAMA & VICKSBURG RAILWAY COMPANY AND UNITED STATES FIDELITY & GUARANTY COMPANY *v.* VALEERE FOUNTAIN, ADMINISTRATRIX OF ESTATE OF FLEX FOUNTAIN, DECEASED. June 6, 1927. Petition for a writ of certiorari to the Supreme Court of the State of Mississippi denied. *Messrs. Charles N. Burch, H. D. Minor, R. H. Thompson, R. L. Dent, S. L. McLaurin,* and *C. H. McKay* for petitioners. No appearance for respondent.

No. 1109. COMMERCIAL UNION FIRE INSURANCE COMPANY *v.* G. L. MARSHALL ET AL;

No. 1110. HARTFORD FIRE INSURANCE COMPANY *v.* G. L. MARSHALL ET AL.;

No. 1111. HOME FIRE AND MARINE INSURANCE COMPANY *v.* G. L. MARSHALL ET AL.; and

No. 1112. COMMERCIAL UNION ASSURANCE COMPANY *v.* G. L. MARSHALL ET AL. June 6, 1927. Petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. R. Lee Bartels* for petitioners. *Mr. Thomas A. Evans* for respondents.

No. 1114. JESSE C. ADKINS, HUGH B. ROWLAND, ROGER B. WHITEFORD, ET AL., ETC. *v.* IGNATIUS J. COSTIGAN. June 6, 1927. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Jesse C. Adkins, Hugh B. Rowland, Roger B. Whiteford, M. M. Doyle,* and *C. F. R. Ogilby* for petitioners. *Messrs. George P. Hoover* and *Morgan H. Beach* for respondent.

No. 1116. BROADWAY TRUST COMPANY, TRUSTEE, *v.* WILLIAM L. DILL, RECEIVER OF HANOVER FARMS COMPANY. June 6, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Harvey F. Carr* for petitioner. *Mr. Carl A. Feick* for respondent.

No. 1120. UNION PETROLEUM STEAMSHIP COMPANY, OWNER OF THE S. S. "WESTWEGO" *v.* UNITED STATES. June 6, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. John M. Woolsey* and *Delbert M. Tibbetts* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Farnum,* and *Mr. J. Frank Staley* for the United States.

No. 1126. COMPAGNIE GENERALE TRANSATLANTIQUE *v.* LAWRENCE LEATHER COMPANY. June 6, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Joseph P. Nolan* for petitioner. *Mr. E. Curtis Rouse* for respondent.

No. 1130. B. K. GOREE, TRUSTEE OF THE ESTATE OF J. L. WALKER, BANKRUPT, *v.* W. W. WILKINSON, TRUSTEE OF THE ESTATE OF WALKER GRAIN COMPANY. June 6, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. S. C. Rowe* for petitioner. *Mr. Mark McMahon* for respondent.

No. 1137. ARTHUR M. ABELL, ADMINISTRATOR OF THE ESTATE OF ADELINE S. ABELL, *v.* FLORA B. THOMPSON AND GEORGE W. WHITE, EXECUTORS, ETC., ET AL. June 6, 1927. Petition for a writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Charles L. Frailey* for petitioner. No appearance for respondents.

No. 1139. B. FRANK WOOD AND J. LEIGH NOURSE *v.* UNITED STATES; and

No. 1140. B. FRANK WOOD *v.* UNITED STATES. June 6, 1927. Petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. T. P. Gore, James A. Reed,* and *Thomas H. Owen* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 1142. COLASTIE ANDRUS, JOINED PRO FORMA BY HER HUSBAND, SIDNEY ANDRUS, S. BROUSSARD, LAODIS BROUSSARD ET AL. *v.* F. M. HUTCHINSON ET AL. June 6, 1927.

Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. William D. Gordon* for petitioners. No appearance for respondents.

No. 1150. MARCELLE SMITH *v.* UNITED STATES. June 6, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Neal E. McNeill* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 591. MAYOR AND BOARD OF ALDERMEN OF THE CITY OF NATCHEZ *v.* S. B. MCNEELY. June 6, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John B. Brunini* for petitioners. *Messrs. Hugh Tullis* and *L. T. Kennedy* for respondent.

No. 637. MRS. LOUISA B. MCNEELY, ADMINISTRATRIX OF THE ESTATE OF S. B. MCNEELY, DECEASED *v.* MAYOR AND BOARD OF ALDERMEN OF THE CITY OF NATCHEZ. June 6, 1927. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Hugh Tullis* and *L. T. Kennedy* for petitioner. No appearance for respondents.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT, FROM APRIL 12, 1927, TO AND INCLUDING JUNE 6, 1927.

No. 223. DEMETRIOS ANASTOPOULOS *v.* JOHN P. JOHNSON, COMMISSIONER OF IMMIGRATION. Appeal from the District Court of the United States for the District of

Massachusetts. April 14, 1927. Dismissed with costs pursuant to the nineteenth rule on motion of *Solicitor General Mitchell* and *Assistant Attorney General Luhring* for appellee. *Mr. Francis M. Costello* for appellant.

No. 1068. HUGO THORSCH *v.* THOMAS W. MILLER, ALIEN PROPERTY CUSTODIAN, AND FRANK WHITE, TREASURER OF UNITED STATES. Appeal from the Court of Appeals of the District of Columbia. April 18, 1927. Docketed and dismissed with costs on motion of *Solicitor General Mitchell* for appellees. No appearance for appellant.

No. 134. TWIN CITY FORGE & FOUNDRY COMPANY *v.* UNITED STATES. Appeal from the Court of Claims. April 18, 1927. Remanded with directions to modify the judgment, per stipulation of counsel on motion of *Solicitor General Mitchell* and *Assistant Attorney General Galloway* for the United States. *Messrs. Jesse C. Adkins, John C. Benson, Frank F. Nesbit,* and *George H. Sullivan* for appellant.

No. 991. WALTER S. HOOPER *v.* UNITED STATES. See *ante,* p. 743.

No. 656. GEORGE R. DALE *v.* STATE OF INDIANA. Error to the Supreme Court of the State of Indiana. April 25, 1927. Dismissed with costs on motion of *Messrs. Moses E. Clapp* and *William V. Rooker* for plaintiff in error. *Messrs. Arthur L. Gilliom* and *Edward M. White* for defendant in error.

No. 844. UNITED STATES *v.* JOHN R. HANBY AND F. J. SULLIVAN. Error to the District Court of the United

States for the Eastern District of North Carolina. April 25, 1927. Dismissed on motion of *Mr. Alfred A. Wheat* in behalf of *Solicitor General Mitchell* and *Assistant Attorney General Willebrandt* for the United States. *Messrs. George Rountree* and *Robert Ruark* for defendants in error.

No. 748. WABASH RAILWAY COMPANY *v.* SOUTH DAVIESS COUNTY DRAINAGE DISTRICT. Error to the Circuit Court of Appeals for the Eighth Circuit. May 16, 1927. Dismissed with costs on motion of *Mr. Frederic D. McKenney* in behalf of *Mr. Homer Hall* for plaintiff in error. *Mr. Platt Hubbell* for defendant in error.

No. 1009. UNITED RAILWAYS COMPANY OF ST. LOUIS AND ROLLA WELLS, RECEIVER *v.* PUBLIC SERVICE COMMISSION OF MISSOURI, T. J. BROWN, ALMON ING, D. F. CALFEE, ETC., ET AL. Appeal from the District Court of the United States for the Western District of Missouri. May 16, 1927. Dismissed with costs on motion of *Messrs. Charles W. Bates* and *S. E. Francis* for appellants. No appearance for appellees.

No. 1072. BURKE AND JAMES, INC., *v.* UNITED STATES. Petition for a writ of certiorari to the Court of Claims. May 16, 1927. Dismissed on motion of *Messrs C. C. Carlin* and *M. Carter Hall* for petitioner. No appearance for the United States.

No. 890. FRED M. BUTZEL, GUARDIAN AD LITEM OF AGNES SALLOUM, *v.* ANNA SCHNELLER, AND ROBERT M. TOMS, PROSECUTING ATTORNEY. Error to the Supreme Court of the State of Michigan. May 16, 1927. Dis-

missed with costs on motion of *Mr. Thomas G. Long* for plaintiff in error. No appearance for defendants in error.

No. 557. A. W. DUCKETT & Co., INC., *v.* UNITED STATES. Certiorari to the Court of Claims. May 31, 1927. Judgment reversed, on confession of error, and case remanded to the Court of Claims for further proceedings, and mandate granted on motion of *Solicitor General Mitchell* for the United States. *Messrs. Ernie Adamson* and *Don R. Almy* for petitioner.

No. 962. WESTERN MARYLAND DAIRY COMPANY *v.* HAROLD E. WEST, EZRA B. WHITMAN, J. FRANK HARPER, COMPRISING AND CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL. Error to the Court of Appeals of the State of Maryland. May 31, 1927. Dismissed with costs on motion of *Messrs. William L. Rawls* and *George W. Lindsay* for plaintiff in error. *Messrs. Thomas H. Robinson* and *Herbert Levy* for defendants in error.

No. 1017. BROADWAY TRUST COMPANY, TRUSTEE, *v.* WILLIAM L. DILL, RECEIVER OF HANOVER FARMS COMPANY. Appeal from the Circuit Court of Appeal for the Third Circuit. May 31, 1927. Dismissed with costs per stipulation of counsel. *Mr. Harvey F. Carr* for appellant. *Messrs. John O. H. Pitney* and *Carl A. Feick* for appellee.

AMENDMENT OF RULES *

ORDER ENTERED MAY 2, 1927.

It is ordered that rules 30 and 31 of this Court be amended so that they shall read as follows:

30.

REHEARING.

A petition for rehearing may be filed with the clerk, in term time or in vacation, within twenty-five days after judgment is entered, but not later, and must be printed, briefly and distinctly state its grounds, and be supported by a certificate of counsel to the effect that it is presented in good faith and not for delay. Such a petition is not subject to oral argument, and will not be granted unless a Justice who concurred in the judgment desires it and a majority of the Court so determines.

31.

MANDATES.

Mandates shall issue as of course after the expiration of twenty-five days from the date the judgment is entered, irrespective of the filing of a petition for rehearing, unless the time is shortened or enlarged by order of the Court, or of a justice when the Court is not in session. See rule 29, paragraph 5.

This amendment shall take effect and be enforced on and after October 3, 1927.

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* For other amendments see 268 U. S. 709; 271 U. S. 693; 273 U. S. 685.

SUMMARY STATEMENT OF BUSINESS OF THE SUPREME COURT OF THE UNITED STATES FOR OCTOBER TERM, 1926.

Original Docket.

Cases pending at beginning of term	13
New cases docketed during term	2
Cases finally disposed of	3
Cases not finally disposed of	12

Appellate Docket.

Cases pending at beginning of term	438
New cases docketed during term	730
Cases finally disposed of	885
Cases not finally disposed of	283

The number of pending cases, original and appellate, was thus decreased by 156.

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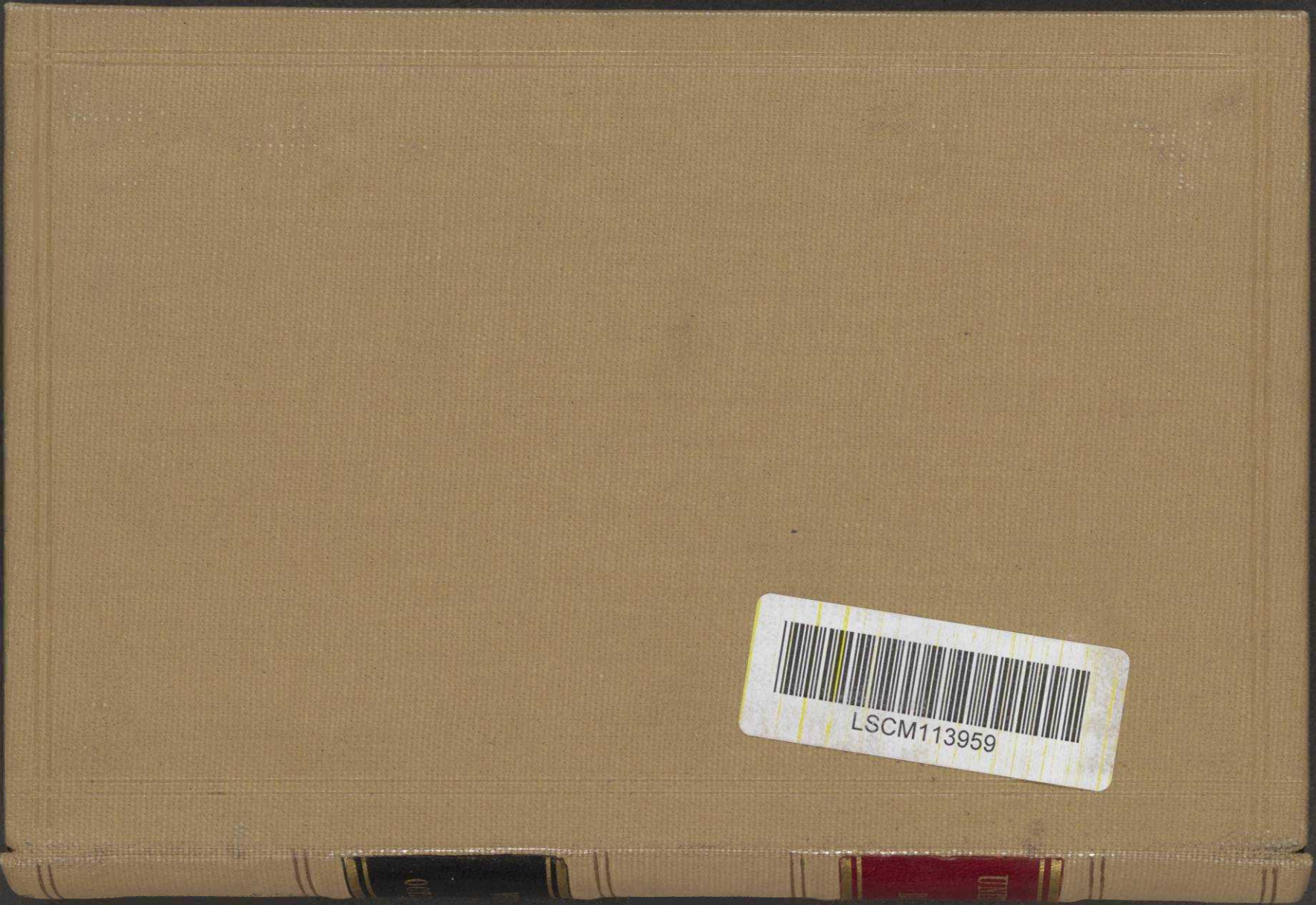
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