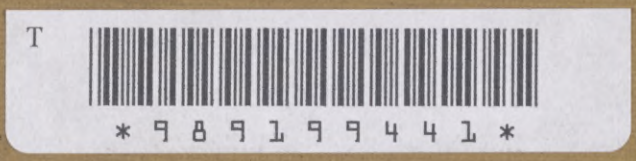


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UNITED STATES REPORTS

VOLUME 277

CASES ADJUDGED

IN

THE SUPREME COURT

AT

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FROM APRIL 10, 1928, TO AND
INCLUDING JUNE 5, 1928

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Cook v. *United States,* 275 U. S. 516. Miss Louise Foster was of counsel for the respondent. Mr. Geo. H. Foster did not appear.

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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.
CHARLES ELMORE CROPLEY, Clerk.
FRANK KEY GREEN, Marshal.

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

SUPREME COURT OF THE UNITED STATES

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.

For next previous allotment, see 266 U. S., p. IX.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1927.

BLODGETT *v.* SILBERMAN ET AL.

SILBERMAN ET AL. *v.* BLODGETT.

CERTIORARI AND ERROR TO THE SUPERIOR COURT OF FAIRFIELD COUNTY, CONNECTICUT.

Nos. 190 and 191. Argued March 12, 13, 1928.—Decided April 16, 1928.

1. The State of a decedent's domicile may impose a succession tax on the transfer of his intangible property by will or inheritance under her laws, even though the evidences of such property be outside of the State at the time of his death, and even though the transfer be subject to taxation in another jurisdiction. *Mobilia sequuntur personam.* P. 8.
2. The interest of a deceased partner in a limited partnership governed by c. 408, N. Y. Laws, 1919, among whose assets are buildings and land, is an interest in the surplus of assets with a right to an accounting—a chose in action. It is intangible property subject to succession tax in the State of his domicile. P. 10.
3. Bonds and certificates of indebtedness of the United States, payable to bearer and transferable from hand to hand, though having some of the qualities of physical property are nevertheless intangible property—choses in action—subject to succession tax by the State of the deceased owner's domicile, although physically they have been in another State ever since he acquired them. *State Tax on Foreign-Held Bonds,* 15 Wall. 300; *Frick* v. *Penna.,* 268 U. S. 473, and other cases distinguished. P. 12.
4. The domiciliary State may likewise tax the succession to stocks of corporations of other States, the certificates for which have

never been within its borders; a savings deposit in another State; and life insurance collected there by the decedent's estate. P. 18.

5. But bank notes and coin kept by the decedent in a safe deposit box in another State, are tangible property and not subject to transfer tax by the State of his domicile. *Id.*

6. A testator, resident in Connecticut, died possessed of an interest in a New York partnership, stocks, bonds and a bank account in New York and a life insurance policy in a New York company. The will, which devised most of the property to New York charities, was probated in New York, and the estate largely settled there, including the payment of debts and legacies and the fixation and payment of the New York transfer and federal estate taxes. *Held* that subsequent proceedings in Connecticut by which a tax was imposed on the succession to the intangibles mentioned, did not deny full faith and credit to the public acts, records and proceedings of New York. *Id.*

7. The full faith and credit clause does not make judgments binding on those who were neither party nor privy to the proceedings in which they were rendered. P. 19.

105 Conn. 192, affirmed in part; reversed in part.

REVIEW of a judgment of the Superior Court of Connecticut, levying a succession tax pursuant to the opinion and advice of the Supreme Court of Errors, 105 Conn. 192, on the transfer of property under the will of a resident of the State. The executors sued out a writ of error from this Court upon the ground that the taxing statute, as applied, violated the Fourteenth Amendment and the full faith and credit provision of the Constitution. The Connecticut Tax Commission applied for a certiorari to so much of the judgment as denied to the State, because of the Fourteenth Amendment, the right to tax the transfer of certain securities of the United States and bank notes and coin.

Mr. Charles E. Hughes, with whom *Messrs. Benjamin W. Alling, Farwell Knapp, Lucius F. Robinson,* and *John F. Caskey* were on the brief, for Blodgett.

Messrs. Abraham L. Gutman and *Kenneth Dayton* for Silberman et al.

Mr. Seth T. Cole for the Tax Commission of the State of New York and the Commissioner of Corporations and Taxation of Massachusetts as *amici curiae,* by special leave of Court.

Messrs. Wm. R. Perkins, Sol M. Stroock, Forrest Hyde, and *Harry H. Shelton* submitted a brief as *amici curiae* on behalf of the Estate of James B. Duke, deceased, by special leave of Court.

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

These two cases, which are really one, grow out of the operation of a transfer tax by the State of Connecticut. They are brought to this Court, one by certiorari, and one by writ of error. The questions presented are whether the tax on the transfer of certain parts of the large estate of Robert B. Hirsch was in violation of the due process clause of the Fourteenth Amendment to the Federal Constitution in that they were tangible property in New York and not in Connecticut. Hirsch died September 23, 1924, domiciled at Stamford, Connecticut, leaving a will with two codicils executed in accordance with the laws of both New York and Connecticut. The plaintiffs are the surviving executors of the will. Hirsch left real estate, chattels, cattle, horses and poultry in Connecticut, and also a debt due from a resident of Connecticut and a certificate of stock in a Connecticut corporation, as to all of which there is no dispute about the tax that was imposed. The great bulk of his estate, however, consisted of (1) a large interest, as general partner, appraised at $1,687,245.34, in the partnership of William Openhym & Sons, doing business in New York, and organized under the Limited Partnership Act of that State; (2) certificates of stock in New York, New Jersey and Canada corporations, appraised at $277,864.25; (3) bonds and Treasury

certificates of indebtedness of the United States, appraised at $615,121.17; (4) a small savings bank account in New York; (5) a life insurance policy in the Mutual Life Insurance Company of New York payable to the estate; and (6) a small amount of bank bills and coin in a deposit box in New York. All the bonds and certificates of stock at the time of the decedent's death, and for a long time prior thereto, had been physically placed and kept in safe deposit boxes in New York City and were never in Connecticut. The partnership assets consisted of real estate in New York and also in Connecticut, merchandise, chattels, credits, and other personal property. The testator bequeathed the larger part of his estate to charitable and educational corporations organized under the laws of New York and existing in that State. The executors offered the will and codicils for probate in New York. They were admitted to probate in the Surrogate's Court in the County of New York, and thereafter the executors proceeded in the settlement of the estate in New York. They have paid from the funds of the estate legacies provided in the will and codicils amounting to $299,297.45. They have also paid the debts, the federal estate tax and the New York transfer or inheritance tax, which amounted to $19,166.04. The transfer report in that court exempted the legacies bequeathed to charitable and educational institutions in accord with New York law. The executors have paid to the trustees named in the will and codicils the amount therein mentioned for the benefit of certain persons named. The executors sold the stock standing in the name of the decedent and made transfer of the same to the purchaser, and the Mutual Life Insurance Company paid to the executors the proceeds of the policy. The National City Bank of New York paid to the executors the amount of a small deposit account therein to the credit of the decedent at the time of his death.

On January 8, 1925, the executors presented to the Court of Probate, for the Stamford district of Connecticut, an exemplified copy of the will and codicils from the record of the proceedings in the Surrogate's Court in New York, and on January 15, 1925, that court received the will and codicils and accepted a bond for the executors and issued to them letters testamentary, made an order limiting the time for the presentation of claims, directed the filing of an inventory of all the property, including choses in action of the estate of the decedent, and appointed appraisers who made and filed the inventory of all the foregoing items of property belonging to the decedent at the time of his death.

On September 1, 1925, the executors filed in the Probate Court for the Stamford district, and with the tax commissioner for Connecticut, a statement under oath covering the property of the estate and the claimed deductions therefrom, all this for the purpose of determining the succession tax, if any, due the State of Connecticut. The tax commissioner thereafter filed a copy of his computation of the tax with the Probate Court, to which the executors made objection, but that court on December 4, 1925, made its order and decree approving the computation of $188,780.58, and directed the executors to pay this amount to the State Treasurer.

From this order the plaintiff executors took an appeal to the Superior Court of Fairfield County, and then by stipulation of the parties the case was reserved for the advice and direction of the Supreme Court of Errors as to what judgment, decree or decision should be made or rendered thereon by the Superior Court.

The chief questions considered by the Supreme Court of Errors were, first, whether the interest of the decedent in the partnership of Openhym & Sons was subject to a transfer tax in Connecticut, and second, whether the bonds of the United States and certificates of its indebted-

ness were to be deemed tangible property in New York and beyond the taxing jurisdiction of the State of Connecticut. There were other questions of taxable jurisdiction over other items of the estate, but we shall consider these two first.

The Supreme Court of Errors held, first, that the interest of the decedent in the partnership was a chose in action and intangible and the transfer thereof was subject to the tax imposed by the law of the decedent's domicil; second, that the bonds and certificates of the United States were tangible property having a *situs* in New York and were not within the taxable jurisdiction of Connecticut, but were to be regarded as in the same class of tangibles as the paintings, works of art and furniture considered in the case of *Frick* v. *Pennsylvania,* 268 U. S. 473. In that case, Pennsylvania, the State of Mr. Frick's domicil, sought to impose a transfer or succession tax on the paintings and other tangible personalty, which had always been in New York City, and it was held that they had an actual *situs* in New York and that, under the Fourteenth Amendment, Pennsylvania could impose no transfer or successsion tax in respect of them. Applying what it conceived to be the principle of that case to the bonds of the United States and certificates of its indebtedness in this, the Supreme Court of Errors held that their transfer could not be taxed in Connecticut.

The Superior Court, following the advice of the Supreme Court of Errors, entered a judgment giving full effect to it. That is the final judgment in the case and it is the judgment now to be reviewed.

In No. 191 a writ of error was allowed by the Chief Justice of the Supreme Court of Errors and the Presiding Judge of the Superior Court of the State of Connecticut under Section 237(a) of the Judicial Code, Act of February 13, 1925 (ch. 229, 43 Stat. 936, 937) to the final and consolidated judgment of the Superior Court of Con-

necticut as the highest court of the State in which a decision in the suit could be had, because there was drawn in question therein the validity of chapter 190, of the Public Acts of 1923 of Connecticut, on the ground of its being repugnant to the Constitution of the United States, and especially to the Fourteenth Amendment thereof, in that the statute as construed and applied by the Superior Court levied a succession tax on the transfer and succession of property and choses in action of the decedent which were within the jurisdiction of New York and not within the jurisdiction of Connecticut, the decedent's domicil.

In No. 190, the State Tax Commissioner applied for a writ of certiorari to the same consolidated judgment, and sought a reversal of that judgment in so far as it denied to the State of Connecticut, because of the Fourteenth Amendment to the Federal Constitution, the power and right created by its statute, chapter 190 of the Public Acts of 1923, to tax the transfer of the United States bonds and certificates of indebtedness and of $287.50 in bank notes and coin, all in a safe deposit box in the City and State of New York, as not within the taxing jurisdiction of Connecticut.

Had the Supreme Court of Errors put its ruling against the validity of part of the tax on the construction of the State Constitution or statute, we could not review that ruling, because it would have involved only a question of state law, but so far as the ruling was put on the ground that the State could not impose the tax consistently with the due process of law clause of the Fourteenth Amendment, a federal question is presented which we may consider, and when we have determined the federal questions, the cause will go back to the state court for further proceedings not inconsistent with our views on such federal questions.

The Connecticut Succession and Transfer Act, Ch. 190 of the Public Acts of 1923, says in its section 1:

"All property and any interest therein owned by a resident of this state at the time of his decease, and all real estate within this state owned by a nonresident of this state at the time of his decease, which shall pass by will or inheritance under the laws of this state; and all gifts of such property by deed, grant or other conveyance, made in contemplation of the death of the grantor or donor, or intended to take effect in possession or enjoyment at or after the death of such grantor or donor, shall be subject to the tax herein prescribed."

This is a tax not upon property but upon the right or privilege of succession to the property of a deceased person as is made clear in the opinion of the Supreme Court of Errors in this and prior cases. *Silberman* v. *Blodgett,* 105 Conn. 192; *Corbin* v. *Townshend,* 92 Conn. 501; *Hopkins' Appeal,* 77 Conn. 644; *Warner* v. *Corbin,* 91 Conn. 532; *Gallup's Appeal,* 76 Conn. 617; *Nettleton's Appeal,* 76 Conn. 235. These cases are all in accord with *Knowlton* v. *Moore,* 178 U. S. 41, 47, in which it was said by this Court that:

" Taxes of this general character are universally deemed to relate, not to property *eo nomine,* but to its passage by will or by descent in case of its intestacy, as distinguished from taxes imposed on property, real or personal as such, because of its ownership and possession. In other words, the public contribution which death duties exact is predicated on the passing of property as the result of death, as distinct from a tax on property dissociated from its transmission or receipt by will, or as the result of intestacy."

The power of the State of a man's domicil to impose a tax upon the succession to, or the transfer of, his intangible property, even when the evidences of such property are outside of the State at the time of his death, has been constantly asserted by the legislatures of the various

States. The Supreme Court of Errors in its opinion in this case says that at the present time the inheritance tax laws of over four-fifths of the States impose a tax similar to that imposed by Connecticut. *Frothingham* v. *Shaw,* 175 Mass. 59; *In re Estate of Zook,* 317 Mo. 986; *In re Sherwood's Estate,* 122 Wash. 648; *Mann.* v. *Carter,* 74 N. H. 345; *People* v. *The Union Trust Company,* 255 Ill. 168; *In re Lines' Estate,* 155 Pa. 378; *In re Estate of Hodges,* 170 Cal. 492; *Commonwealth* v. *Williams' Executor,* 102 Va. 778. The same principle was recognized by this Court in *Carpenter* v. *Pennsylvania,* 17 How. 456, before the adoption of the Fourteenth Amendment, and the principle was reaffirmed thereafter in *Orr* v. *Gilman,* 183 U. S. 278; *Keeney* v. *New York,* 222 U. S. 525; and *Bullen* v. *Wisconsin,* 240 U. S. 625. In the latter case the question arose as to the power of Wisconsin to impose a tax upon the succession to certain intangible property of one of its citizens, the evidences of which were held by a trust company in Illinois upon a revocable trust at the time of his death, and the power was sustained. Reference to the record in the case shows that the property included shares of stock in Missouri, New Jersey and Illinois corporations; stock in a national bank organized under the National Banking Act; mortgage bonds and debentures issued by New Jersey, Illinois, Missouri, Utah and Kansas corporations; promissory notes of residents of Illinois and Minnesota; insurance policies issued by New York, Canadian and Wisconsin insurance companies; and money on deposit in two Illinois banks. The same principle was affirmed in the *Frick* case.

At common law the maxim "*mobilia sequuntur personam*" applied. There has been discussion and criticism of the application and enforcement of that maxim, but it is so fixed in the common law of this country and of England, in so far as it relates to intangible property, including choses in action, without regard to whether they are

evidenced in writing or otherwise and whether the papers evidencing the same are found in the State of the domicil or elsewhere, and is so fully sustained by cases in this and other courts, that it must be treated as settled in this jurisdiction whether it approve itself to legal philosophic test or not.

Further, this principle is not to be shaken by the inquiry into the question whether the transfer of such intangibles, like specialties, bonds or promissory notes, is subject to taxation in another jurisdiction. As to that we need not inquire. It is not the issue in this case. For present purposes it suffices that intangible personalty has such a *situs* at the domicil of its owner that its transfer on his death may be taxed there.

This brings us to the question whether the partnership interest of the decedent in William Openhym & Sons was a chose in action and intangible personalty. The partnership was a limited partnership organized in New York, the last agreement therefor having been executed in December, 1921. The New York partnership law then in force was Chapter 408, Laws of 1919.

Under Section 51, of this law, a partner is a co-owner with his partner of specific partnership property, holding this property as a tenant in partnership. Such tenancy confers certain rights with limitations. A partner has a right equal to that of his partners to possess specific partnership property for partnership purposes, but not otherwise. His right in specific partnership property is not assignable nor is it subject to attachment or execution upon a personal claim against him; upon his death the right to the specific property vests not in the partner's personal representative but in the surviving partner; his right in specific property is not subject to dower, curtesy, or allowance to widows, heirs or next of kin.

Section 52 specifically provides:

"A partner's interest in the partnership is his share of the profits and surplus and the same is personal property."

Under Section 73, when any partner dies and the partnership continues, his personal representative may have the value of his interest at the date of dissolution ascertained and receive as an ordinary creditor an amount equal to the value of his interest in the partnership with interest.

Under Section 98, Chapter 640, Laws of 1922, the rights of a general partner in a limited partnership, which was the interest of the decedent here when he died, are identical with those of a general partner in a general partnership. And in regard to a limited partner's interest, Section 107 of the law specifically provides:

"A limited partner's interest in the partnership is personal property."

It is very plain, therefore, that the interest of the decedent in the partnership of William Openhym & Sons was simply a right to share in what would remain of the partnership assets after its liabilities were satisfied. It was merely an interest in the surplus, a chose in action. It is an intangible and carries with it a right to an accounting.

There were among the holdings and property of the partnership, buildings and land. Although these statutes were passed after the decision in *Darrow* v. *Calkins,* 154 N. Y. 503, we have no reason for thinking that the partnership law of New York is now any different from what its Court of Appeals said it was in that case, pp. 515, 516, as follows:

" It is, however, generally conceded that the question whether partnership real estate shall be deemed absolutely converted into personalty for all purposes, or only converted *pro tanto* for the purpose of partnership equities, may be controlled by the express or implied agreement of the partners themselves, and that where by such agreement it appears that it was the intention of the partners that the lands should be treated and administered

as personalty for all purposes, effect will be given thereto. In respect to real estate purchased for partnership purposes with partnership funds and used in the prosecution of the partnership business, the English rule of 'out and out' conversion may be regarded as properly applied on the ground of intention, even in jurisdictions which have not adopted that rule as applied to partnership real estate acquired under different circumstances and where no specific intention appeared. The investment of partnership funds in lands and chattels for the purpose of a partnership business, the fact that the two species of property are in most cases of this kind, so commingled that they can not be separated without impairing the value of each, has been deemed to justify the inference that under such circumstances the lands as well as the chattels were intended by the partners to constitute a part of the partnership stock and that both together should take the character of personalty for all purposes, and Judge Denio in *Collumb* v. *Read* expressed the opinion that to this extent the English rule of conversion prevailed here. That paramount consideration should be given to the intention of the partners when ascertained, is conceded by most of the cases."

It thus clearly appears that both under the partnership agreement and under the laws of the State of New York the interest of the partner was the right to receive a sum of money equal to his share of the net value of the partnership after a settlement, and this right to his share is a debt owing to him, a chose in action, and an intangible. We concur with the Supreme Court of Errors that as such it was subject to the transfer tax of Connecticut.

We come then to the second question, whether bonds of the United States and certificates of indebtedness of the United States deposited in a safe deposit box in New York City, and never removed from there, owned by the

decedent at the time of his death, were intangibles which come within the rule already stated.

The argument is that such bonds, payable to bearer and transferable from hand to hand, have lost their character as choses in action and have taken on the qualities of physical property, and cases are cited to indicate that they can be made the subject of execution and constitute a basis for the jurisdiction of the courts and of taxing officers of the State in which the paper upon which the evidence of the debt or obligation is written, is found, although their owner lives and dies in another State.

The Supreme Court of Errors takes this view, citing *Frick* v. *Pennsylvania,* and holds that the transfer of the United States bonds and certificates is taxable in New York where they are, and only there. The Court cites, as sustaining its conclusion that the transfer of the bonds is only taxable in New York, the case of *State Tax on Foreign-Held Bonds,* 15 Wall. 300. This case is often cited to the point that Mr. Justice Field takes as indisputable (on page 319) that a State may not tax property that is not within its jurisdiction—a matter recognized in *Frick* v. *Pennsylvania,* 268 U. S. 473, 489; *Union Refrigerator Transit Company* v. *Kentucky,* 199 U. S. 194, 202, and *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U. S. 196, 206. The effect of some of Mr. Justice Field's language in that case, and the exact point on which the decision there turned, have since been fully discussed by this Court and qualified in *Savings & Loan Society* v. *Multnomah County,* 169 U. S. 421, 428; *New Orleans* v. *Stempel,* 175 U. S. 309, 319, 320; and *Blackstone* v. *Miller,* 188 U. S. 189, 206. The tax there held invalid was a tax imposed by a statute of Pennsylvania upon the interest due a non-resident bond holder on bonds issued by a corporation of that State. It is now settled in these later cases that the point decided in the *State Tax on*

Foreign-Held Bonds case was that the law of Pennsylvania in requiring the railroad company, which issued the bonds, to pay the state tax on them and deduct it from the interest due the non-resident owners, was as to them a law impairing the obligation of contracts under *Murray* v. *Charleston,* 96 U. S. 432. The case, therefore, is not authority for the proposition for which the Supreme Court of Errors cites it, to-wit: That such bonds are to be completely assimilated to tangible personal property. The other cases cited by the Supreme Court of Errors are *New Orleans* v. *Stempel,* 175 U. S. 309, 321, and like cases which follow it in which a State, not that of the domicil of the owner, has been held to have the right to tax bonds, promissory notes, and other written evidences of choses in action with which business is there carried on for the owner, giving them what is sometimes called "a business *situs*"; but such cases have little or no bearing on the power of the State of a decedent's domicil to tax the transfer of his bonds which we are now considering.

The question here is whether bonds, unlike other choses in action, may have a *situs* different from the owner's domicil such as will render their transfer taxable in the State of that *situs* and in only that State. We think bonds are not thus distinguishable from other choses in action. It is not enough to show that the written or printed evidence of ownership may, by the law of the State in which they are physically present, be permitted to be taken in execution or dealt with as reaching that of which they are evidence, even without the presence of the owner. While bonds often are so treated, they are nevertheless in their essence only evidences of debt. The Supreme Court of Errors expressly admits that they are choses in action. Whatever incidental qualities may be added by usage of business or by statutory provision, this characteristic remains and shows itself by the fact that

their destruction physically will not destroy the debt which they represent. They are representative and not the thing itself.

The case of *Kirtland* v. *Hotchkiss,* 100 U. S. 491, is in point. The case came to this Court from the Supreme Court of Errors of Connecticut and it involved the taxable status in that State of bonds held by one of its citizens and evidencing a debt owing to him by a citizen of Illinois. The court said, p. 498:

" The question does not seem to us to be very difficult of solution. The creditor, it is conceded, is a permanent resident within the jurisdiction of the State imposing the tax. The debt is property in his hands constituting a portion of his wealth, from which he is under the highest obligation, in common with his fellow-citizens of the same State, to contribute for the support of the government whose protection he enjoys.

" That debt, although a species of intangible property, may, for purposes of taxation, if not for all others, be regarded as situated at the domicile of the creditor. It is none the less property because its amount and maturity are set forth in a bond. That bond, wherever actually held or deposited, is only the evidence of the debt, and if destroyed, the debt—the right to demand payment of the money loaned, with the stipulated interest—remains. Nor is the debt, for the purposes of taxation, affected by the fact that it is secured by mortgage upon real estate situated in Illinois. The mortgage is but a security for the debt, and, as held in *State Tax on Foreign-held Bonds* (*supra*), the right of the creditor ' to proceed against the property mortgaged, upon a given contingency, to enforce by its sale the payment of his demand, . . . has no locality independent of the party in whom it resides. It may undoubtedly be taxed by the State when held by a resident therein,' &c. Cooley on Taxation, 15, 63, 134, 270. The debt, then, having its *situs* at the creditor's

residence, both he and it are, for the purposes of taxation, within the jurisdiction of the State."

The line which was drawn in the case of *Frick* v. *Pennsylvania, supra,* was one which was adopted from the decision of this Court in *Union Refrigerator Transit Company* v. *Kentucky,* 199 U. S. 194, and other cases cited in the same connection, where it was held that the power of taxation could not extend to tangible chattels having an actual *situs* outside the jurisdiction, although the owner was within it. It was pointed out that this is not true of debts and choses in action, which usually have a taxable *situs* at the owner's domicil. In the *Union Refrigerator* case, this Court said, p. 205:

"In this class of cases the tendency of modern authorities is to apply the maxim *mobilia sequuntur personam,* and to hold that the property may be taxed at the domicil of the owner as the real *situs* of the debt, and also, more particularly in the case of mortgages, in the State where the property is retained."

The Court again said, p. 206:

"The arguments in favor of the taxation of intangible property at the domicil of the owner have no application to tangible property. The fact that such property is visible, easily found and difficult to conceal, and the tax readily collectible, is so cogent an argument for its taxation at its *situs,* that of late there is a general consensus of opinion that it is taxable in the State where it is permanently located and employed and where it receives its entire protection, irrespective of the domicil of the owner. We have, ourselves, held in a number of cases that such property permanently located in a State other than that of its owner is taxable there. *Brown* v. *Houston,* 114 U. S. 622; *Coe* v. *Errol,* 116 U. S. 517; *Pullman's Car Co.* v. *Pennsylvania,* 141 U. S. 18; *Western Union Telegraph Company* v. *Massachusetts,* 125 U. S. 530; *Railroad Com-*

pany v. *Peniston,* 18 Wall. 5; *American Refrigerator Transit Company* v. *Hall,* 174 U. S. 70; *Pittsburgh Coal Company* v. *Bates,* 156 U. S. 577; *Old Dominion Steamship Company* v. *Virginia,* 198 U. S. 299."

The Court continued, p. 206:

"There are doubtless cases in the state reports announcing the principle that the ancient maxim of *mobilia sequuntur personam* still applies to personal property, and that it may be taxed at the domicil of the owner, but upon examination they all or nearly all relate to intangible property, such as stocks, bonds, notes and other choses in action. We are cited to none applying this rule to tangible property, and after a careful examination have not been able to find any wherein the question is squarely presented. . . ."

The discussion in the *Union Refrigerator* case shows what this Court meant in the *Frick* case in holding that personal property in the form of paintings and furniture having an actual *situs* in one State could not be subjected to a transfer tax in another State, and emphasizes the inference that it did not apply to anything having as its essence an indebtedness or a chose in action and could not apply to property in the form of specialties or bonds or other written evidences of indebtedness whether governmental or otherwise, even though they passed from hand to hand. The analogy between furniture and bonds cannot be complete because bonds are representative only and are not the thing represented. They are at most choses in action and intangibles.

We think therefore that the Supreme Court of Errors in extending the rule of the *Frick* case from tangible personal property, like paintings, furniture or cattle, to bonds, is not warranted, and to that extent we must reverse its conclusion in denying to Connecticut the right to tax the transfer of the bonds and Treasury certificates.

Of course this reasoning necessarily sustains the different view of that court that the transfer of certificates of stock in corporations of other States than Connecticut was taxable in the latter as the transfer of choses in action.

Among the other items is a savings bank account in New York which is certainly a chose in action and was properly treated as subject to the same rule. So, too, a life insurance policy payable to the estate was also of that character.

There was a small amount of cash, $287.48, in bank notes and coin in a safe deposit box in New York which the Supreme Court of Errors held not taxable in Connecticut. As to this, the contention on behalf of Connecticut is that it should be treated as attached to the person of the owner and subject to a transfer tax at the domicil. It is argued that it was not like coin or treasure in bulk, but like loose change, so to speak. To money of this amount usually and easily carried on the person, it is said that the doctrine of *mobilia sequuntur personam* has peculiar application in the historical derivation of the maxim. But we think that money, so definitely fixed and separated in its actual *situs* from the person of the owner as this was, is tangible property and can not be distinguished from the paintings and furniture held in the *Frick* case to be taxable only in the jurisdiction where they were.

The results thus stated lead to our reversing the judgment of the Superior Court of Connecticut, in respect to the tax on the transfer of the bonds and certificates of indebtedness of the United States, and to our affirming the judgment in other respects.

It is further contended by the executors that the proceedings in the Connecticut court and the judgment therein fail to give full faith and credit to the public acts, records and proceedings of the State of New York, and that this is in violation of the Constitution of the

United States. We do not think there is anything in this point. There is nothing in the proceedings in the Connecticut court that is inconsistent with those in the New York court. There is nothing to indicate that the New York court decided, assuming it had jurisdiction to decide, that there was no power in the State of Connecticut to impose a tax on the transfer that was taxed in Connecticut. More than that, the proceedings and judgment in New York were not such as would conclude Connecticut even with the aid of the full faith and credit clause of the Constitution. Connecticut was not a party to those proceedings or to that judgment, nor was it in privity with any one who was a party.

Affirmed in part and reversed in part.

WILLIAMS *v.* GREAT SOUTHERN LUMBER COMPANY.

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

No. 252. Argued March 1, 2, 1928.—Decided April 16, 1928.

1. Plaintiff sought damages from the defendant Lumber Company for the death of her husband, alleging that the company had conspired with others to kill him and break up a local labor union of which he was the head, and that his death, which occurred through shooting when warrants were being served on three other men in his office, was the result of such conspiracy. A crucial issue was whether the party that killed him was in character a mob acting with the company or a *bona fide* posse sent by the Chief of Police to aid a city policeman in making the arrests; and upon this issue the reason had by the Chief of Police for sending a posse was of prime importance. Respecting this it appeared among other facts (detailed in the opinion), that on the morning when the shooting occurred the three men, for one of whom a warrant had already been issued, were seen on the street, the other two armed with shotguns; that the three walked together along the main street

of the city causing excitement among bystanders, and entered the decedent's office; that a policeman who saw them notified the Chief of Police; and that the Chief of Police obtained a warrant for arrest of the two armed men, charging breach of the peace; lodged it and the other warrant with a paid policeman for service, and, in view of conditions threatening to the public peace and the reported conduct of the two armed men, deemed it advisable to send the posse with the arresting officer. The trial judge charged that a citizen carrying arms publicly on the street committed no offense for which he was subject to arrest. *Held* erroneous to exclude evidence offered by the defendant company, showing that these two men, while walking the streets armed, had used threatening language, amounting in the circumstances to a breach of the peace, and that this had been communicated to the Chief of Police before he procured the warrants and ordered out the posse. P. 24.

2. In an action for the death of a man, based on an alleged conspiracy to kill him, a statement, 15 minutes after the killing, made by one of the party that did it, to the effect that they had come to kill the deceased and had killed him,—*Held* inadmissible against the defendant as a part of the *res gestae*. P. 25.
3. Since the passage of the Act of 1919, amending Jud. Code, § 269, as before, an error which relates, not to merely formal or technical matters, but to the substantial rights of the parties, is ground for reversal unless it appears from the whole record that it was harmless and did not prejudice the rights of the complaining party. P. 26.

17 F. (2d) 468, affirmed.

CERTIORARI, 275 U. S. 511, to a judgment of the Circuit Court of Appeals, which reversed a judgment recovered in the District Court, 13 F. (2d) 246, in an action brought by the present petitioner against the respondent Lumber Company, based on the alleged unlawful killing of her husband. Petitioner sued for herself and as tutrix of a minor child.

Messrs. W. J. Waguespack and *A. F. Higgins,* with whom *Mr. Max M. Schaumburger* was on the brief, for petitioner.

Mr. H. Generes Dufour, with whom *Messrs. B. M. Miller* and *Delos R. Johnson* were on the brief, for respondent.

MR. JUSTICE SANFORD delivered the opinion of the Court.

This suit was brought in the federal court for eastern Louisiana by Lena A. Williams, widow of L. E. Williams, in her own behalf and as tutrix of their minor child, against the Great Southern Lumber Company, to recover damages for the alleged unlawful killing of her husband. She had a verdict and judgment. 13 F. (2d) 246. The Circuit Court of Appeals reversed the judgment, and remanded the case for a new trial. 17 F. (2d) 468.

The Lumber Company operated a sawmill in the city of Bogalusa, Louisiana, in which it employed about 2,500 men, white and colored. The sawmill was conducted as an "open shop," and although union laborers were employed individually, the Company did not deal with the union itself. Williams was president of the local union.

The complaint alleged that a conspiracy had been formed between the Company, its officers, agents and others to kill Williams and destroy organized labor in the city, and that he was killed without just cause by a mob composed largely of officers, agents and employees of the Company acting within the scope of their employment. The Company denied this, and alleged that he was killed by a posse of peace officers of the city while he was unlawfully resisting them in attempting to serve warrants issued for the arrest of certain other persons.

The Circuit Court of Appeals, while stating that there was no direct evidence of the alleged conspiracy, did not pass upon the question whether the trial court had erred in denying the Company's request for a directed verdict, but reversed the judgment on the grounds of error in de-

clining to permit the introduction of certain evidence offered by the Company, and in admitting certain evidence of the plaintiff.

The petitioner contends that these rulings of the trial court were correct; and that, even if erroneous, they were technical errors which did not affect the substantial rights of the Company or constitute grounds of reversal.

For the purpose of determining these contentions it suffices to say that there was substantial evidence showing or tending to show the following facts: For some time there had been much disturbance in the city, arising apparently out of friction between the labor union and the Company as to its open shop policy, and an effort to unionize the colored laborers. On one occasion millwrights brought to the city to repair broken machinery which had caused the mill to shut down, had been forced to re-enter the train and leave the city. On another, certain laborers had been put in jail and a crowd of their sympathizers, some of whom were armed, had threatened a jail delivery. On another, the light and water plant, supplied by power from the Company's plant, had been forced to shut down temporarily. And frequently there had been disorders at meetings of the city commission. The general condition finally became so threatening to the public peace and safety that a number of business and professional men organized a League—to which no union members or persons connected with the Company were admitted—for the purpose of assisting the city authorities in maintaining law and order, and offered their services to the city as volunteer police to serve when occasion might require. On the advice of the city judge and attorney and the State district judge, this offer was accepted, and many members of the League were sworn in as such special police. The Commissioner of Public Safety and the Chief of Police also arranged with the manager of the Company that when so requested a siren whistle at the mill, which

had been customarily used as a fire alarm, should be sounded to summon the volunteer police. And on the occasion of the threatened jail delivery the volunteer police had been thus summoned and had caused the dispersal of the mob.

For some weeks immediately prior to the killing of Williams there had been a shut-down of the mill due to the breakage of machinery and conditions in the city had quieted.

In this state of affairs, on the day before Williams was killed, a city warrant was issued, on the complaint of a merchant who was a member of the volunteer police, against one Dacus, a colored man, on the charge of being a dangerous and suspicious character. Just what had been the connection of Dacus, if any, with the labor troubles does not clearly appear. On that day Dacus could not be found, and was not arrested. On the next day, however, he appeared on the streets of the city in company with two white men, O'Rourke and Bouchillon, associates of Williams in the labor union, who were armed with shot guns. The three together walked along the main street of the city, causing excitement among the bystanders, and entered upon the premises upon which Williams had his office and residence. A policeman who saw them immediately informed the Chief of Police of what had occurred. The court, however, did not permit the policeman to testify as to the language used by O'Rourke and Bouchillon, which he reported to the Chief of Police; nor the Chief of Police to testify as to the language thus reported to him. The Chief of Police, who was also informed of this occurrence by other citizens, obtained a city warrant for the arrest of O'Rourke and Bouchillon on the charge of disturbing the public peace, which, with the warrant for Dacus, was given to a paid police officer for service. Both the Chief of Police and the Commissioner of Public Safety, with whom he conferred, were of

opinion that in view of the existing conditions and the reported conduct of O'Rourke and Bouchillon, it was advisable, in view of the small number of paid police available, that the officer to whom the warrants were given should be accompanied by the Commissioner of Public Safety and by the volunteer police. At their request the Superintendent caused the siren whistle to be sounded, and many of the volunteer police assembled at the city hall. A posse consisting of the paid policeman with these volunteer police, headed by the Commissioner of Public Safety, then proceeded to Williams' office for the purpose of making the arrests. They were also accompanied or followed by several other people—some of whom were officers or employees of the Company—who had not been summoned as members of the posse.

There was a direct conflict in the evidence as to what occurred when the posse reached Williams' office; some of the witnesses testifying to the effect that Williams and others in the office were killed by members of the party, without warning or provocation; and others testifying that Williams, who was standing at the door of the office, was notified that the purpose of the visit was to serve warrants on Dacus, O'Rourke and Bouchillon, and called upon to put down a pistol held by him and permit the arrests to be made, which he refused to do; and that a shot was then fired from the inside of the office, and this was followed by a fusillade from outside and inside the office, in which Williams was killed, and others, including O'Rourke and Bouchillon, were killed or wounded.

1. The Company should have been permitted to show the language that was used by O'Rourke and Bouchillon and communicated to the Chief of Police. The offer of proof was to the effect that, as communicated to the Chief of Police, O'Rourke and Bouchillon while walking down the streets with shotguns, with Dacus between them,

said—using vile and opprobrious epithets—that they would like to see any white man who would come and take Dacus away, or the eye of any white man who would touch him. This plainly indicated a purpose to prevent by force the arrest of Dacus, and was a breach of the peace. A crucial issue in the case was whether the party that killed Williams was a mob, acting in concert with the Company, which had gone to his office for the purpose of killing him; or whether it was a bona fide posse of peace officers sent by the Chief of Police and the Commissioner of Public Safety to aid the officer in making the arrests. On this issue it was of prime importance to the Company to show the reason which the Chief of Police and the Commissioner of Public Safety had for sending the posse of voluntary police to assist in making the arrest, and not leave the bona fide nature of the posse—which was directly brought in issue—to depend merely upon the expression of their opinion without a full showing of the facts upon which that opinion was based. This was emphasized by the fact that while the district judge did not permit evidence of the threatening language used by O'Rourke and Bouchillon to go to the jury, he charged them that a citizen carrying arms publicly on the street committed no offense and was not subject to arrest; thus leaving the jury to infer that the conduct of O'Rourke and Bouchillon, unaccompanied by any evidence of threatening language, was entirely lawful, and not a justification for issuing the warrants against them or sending the posse of voluntary police to assist in the arrests. The exclusion of evidence as to the threatening language obviously prevented the Company from presenting its full and complete defense to the jury.

2. The district court also permitted the plaintiff, over the objection of the Company, to testify that about ten or fifteen minutes after her husband had been killed and

the last shot had been fired, she heard one Carson, a member of the volunteer police force, say that "they had come to kill Lem Williams, and they had killed him." There was a direct conflict in the evidence as to whether Carson had been with the party at the time Williams was killed; the weight of the evidence being to the effect that he had been sent to another part of the city and had arrived after the killing. But, however this may be, the statement made by him as to the purpose the party had in coming, made after the killing had taken place and when the conspiracy, if one had existed, had accomplished its purpose, was hearsay, not part of the *res gestae,* and not admissible against the Company.

3. The judgment was properly reversed on account of these errors. This was not affected by the provision of § 269 of the Judicial Code, as amended in 1919,[1] that in an appellate proceeding judgment shall be given after the examination of the entire record, "without regard to technical errors, defects or exceptions which do not affect the substantial rights of the parties." The errors in the exclusion and admission of evidence directly affected the substantial rights of the Company. Since the passage of this Act, as well as before, an error which relates, not to merely formal or technical matters, but to the substantial rights of the parties "is to be held a ground for reversal, unless it appears from the whole record that it was harmless and did not prejudice the rights of the complaining party." *United States* v. *River Rouge Co.,* 269 U. S. 411, 421. Here it cannot be said from the entire record that the errors were harmless; but on the contrary they were material and of a highly prejudicial character.

Judgment affirmed.

[1] 40 Stat. 1181, c. 48; U. S. C., Tit. 28, § 391.

BROOKE *v.* CITY OF NORFOLK ET AL.

CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 229. Argued April 10, 11, 1928.—Decided April 23, 1928.

A beneficiary entitled only to the income for life of a fund controlled and possessed by trustees in another State where the trust was created, cannot be taxed on the corpus of the fund by the State of his domicile in addition to a tax upon the income. P. 28.

Reversed.

CERTIORARI, 274 U. S. 734, to a judgment of the Supreme Court of Appeals of Virginia, which, in effect, sustained a judgment of the Corporation Court of Norfolk, upholding tax assessments made against the petitioner, a citizen of Virginia.

Mr. Robert B. Tunstall, with whom *Mr. Nathaniel T. Green* was on the brief, for petitioner.

Mr. E. Warren Wall for respondents.

In the case of personal property, it has been repeatedly held that a general gift or bequest of the income is in contemplation of law equivalent to a gift of the property itself; that the principal of the fund passes by a gift of the income therefrom.

By a long line of Virginia decisions, it has been held by the state court of last resort that it is the policy of this Commonwealth to tax the interest of all residents in all intangible property owned by them, regardless of the fact that the income from the property may be collected for and paid over to the owner by a trustee, no matter whether the trustee be a resident or a nonresident of this State.

Virginia does not impose any tax upon the foreign trustee or the funds in his hands as such; the tax assessed

is simply a personal charge against a resident of the State, the basis for this charge being the interest of that resident in the intangible personality held in trust for him. If the Commonwealth of Virginia is forbidden by the Federal Constitution to tax its own citizens and residents on account of their interest in intangible personal property, then upon whom may it impose taxes on account of such ownership?

Mr. Justice Holmes delivered the opinion of the court.

The petitioner applied in the local form of proceeding for the correction of two assessments for taxation alleged to be erroneous and contrary to the Fourteenth Amendment. The Court of first instance, The Corporation Court of the City of Norfolk, upheld both assessments as valid, and the Supreme Court of Appeals of Virginia rejected a petition for a writ of error on the ground that the judgment below was plainly right. A writ of certiorari was granted by this Court. 274 U. S. 734.

The assessments complained of were for City and State taxes upon the corpus of a trust fund created by the will of a citizen of Maryland resident in Baltimore at the time of her death. This will bequeathed to the Safe Deposit and Trust Company of Baltimore eighty thousand dollars in trust to pay the income to the petitioner for life, then to her daughters for their lives, and, upon the death of the last survivor, to divide the principal between the descendants then living of the daughters *per stirpes*. The will was proved in Maryland and in 1914 was admitted to probate in the Corporation Court of Norfolk as a foreign will. The property held in trust has remained in Maryland and no part of it is or ever has been in Virginia.

The petitioner has paid without question a tax upon the income received by her. But the doctrine contended for now is that the petitioner is chargeable as if she owned the whole. No doubt in the case of tangible prop-

erty lying within the State and subject to a paramount lien for taxes, the occupant actually using it may be made personally liable. *Illinois Central R. R. Co.* v. *Kentucky,* 218 U. S. 551, 562. *Carstairs* v. *Cochran,* 193 U. S. 10, 16. But here the property is not within the State, does not belong to the petitioner and is not within her possession or control. The assessment is a bare proposition to make the petitioner pay upon an interest to which she is a stranger. This cannot be done. See *Wachovia Bank & Trust Co.* v. *Doughton,* 272 U. S. 567, 575.

Judgment reversed.

COFFIN BROTHERS & COMPANY ET AL. *v.* BENNETT.

ERROR TO THE SUPREME COURT OF GEORGIA.

No. 465. Argued April 17, 1928.—Decided April 30, 1928.

1. The law in Georgia by which the Superintendent of Banks may issue executions against stockholders of insolvent banks who, after notice from him, neglect to pay assessments on their stock, and which makes such executions liens on their property from date of issuance, is consistent with due process of law, since the stockholders are given opportunity to raise and try in court every possible defense by filing affidavits of illegality. P. 31.
2. The Fourteenth Amendment is not concerned with the mere form of the state procedure. *Id.*
3. If the debtor does not demand a trial, the execution does not need the sanction of a judgment. *Id.*
4. The stockholders, by becoming such, assumed the liability imposed by the statute. *Id.*

164 Ga. 350, affirmed.

ERROR to a judgment of the Supreme Court of Georgia which affirmed a judgment sustaining a demurrer to a petition seeking to enjoin Bennett, the Superintendent of Banks, from issuing executions to collect assessments made on stockholders of a bank.

Messrs. G. Y. Harrell and *R. S. Wimberly* submitted for plaintiffs in error.

Mr. Orville A. Park, with whom *Mr. Carl N. Davie* was on the brief, for defendant in error.

Mr. Justice Holmes delivered the opinion of the Court.

In July, 1926, the Richland State Bank, organized under the laws of the State of Georgia, closed its doors and turned its affairs over to the defendant in error, the Superintendent of Banks for the State. In the following September the Superintendent issued a notice to each of the plaintiffs in error that an assessment of 100 per centum on the par value of his stock was levied, as necessary to pay the depositors in full. These proceedings were under and in accordance with the Banking Act of Georgia, of 1919, as amended in 1925, codified in 12 Park's Annotated Code, § 2268(t). That section provides that if any stockholder notified shall neglect to pay the assessment the Superintendent shall issue an execution for the amount, to be enforced like other executions, " provided, however, that any stockholder shall have the right by affidavit of illegality, as in cases of affidavits of illegality to other executions, to contest his liability for such assessment and the amount and necessity thereof." In that case the affidavit and execution are to be returned to court for trial. The execution is made " a lien on all property of the defendant subject to levy and sale for the amount which shall be adjudged to be due thereon from the date of the issuance thereof by the Superintendent." The plaintiffs in error filed a petition in equity to enjoin the Superintendent from taking the next statutory steps, on the ground that the section was contrary to the

Fourteenth Amendment by denying to them due process of law. A general demurrer was sustained by the trial Court and by the Supreme Court of the State. 164 Ga. 350.

The objection urged by the plaintiffs in error seems to be that this section purports to authorize an execution and the creation of a lien at the beginning, before and without any judicial proceeding. But the stockholders are allowed to raise and try every possible defense by an affidavit of illegality, which, as said by the Supreme Court of Georgia, makes the so called execution 'a mode only of commencing against them suits to enforce their statutory liability to depositors.' A reasonable opportunity to be heard and to present the defence is given and if a defence is presented the execution is the result of a trial in Court. The Fourteenth Amendment is not concerned with the form. *Missouri ex rel. Hurwitz* v. *North,* 271 U. S. 40, 42. The fact that the execution is issued in the first instance by an agent of the State but not from a Court, followed as it is by personal notice and a right to take the case into court, is a familiar method in Georgia and is open to no objection. *Martin* v. *Bennett,* 291 Fed. Rep. 626, 630, 631. If the debtor does not demand a trial the execution does not need the sanction of a judgment, (see *Murray* v. *Hoboken Land & Improvement Co.,* 18 How. 272); the plaintiffs in error by becoming stockholders had assumed the liability on which they are to be held. *Bernheimer* v. *Converse,* 206 U. S. 516, 529.

As to the lien, nothing is more common than to allow parties alleging themselves to be creditors to establish in advance by attachment a lien dependent for its effect upon the result of the suit. We see nothing in this case that requires further argument to show that the decision below was right.

Judgment affirmed.

LOUISVILLE GAS & ELECTRIC COMPANY *v.* COLEMAN, AUDITOR.

ERROR TO THE COURT OF APPEALS OF KENTUCKY.

No. 70. Argued October 26, 1927. Reargued February 29, 1928.—Decided April 30, 1928.

1. A statute of Kentucky, where the recording of mortgages is essential to the protection of mortgagees against *bona fide* purchasers and creditors, conditions the recording of mortgages not maturing within five years upon the payment of a tax of 20¢ for each $100 of value secured; but mortgages maturing within that period it exempts entirely. *Held* that the tax is void under the equal protection clause of the Fourteenth Amendment. Pp. 35–38.
2. The equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances. It applies to the exercise of all the powers of the State which can affect the individual or his property, including the power of taxation. P. 37.
3. Classification must always rest upon some difference which bears a reasonable and just relation to the act in respect of which the classification is proposed. *Id.*
4. Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to this constitutional provision. *Id.*
5. In the application of the equal protection clause to the tax here in question, it is immaterial whether it be called a privilege tax or a property tax. P. 38.
6. The time within which the indebtedness secured by a mortgage is to be paid may be a proper element in fixing the amount of a tax for recording it, but this classification cannot be used to justify taxing some, while others, under circumstances identical in all respects save taxable value, are entirely exempt. *Id.*
7. Owing to the character and quasi-public purposes of building and loan associations in Kentucky, the provision of the statute in question exempting them from payment of the recording tax, is not violative of the equal protection clause. P. 40.

213 Ky. 762, reversed.

ERROR to a judgment of the Court of Appeals of Kentucky, which affirmed a judgment dismissing an action to recover money exacted as a tax on the recording of a deed of trust.

Mr. Matthew O'Dogherty, with whom *Mr. Alex P. Humphrey* was on the brief, for plaintiff in error.

Mr. Clifford E. Smith, with whom *Messrs. Frank E. Daugherty,* Attorney General of Kentucky, and *Charles F. Creal,* Assistant Attorney General, were on the brief, for defendant in error.

The Fourteenth Amendment has never been so applied by this Court as to interfere with the States in adopting a system of taxation, or in making classifications of properties or objects for taxation. It is not a shield against every inequality or injustice that may result from unwise state legislation. It imposes no "iron rule of taxation" upon the States, but is only applied when there is such a clear discrimination as to amount to a denial of equal protection of the law or a deprivation of property without due process of law within the meaning of its provisions.

The opinion of the Court of Appeals of Kentucky in *Middendorf* v. *Goodale,* 202 Ky. 118, holding that the exemptions granted do not render the statute repugnant to the federal or state constitutions, is well fortified by authorities cited, especially as to the exemption of building and loan associations. None of the authorities cited bears directly on the application of the statute to mortgages where the indebtedness matures within five years. However, many of them sustain in principle the distinction or discrimination made as to such mortgages.

The reason for the distinction is as obvious as to one class as to the other. It will not be seriously contended

that an exemption might not have been granted as to mortgages securing indebtedness up to a certain fixed amount. It would not be difficult to find reasons for the exemption of mortgages as to so much of the indebtedness as does not mature within five years.

It is a matter of common knowledge that short term loans carry the highest legal rate of interest and often, directly or indirectly, usurious rates, whereas long term loans are secured at lesser rates, usually one-half to two per cent. less than the maximum legal rate. In view of this favorable interest rate, the tax on the long term loan is not a great burden or hardship, the tax amounting to only one-fifth of one per cent. for one year. And again, a mortgagor in securing a long term loan, secures his mortgaged assets to the extent of such loan and for the term thereof against all subsequent creditors and all debts or claims arising under contract or otherwise. We might add other reasons for the distinction, but the basis for it is too apparent to require elaboration.

Congress and federal courts recognize such a distinction between building and loan associations and other corporations as to warrant a discrimination in favor of the former in matters of taxation. See Corporation Excise Tax Act, Income Tax Act, War Revenue Act, *Central Building Co.* v. *Bowland,* 216 Fed. 526.

The rule of uniformity and equality prescribed by the Fourteenth Amendment only requires that the statute shall apply alike to all of a class under the same circumstances and conditions. The statute under consideration meets this rule. The courts have upheld statutes where the reason for classification or discrimination was no more apparent than they are here. *Pacific Express Co.* v. *Seibert,* 142 U. S. 339; *Citizens Telephone Co.* v. *Fuller,* 229 U. S. 322; *King* v. *Mullins,* 171 U. S. 404; *St. Louis Cons. Coal Co.* v. *Illinois,* 185 U. S. 203; *N. Y., N. H., & H. R. Co.* v. *New York,* 165 U. S. 628; *American Sugar Co.* v.

Louisiana, 179 U. S. 89; *Missouri Ry. Co.* v. *Mackey,* 127 U. S. 205; *Magoun* v. *Illinois Savings Bank,* 170 U. S. 283. *Federal Land Bank* v. *Crossland,* 261 U. S. 374, distinguished.

Mr. Justice Sutherland delivered the opinion of the Court.

The plaintiff in error, a Kentucky corporation, executed a deed of trust of property in that State to secure bonds amounting in the aggregate to $150,000,000, of which $18,805,000 were issued, bearing date November 1, 1922, and maturing November 1, 1952. The deed was presented to the clerk of the Jefferson county court for record and payment made of the lawful recording fee required by the state statute, but the clerk refused to record the deed unless plaintiff in error paid to him a tax of 20¢ on each $100 of the $18,805,000, as required by § 4019a–9 of the Kentucky statutes, Carroll's Edition, 1922, the pertinent portions of which follow:

"A tax of twenty cents (20¢) is hereby imposed upon each one hundred ($100.00) or fraction thereof of indebtedness which is, or may be, in any contingency secured by any mortgage of property in this state, which mortgage shall be lodged for record after this act goes into effect where the indebtedness does not mature within five years. . . .

" . . . provided, however, the provisions of this section shall not apply to mortgages executed to building and loan associations."

It is provided by another Kentucky statute that no deed or deed of trust or mortgage shall be valid against a purchaser for a valuable consideration without notice thereof or against creditors until such deed or mortgage shall be lodged for record. Ky. Stats., § 496. In view of this statute, plaintiff in error concluded that it was absolutely necessary to place the deed of trust of record,

and thereupon, unwillingly and under protest, paid the amount demanded in addition to the lawful recording fee.

Subsequently, plaintiff in error brought this action in the proper state court to recover the amount of the tax so paid upon the ground that the quoted provisions of § 4019a–9 were contrary to the Kentucky constitution requiring uniformity of taxes upon all property of the same class, and upon the further ground that these provisions denied the equal protection of the law and deprived plaintiff in error of its property without due process of law in contravention of the Fourteenth Amendment of the Federal Constitution. A demurrer to the petition was sustained by the court of first instance and the petition dismissed. Upon appeal to the state court of appeals, the judgment was affirmed, *sub nom. Louisville Gas & Electric Co.* v. *Shanks, Auditor,* 213 Ky. 762, upon the authority of *Middendorf* v. *Goodale,* 202 Ky. 118.

The state court of appeals, in disposing of the contention that the statute violated the state constitution, held that the tax imposed was not a property tax but a privilege tax, that is, a tax imposed upon the privilege of recording mortgages, etc., the payment of which, it was said, was entirely optional with the owners or holders thereof. This determination of the state court, in so far as it affects the challenge under the state constitution, we accept as conclusive, in accordance with the well-settled rule. *Merchants' Bank* v. *Pennsylvania,* 167 U. S. 461, 462. But the state court further held that the statute was not in conflict with the equal protection clause of the Fourteenth Amendment, and this presents a different question calling for our independent consideration and decision.

The contention on behalf of plaintiff in error is that the equal protection clause is contravened by the provisions exempting from the operation of the tax, first, indebtedness which does not mature within five years,

and, second, mortgages executed to building and loan associations.

The equal protection clause, like the due process of law clause, is not susceptible of exact delimitation. No definite rule in respect of either, which automatically will solve the question in specific instances, can be formulated. Certain general principles, however, have been established in the light of which the cases as they arise are to be considered. In the first place, it may be said generally that the equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances, *Kentucky Railroad Tax Cases,* 115 U. S. 321, 337; *Magoun* v. *Illinois Trust & Savings Bank,* 170 U. S. 283, 293, and that it applies to the exercise of all the powers of the state which can affect the individual or his property, including the power of taxation. *County of Santa Clara* v. *Southern Pac. R. Co.,* 18 Fed. 385, 388–399; *The Railroad Tax Cases,* 13 Fed. 722, 733. It does not, however, forbid classification; and the power of the state to classify for purposes of taxation is of wide range and flexibility, provided always, that the classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co.* v. *Virginia,* 253 U. S. 412, 415; *Air-way Corp.* v. *Day,* 266 U. S. 71, 85; *Schlesinger* v. *Wisconsin,* 270 U. S. 230, 240. That is to say, *mere* difference is not enough: the attempted classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." *Gulf, Colorado & Santa Fe Ry.* v. *Ellis,* 165 U. S. 150, 155. Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional

provision. Compare *Martin* v. *District of Columbia,* 205 U. S. 135, 139; *Bell's Gap R. R. Co.* v. *Pennsylvania,* 134 U. S. 232, 237.

While, for the purpose of determining whether the statute assailed violates the federal Constitution, we are not bound by the characterization of the tax by the state court, *St. Louis Compress Co.* v. *Arkansas,* 260 U. S. 346, 348, the matter is here of little importance. The application of the equal protection clause does not depend upon what name is given to the tax. Whether the tax now in question be called a privilege tax or a property tax, it falls in effect upon one indebtedness and not upon another where the sum of each is the same; where both are incurred by corporations or both by natural persons; where the percentage of interest to be paid is the same; where the mortgage security is identical in all respects; where, in short, the only difference well may be that one is payable in 60 months and the other in 59 months. No doubt the state may take into consideration as an element in fixing the *amount* of the tax the time within which the indebtedness is to be paid; for, since the tax is a flat sum covering the entire life of the lien, the privilege of recording the short-time lien and that of recording the long-time lien have different taxable values. But classification good for one purpose may be bad for another; and it does not follow that because the state may classify for the purpose of proportioning the tax, it may adopt the same classification to the end that some shall bear a burden of taxation from which others under circumstances identical in all respects save in respect of the matter of value, are entirely exempt.

Here it seems clear that a circumstance which affects only taxable values has been made the basis of a classification under which one is compelled to pay a tax for the enjoyment of a necessary privilege which, aside from the amount of the recording fee which is paid by each, is

furnished to another as a pure gratuity. Such a classification is arbitrary. It bears no reasonable or just relation to the intended result of the legislation. The difference relied upon is no more substantial, as the sole basis for the present classification, than a difference in value between two similar pieces of land would be if invoked as the sole basis for a like classification in respect of such property. Certainly one who is secured by the state in the priority of his lien for a period less than five years enjoys a privilege which in kind and character fairly cannot be distinguished from a like privilege enjoyed by another for a longer period of time. The former reasonably may be required to pay proportionately less than the latter; but to exact, as the price of a privilege which, for obvious reasons, neither safely can forego, a tax from the latter not imposed in any degree upon the former produces an obvious and gross inequality. If the state, upon the same classification, had reversed the process and taxed indebtedness maturing within a shorter period than five years, and exempted such as matured in a longer period, the inequality probably would be readily conceded, but the constitutional infirmity, though more strikingly apparent, would have been the same.

We are not dealing with a charge made for services rendered or a fee for regulation, but a tax in the strict sense of the term. It is said that it is a tax upon a privilege which the owner or holder of the instrument creating a lien is free to accept or reject. But for practical purposes there is no such option, for, as this Court recently held, there is a practical necessity to record such instruments because, if not recorded, the statute overrides them in favor of purchasers without notice and creditors; and the choice is like one made under duress. "The State is not bound to furnish a registry, but if it sees fit to do so it cannot use its control as a means to impose a liability that it cannot impose directly, any more than it can es-

cape its constitutional obligations by denying jurisdiction to its Courts in cases which those Courts are otherwise competent to entertain. *Kenney* v. *Supreme Lodge of the World,* 252 U. S. 411, 415." *Federal Land Bank* v. *Crosland,* 261 U. S. 374, 378.

The exemption of building and loan associations from the operation of the tax is a different matter. The equal protection clause of the Fourteenth Amendment does not preclude a state in imposing taxes from making exemptions, provided the power is not exercised arbitrarily. It may exempt the property of churches, charitable institutions, and the like; and it does not admit of fair doubt that, under the circumstances disclosed by the opinion of the court below in the *Middendorf* case, it has lawfully exempted building and loan associations. That court points out that a building and loan association under the Kentucky statutes must receive payments from members only and make loans to members only, in pursuance of a plan set forth. Money accumulated is to be loaned to members according to a rule of priority. The essential principle of such an association is mutuality. The purpose of the statute, the court below says, was to provide the members of the associations with the means of borrowing money for the acquisition of homes, in recognition of the duty of the state to encourage the acquisition of homes by its citizens. Such associations are also placed by the state statute in a separate class for purposes of *ad valorem* taxation. It is made clear by the lower court that the purpose of the exemption was to enable these associations, by relieving them of a burden, more completely to carry out the quasi-public purpose which the legislature designed in providing for their creation. This exemption, therefore, must be upheld; but, since the effect of the exemption first considered is to deny plaintiff in error the equal protection of the law in violation of the

equality provision of the Fourteenth Amendment, the court belowed erred in sustaining the validity of the tax and affirming the action of the trial court in dismissing the petition.

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

MR. JUSTICE HOLMES.

When a legal distinction is determined, as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place. Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark.

There is a plain distinction between large loans secured by negotiable bonds and mortgages that easily escape taxation, and small ones to needy borrowers for which they give their personal note for a short term and a mortgage of their house. I hardly think it would be denied that the large transactions of the money market reasonably may be subjected to a tax from which small ones for private need are exempted. The Legislature of Kentucky after careful consideration has decided that the distinction is clearly marked when the loan is for so long a term as five years. Whatever doubt I may feel, I certainly cannot say that it is wrong. If it is right as to the

run of cases a possible exception here and there would not make the law bad. All taxes have to be laid by general rules.

I think that the judgment should be affirmed.

MR. JUSTICE BRANDEIS, MR. JUSTICE SANFORD and MR. JUSTICE STONE concur in this opinion.

MR. JUSTICE BRANDEIS, dissenting.

Pursuant to power conferred by the Constitution of Kentucky, its Legislature imposed a recording tax of 20 cents per $100 upon mortgages given to secure loans which do not mature within five years from the date of the mortgage. The statute discriminates between long and short term loans as subjects of taxation. A loan maturing in 60 months or more would be subject to the tax, whereas one maturing in 59 months or less, but otherwise similar in all respects would not be. The distinction between long term and short term loans—with differences in yield for securities otherwise identical in character—is one familiar to American investment bankers and their clients. Did the Kentucky Legislature, in adopting that classification for purposes of the mortgage recording tax, exceed the bounds of that "wide discretion in selecting the subjects of taxation" which this Court sanctions, as declared in *Lake Superior Mines* v. *Lord*, 271 U. S. 577, 582, so long as the State "refrains from clear and hostile discrimination against particular persons or classes"?

Classifications based solely on factual differences no greater than that between a loan maturing in 59 months or less and one maturing in 60 months or more, have been sustained in many fields of legislation.[1] In *Citizens Tele-*

[1] A statute which fixed the maximum rate of fare on railroads more than 75 miles long, at 3 cents, but on railroads in all other respects similarly situated, at 5 cents if the line was between 15 and 75 miles

phone Co. v. *Fuller,* 229 U. S. 322, 329, it was said that in taxation there is a broader power of classification than in some other exercises of legislation. The cases dealing specifically with classification for purpose of taxation on a basis similar to that here employed, are not discussed in the opinion of the Court; and only one of them is cited. It seems desirable to call attention to some of them, as the rule which they declare is embodied in the tax systems of the Nation and of many States.

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long, and at 8 cents if the line was 15 miles or less in length. *Dow* v. *Beidelman,* 125 U. S. 680, 690, 691. Compare *Chesapeake & Ohio Ry. Co.* v. *Conley,* 230 U. S. 513, 522. A statute which permitted railroads less than 50 miles in length to heat passenger cars by stove or furnace, but denied such permission to lines of 50 miles or more. *New York, New Haven & Hartford R. R. Co.* v. *New York,* 165 U. S. 628, 633. A statute which permitted railroads of less than 50 miles in length to be operated without a complete crew, but denied such permission to lines of 50 miles or more. *Chicago, Rock Island & Pacific Ry. Co.* v. *Arkansas,* 219 U. S. 453; *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Arkansas,* 240 U. S. 518, 520. An inspection law which applied to mines employing 6 or more men, but not to those employing 5 or less. *St. Louis Consolidated Coal Co.* v. *Illinois,* 185 U. S. 203, 207. A screen law which applied to mines employing 10 or more men, but not to those employing 9 or less. *McLean* v. *Arkansas,* 211 U. S. 539, 551. A statute requiring a washroom at mines where there was a request by 20 employees, but not at mines where by only 19. *Booth* v. *Indiana,* 237 U. S. 391, 397. Workmen's compensation laws which apply to employers of 4 or 5 men, but not to employers of less. *Jeffrey Manufacturing Co.* v. *Blagg,* 235 U. S. 571, 576; *Middleton* v. *Texas Power & Light Co.,* 249 U. S. 152, 159; *Ward & Gow* v. *Krinsky,* 259 U. S. 503, 516. A fire inspection law which applied to hotels with 50 or more rooms, but not to hotels with 49 or less. *Miller* v. *Strahl,* 239 U. S. 426, 434. A law which required the licensing of physicians who during the preceding year had treated 11 or less persons, but not those who had treated 12 or more. *Watson* v. *Maryland,* 218 U. S. 173. An ordinance which prohibited the keeping of a private market within 6 squares of a public one but not within 7. *Natal* v. *Louisiana,* 139 U. S. 621. A statute which prohibited the herding of sheep within

In *Magoun* v. *Illinois Trust & Savings Bank,* 170 U. S. 283, 300, 301, the inheritance tax, in the case of strangers to the blood, exempted estates of $500, but did not allow that exemption to larger estates.[2] Moreover, it prescribed

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2 miles of a dwelling house, but not if a yard or more beyond. *Bacon* v. *Walker,* 204 U. S. 311. A law which prohibited the establishment of a carbon black factory within 10 miles of an incorporated town, but not if a rod more remote. *Walls* v. *Midland Carbon Co.,* 254 U. S. 300, 324. A statute permitting, in a suit against a corporation, a change of venue where it had more than 50 stockholders, but not if it had 50 or less. *Cincinnati Street Ry. Co.* v. *Snell,* 193 U. S. 30. Statutes exempting from certain requirements banks whose transactions average $500 or more. *Engel* v. *O'Malley,* 219 U. S. 128; *Dillingham* v. *McLaughlin,* 264 U. S. 370. A tax law providing for the forfeit of tracts of 1,000 acres or more, but which does not provide for forfeiting, under like circumstances, tracts of 999 acres or less. *King* v. *Mullins,* 171 U. S. 404, 435. A statute which fixed the number of peremptory challenges to jurors at 8, but allowed 15 in cities having a population of over 100,000 inhabitants. *Hayes* v. *Missouri,* 120 U. S. 68. Many other statutes involving the classification of cities according to population, under which a single resident more or less may affect vitally not only the power and duties of the municipality, but the rights and liabilities of persons resident therein. *Missouri* v. *Lewis,* 101 U. S. 22; *Budd* v. *New York,* 143 U. S. 517, 548; *Moeschen* v. *Tenement House Department,* 203 U. S. 583; *Northwestern Laundry Co.* v. *Des Moines,* 239 U. S. 486, 495; *Marcus Brown Co.* v. *Feldman,* 256 U. S. 170, 198; *Packard* v. *Banton,* 264 U. S. 140, 143; *Radice* v. *New York,* 264 U. S. 292, 296.

[2] Compare the statutory provisions in Arkansas, Crawford & Moses Digest, 1921, § 10221; Kansas, Revised Statutes, 1923, § 79–1501; Maryland, Bagby's Code, 1924, § 124; Michigan, Compiled Laws, 1915, § 14525; Nebraska, Session Laws, 1923, c. 187. See *In re Fox's Estate,* 154 Mich. 5. The more common type of statute which taxes only the amount above the exemption, e. g., Revenue Act of 1926, 44 Stat. 9, 69, likewise discriminates between different dollars. The constitutionality of such exemptions was affirmed as recently as *Hope Natural Gas Co.* v. *Hall,* 274 U. S. 284, 289. Compare *Minot* v. *Winthrop,* 162 Mass. 113; *Gelsthorpe* v. *Furnell,* 20 Mont. 299; *State* v *Alston,* 94 Tenn. 674; *In re Hickok's Estate,* 78 Vt. 259.

progressive rates, rising in steps with the amount of the gift and applying to the entire gift and not merely to the excess.[3] Under the law a legatee of $10,000, being subject to a 3 per cent. tax, would receive net $9,700, whereas a legatee of $10,001, being subject to a 4 per cent. tax on the entire legacy would receive net only $9,600.96. The Court held the classification reasonable, saying:

"The condition is not arbitrary because it is determined by that value [of the inheritance]; it is not unequal in operation because it does not levy the same percentage on every dollar; does not fail to treat 'all alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed.' The jurisdiction of courts is fixed by amounts. The right of appeal is. As was said at bar the Congress of the United States has classified the right of suitors to come into the United States courts by amounts. Regarding these alone, there is the same inequality that is urged against classification of the Illinois law. All license laws and all specific taxes have in them elements of inequality, nevertheless they are universally imposed and their legality has never been questioned."

The Court has likewise sustained a statute which imposed an *ad valorem* tax upon telephone companies with annual earnings of $500 or more, while exempting others similarly situated whose earnings were less than $500, *Citizens Telephone Co.* v. *Fuller*, 229 U. S. 322, 329; a statute which imposed a license fee upon "all persons"

[3] Compare *In re McKennan's Estate*, 27 S. Dak. 136, sustaining a similar provision in Laws 1905, c. 54. Even where such rates do not apply to the total amount but only to that over a certain excess, they seem to violate the standards now laid down by the Court. But since *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, and *Knowlton* v. *Moore*, 178 U. S. 41, 109, the validity of taxes of this type has no longer been open to doubt.

engaged in the laundry busines but exempted concerns employing not more than two women, and steam laundries, *Quong Wing* v. *Kirkendall,* 223 U. S. 59, 62;[4] an ordinance under which a $5 tax was laid upon merchants whose gross sales were $1,000, and a tax of $10 upon those similarly situated whose sales were $1,001, *Clark* v. *Titusville,* 184 U. S. 329, 331;[5] an ordinance which laid a tax of $1,000 upon theatres whose admission was $1 or more, but only $400 upon those similarly situated whose admission prices were less than $1 and more than 50 cents, *Metropolis Theatre Co.* v. *Chicago,* 228 U. S. 61, 69–70.[6]

In the light of these decisions, I should have supposed the validity of the classification made by the Legislature of Kentucky to be clear. Recognizing that members of

[4] For statutes exempting small producers, borrowers, etc., from license taxes of various sorts, compare Florida Revised Statutes, 1920, §§ 842, 843, 855; Georgia Code, 1926, § 993 (115) and (124); Carroll's Kentucky Statutes, 1922, §§ 4224, 4238; South Carolina Code, 1922, § 5188; Tennessee, Public Acts, 1923, p. 258 (mortgage registration tax); Virginia, Tax Bill, § 92½; West Virginia, Acts Extraordinary Session, 1919, c. 5. See *Los Angeles Gas & Electric Corporation* v. *Los Angeles,* 163 Cal. 621, 627; *Cobb* v. *Commissioners,* 122 N. C. 307, 312; *Pipe Line Co.* v. *Hallanan,* 87 W. Va. 396.

[5] For stepped taxes of this type, compare California Political Code, 1920, §§ 3376, 3379; Florida Revised Statutes, 1920, §§ 839, 850; Georgia Code, 1926, § 993 (53) and (54); Nebraska Compiled Statutes, 1922, § 681; New Hampshire Public Laws, 1926, c. 225, § 91; Oregon Laws, 1920, § 6883; Shannon's Tennessee Code, Supp. 1926, § 712, pp. 200, 206, 208, 227, § 717; Utah Compiled Laws, 1917, § 1271, as amended by Laws, 1925, c. 112; Virginia, Tax Bill, §§ 46, 46½, 109; Remington's Washington Compiled Statutes, 1922, § 3841, as amended by Laws, Extra Session 1925, c. 149; Wyoming, Laws 1925, c. 117, § 1. Compare *Saks* v. *Mayor of Birmingham,* 120 Ala. 190; *In re Martin,* 62 Kans. 638; *Gordon* v. *City of Louisville,* 138 Ky. 442; *State* v. *Merchants Trading Co.,* 114 La. 529; *Wayne Mercantile Co.* v. *Commissioners of Mount Olive,* 161 N. C. 121; *Salt Lake City* v. *Christensen Co.,* 34 Utah 38.

[6] Compare California Political Code, 1920, § 3380; Shannon's Tennessee Code, Supp. 1926, § 712, pp. 214, 220.

the legislature of the State which made the classification, and members of the court which sanctioned it, necessarily possessed greater knowledge of local conditions and needs than is possible for us, I should have assumed that this classification, which obviously is not invidious, was a reasonable one, unless some facts were adduced to show that it was arbitrary. Compare *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245, 255; *Clarke* v. *Deckebach,* 274 U. S. 392, 397. No such facts have been adduced by the Company. On the other hand, facts called to our attention by counsel for the Commonwealth and of which we may take judicial notice, *McLean* v. *Denver & Rio Grande R. R. Co.,* 203 U. S. 38, 50; *Sligh* v. *Kirkwood,* 237 U. S. 52, 61, show that the classification was adopted by the Legislature of Kentucky in an effort to equalize the tax burden incident to loans.

The mortgage recording tax is a feature of the revenue system of at least nine states.[7] Its purpose in all is substantially the same—to supply an effective means for reaching this form of intangible property, which is likely to evade taxation under the general property tax. The recording tax is commonly accompanied either by a complete exemption of mortgage securities from other property taxation or, as in Kentucky, by exemption of such

[7] Alabama, Acts 1903, p. 227; Kansas, Laws 1925, c. 273; Kentucky, Acts Special Session 1917, c. 11, § 9; Michigan, Acts 1911, p. 132; Minnesota, Laws 1907, c. 328, as amended by Laws 1913, c. 163, and Laws 1921, c. 445; New York, Laws 1906, c. 532, and Laws 1907, c. 340, amending Laws 1905, c. 729; Oklahoma, Session Laws 1913, p. 684; Tennessee, Acts 1923, p. 258, Acts 1925, p. 472; Virginia, Acts 1910, p. 488. See *State* v. *Alabama Fuel & Iron Co.,* 188 Ala. 487; *Middendorf* v. *Goodale,* 202 Ky. 118; *Union Trust Co.* v. *Common Council of Detroit,* 170 Mich. 692; *Mutual Benefit Insurance Co.* v. *County of Martin,* 104 Minn. 179; *People* v. *Ronner,* 185 N. Y. 285; *Trustees' Insurance Corporation* v. *Hooton,* 53 Okla. 530; *Pocahontas Consolidated Collieries Co.* v. *Commonwealth,* 113 Va. 108; *Saville* v. *Virginia Ry. & Power Co.,* 114 Va. 444.

securities from local taxation alone. As imposed in Alabama and New York, the states which first adopted it, the tax is levied at the same rate irrespective of the length of the loan. The obvious unfairness of such an arrangement, both to the short term borrower and to the State, has been one of the chief objections to adoption of the tax.[8] Other states, impressed with the general efficiency of the tax, have attempted to eliminate the unfairness produced by the flat rate. Thus, in Oklahoma, the rates are 2 cents per $100 for loans of less than 2 years, 4 cents where the loan is for 2 years or more, 6 cents where for 3 or more, 8 cents where for 4 or more, and 10 cents where for 5 or more.[9] In South Dakota, the tax was 10 cents per $100 per year or fraction thereof, with a proviso that in no event should the tax be more than 50 cents per $100.[10] Such taxes obviate only in part the objection urged against the flat rate tax, namely, that mortgages for a long term are taxed, proportionally, at a lower rate than those for a short. In Minnesota, which had originally enacted the flat rate tax,[11] a different expedient was devised. In 1913 it was provided that the tax should be 15 cents per $100 unless the loan was for more than 5

[8] This objection to the flat rate tax was brought to the attention of the Kentucky commission of 1916 in a brief filed on behalf of the Louisville Real Estate Board, though the Board itself favored the flat rate plan. See letter of Mr. A. E. Holcomb criticizing the New York law, p. 41; letter of Mr. George Lord criticizing the Michigan law, p. 45. See also Report of Committee of National Tax Association on Taxation of Personal Property, 1911; Report of Minnesota Tax Commission, 1908, p. 165; Robinson, The Mortgage Recording Tax, 25 Pol. Sci. Q. 609.

[9] Oklahoma, Session Laws 1913, p. 684.

[10] South Dakota, Session Laws 1919, c. 113, repealed by Session Laws 1923, c. 110.

[11] Minnesota, Laws 1907, c. 328,

years, in which event the tax was to be 25 cents.[12] In Minnesota the discrimination between long and short term securities is thus 10 cents per $100; in Kentucky it is 20 cents. But the distinction and the reasons for it are substantially the same.

The mortgage recording tax was adopted in Kentucky only after the most serious consideration. It was part of the general system of taxation enacted in 1917 after investigations by two special tax commissions appointed to enquire into the particular needs of the State. In the reports of both commissions the fact that theretofore mortgage loans had largely escaped taxation was a subject of much consideration.[13] The first commission, which was appointed in 1912, submitted a preliminary report recommending an amendment to the state constitution so as to permit the classification of property for purposes of taxation and the application of different methods of taxation to different classes. The amendment proposed was submitted to the people and adopted. Kentucky Constitution, § 171. In December, 1913, the commission submitted its final report. It recommended, among other things, that mortgages, bonds and other choses in action "be taxed by a method which will bring them out of hiding".[14] It submitted with the report a draft of a bill for the taxation of intangibles, but recommended that the bill should not be passed until the subject had received further study by another commission.

The second commission filed its report in 1916. Like the first commission, it adverted to the fact that "even in

[12] Minnesota, Laws 1913, c. 163. By Laws 1921, c. 445, the line of cleavage was changed from 5 years to 5 years and 60 days.

[13] Report of Kentucky Tax Commission, 1912–1914, pp. 70–97; Report of Kentucky Tax Commission, 1916, p. 6.

[14] Report, 1912, p. 10.

the case of mortgages numerous ingenious and decidedly reprehensible methods are resorted to, in order that the real owner of such securities may escape his lawful portion of the burden of taxes," and it recommended, among other things, the imposition of a mortgage recording tax.[15] This was passed at an extraordinary session of the legislature called " for the sole purpose of considering the subject of revenue and taxation," which remained in session from February 14 to April 25, 1917. The legislation subjected different classes of intangible property to widely varying rates and supplemented the property taxes by license fees, including the mortgage recording tax here in question. It subjected credits secured by mortgage to the annual general property tax of 40 cents per $100 for state purposes but exempted them from local taxation; imposed the mortgage recording tax; and retained a statute then in force laying a flat recording tax of 50 cents on all mortgages (except chattel mortgages for less than $200). Kentucky Statutes, Carroll's 1922 edition, § 4238. We are told that the commission and the Legislature concluded that the taxes imposed by the several statutes would, in view of facts to be stated, approximately equalize the pro rata amount of taxes to be paid on loans secured by mortgage, taking account of the difference in the dates of maturity. In determining whether the equal treatment required by the Federal Constitution has been afforded we must, of course, consider all the statutes operating upon the subject matter. *Farmers & Mechanics Savings Bank* v. *Minnesota,* 232 U. S. 516, 529; *Interstate Busses Corporation* v. *Blodgett,* 276 U. S. 245.

In Kentucky local reasons exist for treating long term mortgage loans somewhat differently from those for a

[15] Report, 1916, pp. 6, 10. In a brief submitted to the Tax Commission, the Louisville Real Estate Board had urged the enactment of a recording tax of 50 cents per $100, applicable only to mortgages of real estate.

short term. There is among those loans which are secured by mortgages of real or personal property, and hence require registration, commonly a marked difference in the character of the short term and the long term loans.

Probably 90 or 95 per cent of the short term loans are evidenced by promissory notes payable to the lender. The larger part are for amounts less than $300, many of them maturing within a few months and providing for the payment of interest in advance. Another large part consists of loans secured by mortgage upon the residence of the borrower and made for domestic purposes. On the other hand, the long term loans are commonly evidenced by coupon bonds; are issued for large amounts; and represent borrowings for business purposes. The rate of interest on short term mortgage loans is generally higher than that on long term loans of equal safety, in part for the following reason. Because the short term loans are usually evidenced by promissory notes payable to the lender, the registration of the mortgage discloses the identity of the holder of the notes; and he is commonly subjected to the tax of 40 cents per $100 imposed by law upon all mortgage loans.[16] Because the long term loans are commonly represented by negotiable coupon bonds and are secured by a deed of trust, registration does not disclose to the assessors who the holders of the securities are, and they frequently escape taxation thereon. Laying the mortgage recording tax only upon the long term loans tends in some measure to reduce the disadvantage under which the short term borrower labors.

At what point the line should be drawn between short term and long term loans is, of course, a matter on which even men conversant with all the facts may reasonably differ. There was much difference of opinion concerning this in the Kentucky Legislature. The bill, as recom-

[16] Acts Special Session, 1917, c. 11, § 1. By Acts 1924, c. 116, § 1, the rate was raised to 50 cents.

mended by the Tax Commission, and as introduced in the House, exempted from the tax here in question only such mortgages as secured indebtedness maturing within three years; and it imposed a tax of 25 cents for $100.[17] In the House, the bill was amended so as to exempt loans maturing in less than five years.[18] In the Senate, the House bill was amended so as to reduce the period to three years.[19] The House refused to concur in the Senate amendment.[20] The Senate receded; [21] and thereupon the bill was passed granting the exemption of loans maturing within five years, but with the rate reduced to 20 cents.[22] Thus, we know that in making this particular classification there was in fact an exercise of legislative judgment and discretion. Surely the particular classification was not such " as to preclude [in law] the assumption that it was made in the exercise of legislative judgment and discretion." See *Stebbins* v. *Riley,* 268 U. S. 137, 143. Whether the exercise was a wise one is not our concern.

That it was permissible for Kentucky, in levying its mortgage recording tax, to take account of the probability that certain types of mortgage would escape further taxation, is not open to doubt. *Watson* v. *State Comptroller,* 254 U. S. 122, 125. There is abundant proof that the legislature was justified in thinking that the bulk of the long term loans would escape the general property tax, while most of those for a short term would not. That the statute taxes certain long term loans which, because of their similarity in other respects to those for a short term, are likely to be subjected to the state property tax,

[17] Report, 1916, p. 35, House Journal, 1917 Special Session, p. 219.

[18] House Journal, p. 255.

[19] Senate Journal, pp. 152, 153.

[20] House Journal, p. 550.

[21] Senate Journal, p. 257.

[22] See Senate Journal, p. 153; House Journal, pp. 645, 649–650.

would not render the statute invalid even as applied to them. Compare *Citizens Telephone Co.* v. *Fuller,* 229 U. S. 322, 332. Wherever the line might be drawn, the statute would sometimes operate unjustly. But such occasional instances of injustice would not render the classification arbitary. As was said in *Metropolis Theatre Co.* v. *Chicago,* 228 U. S. 61, 69, 70: "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific."

Moreover, the deed of trust here in question is not similar to the Kentucky mortgages maturing within five years. It is a deed of trust given by a public service corporation to secure $150,000,000 in thirty-year 5 per cent. coupon bonds of $1,000 each, the bonds to be issued from time to time, the initial issue being $18,805,000. The equality clause would not prevent a State from confining the recording tax to deeds of trust given to secure bonds of a public service corporation. Compare *Kentucky Railroad Tax Cases,* 115 U. S. 321, 338; *Bell's Gap Railroad Co.* v. *Pennsylvania,* 134 U. S. 232, 237; *Pacific Express Co.* v. *Seibert,* 142 U. S. 339, 351; *American Sugar Refining Co.* v. *Louisiana,* 179 U. S. 89, 92; *Hatch* v. *Reardon,* 204 U. S. 152, 158. The characteristics of this deed of trust clearly furnish a basis for reasonable classification as compared with probably every mortgage exempted from the recording tax. If the statute as applied does not in fact discriminate in favor of any property of a like nature, there is not inequality in treatment. A "tax is not to be upset upon hypothetical and unreal possibilities, if it would be good upon the facts as they are." *Pullman Co.* v. *Knott,* 235 U. S. 23, 26. See *Crescent Oil Co.* v. *Mississippi,* 257 U. S. 129, 137, 138.

As Kentucky might lawfully have levied the recording tax only on deeds of trust securing bond issues like that

here involved and as there is no showing that there exist any similar deeds of trust securing loans for less than five years, no constitutional right of the plaintiff is invaded because the statute may also include loans actually similar to those exempted except in regard to their term, and which, because similar in fact, could not be treated differently from those exempt. *Clark* v. *Kansas City,* 176 U. S. 114, 117–118; *Aluminum Co.* v. *Ramsey,* 222 U. S. 251, 256; *Murphy* v. *California* 225 U. S. 623, 630; *Darnell* v. *Indiana,* 226 U. S. 390, 398; *Mountain Timber Co.* v. *Washington,* 243 U. S. 219, 242; *Roberts & Schaefer Co.* v. *Emmerson,* 271 U. S. 50, 54–55. One who would strike down a statute must show not only that he is affected by it, but that as applied to him, the statute exceeds the power of the State. This rule, acted upon as early as *Austin* v. *The Aldermen,* 7 Wall. 694, and definitely stated in *Supervisors* v. *Stanley,* 105 U. S. 305, 314, has been consistently followed since that time. In my opinion, it is sufficient alone to require affirmance of the judgment.

Mr. Justice Holmes and Mr. Justice Stone join in this opinion.

CITY OF GAINESVILLE *v.* BROWN-CRUMMER INVESTMENT COMPANY ET AL.

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

No. 433. Argued April 13, 1928.—Decided May 14, 1928.

1. Jurisdiction of the District Court on removal should appear affirmatively; it may be questioned at any stage, and its absence cannot be waived; but acquiescence may strengthen inferences from the record of facts necessary to sustain jurisdiction. P. 59.
2. A controversy between the plaintiff and a citizen of another State, as to the validity of certain warrants and their acquisition by that

defendant as a *bona fide* purchaser, *held* separable from a controversy between the plaintiff and other defendants as to their liability as guarantors of an agreement to hold the warrants in escrow. P. 59.

3. Removal to the District Court on the ground of separable controversy between citizens of different States, removes the whole suit. Jud. Code, § 28. P. 60.

20 F. (2d) 497, reversed.

CERTIORARI, 275 U. S. 516, to a judgment of the Circuit Court of Appeals, affirming in part, and in part reversing a judgment in a suit brought by the City which was removed to the District Court by the above-named respondent, upon the ground of diversity of citizenship. The suit concerned certain warrants issued by the City, which it sought to have canceled as invalid. The removing defendant made good its claim as *bona fide* purchaser, and the judgment in its favor was affirmed. Two other defendants, who were residents of the State, and whom the City sought to hold as guarantors of escrow conditions under which the warrants were deposited, were also successful in the District Court; but as to them the judgment was reversed by the Circuit Court of Appeals, and the cause ordered dismissed for want of jurisdiction, that court being of the opinion that their part of the case was not removable.

Mr. W. O. Davis, with whom *Mr. Cecil Murphy* was on the brief, for petitioner.

Mr. Alex F. Weisberg, with whom *Messrs. James G. Martin* and *Rhodes S. Baker* were on the brief, for Brown-Crummer Investment Company.

Mr. H. O. Head, with whom *Messrs. F. C. Dillard* and *Rice Maxey* were on the brief, for H. O. Head, Executor.

Mr. J. L. Parrish was on the brief for Southern Surety Company.

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

This suit was begun by the City of Gainesville, Texas, in a state court of Texas against the Southern Construction Company, a partnership consisting of Harry D. Levy and Lester Levy, and against H. W. Head and the Southern Surety Company, all of whom were citizens of Texas, except the Surety Company, which was an Iowa corporation. The action grew out of a contract between the city and the Southern Construction Company for street improvements. The city issued city time warrants payable to bearer, to pay the contractor. The contract was partly executed and the improvements partly constructed. A second contract was then made by which some of the warrants were to be issued before the rest of the work was done and were to be placed in escrow to be delivered to the contracting company as the work should be completed and approved. The performance of the escrow conditions was guaranteed to the city by H. W. Head, and the Southern Surety Company of Iowa became his surety on this guaranty.

There is in the record a signed stipulation of the parties descriptive of the details of the proceedings, which in part is as follows:

"Default judgment in said cause was rendered by said court in favor of the plaintiff against all defendants for $15,000.00 and against the Southern Construction Company for $4,090, which judgment upon appeal by said Head and said Southern Surety Company was reversed by the Court of Civil Appeals for the Sixth Supreme Judicial District as to said Head and said Southern Surety Company, but was affirmed as to said Southern Construction Company. See *Head* v. *City of Gainesville,* 254 S. W. 323. Upon the remand of said cause to the District Court for Cooke County, H. O. Head, as executor,

made himself a party in lieu of H. W. Head, who had died in the meantime, and he and the Southern Surety Company filed an answer to the petition. Thereupon, the plaintiff amended its petition making Brown-Crummer Investment Company, a Kansas corporation, a party defendant, and said Brown-Crummer Investment Company within the time allowed by law filed its petition to remove said cause to this court [*i. e.* the United States District Court for the Eastern District of Texas] upon the ground of a separable controversy. After a transcript of the proceedings was filed in this court, a motion to remand made by the plaintiff was overruled. All parties having repleaded in this court with the exception of the Southern Construction Company, which did not appear, it is agreed that the transcript of the proceedings in the district court as well as all abandoned pleadings may be omitted by the clerk in making out the record for the circuit court of appeals, as immaterial."

The Brown-Crummer Company was made a party by the city on the ground that it had in its possession $15,000 of the city warrants which the city did not owe because the paving contract had not been completed. The city sought to have them delivered up to be cancelled to prevent their sale to a bona fide purchaser. The Company was a dealer in municipal securities at Wichita, Kansas, and claimed to be owner as bona fide purchaser of the warrants, and when made a party sought judgment on them in this case against the city. It is upon the validity of those warrants that the chief issue in the case turns.

Upon the removal of this cause from the state to the federal court, the defendant Head sought to avoid liability, on his guaranty to return $15,000 of warrants of the city, and that of his surety, the Southern Surety Company, by the contention that the warrants in question were illegally issued, void under state law and of no value. In all its petitions but the last, the city had alleged that

its warrants were valid. In its later pleading, however, it changed its attitude somewhat and pleaded in the alternative that if the court should hold the warrants void, they should as against the Brown-Crummer Company be so declared and asked that they be cancelled.

Both the issue between the city and the Brown-Crummer Company on the warrants and that between the city and Head and the Iowa surety company for breach of their guaranty were tried to a jury in the district court. The court directed a verdict on the warrants in favor of the Brown-Crummer Company and gave judgment against the city for $13,125 with interest. On the claim of the city under the guaranty against Head and the Surety Company, the court directed a verdict for the defendants and gave judgment of dismissal against the city.

The case was carried to the Circuit Court of Appeals of the Fifth Circuit. That court in its opinion dealt at some length with the questions whether the city warrants were valid under the state law and whether they were held by Brown-Crummer Company as a bona fide purchaser without notice of any infirmity in their origin. The Court of Appeals held the warrants legal and adjudged that the city was estopped as against the company to plead irregularities in their issue. The court therefore found no reversible error in the directed verdict in favor of the Brown-Crummer Investment Company. To that extent the judgment was affirmed.

The Court of Appeals dealt with the judgment in favor of the executor, Head, and the Surety Company against the city, which the city had sought to review and seeks to review here, by remanding it to the district court with instructions to dismiss the proceedings as between the parties.

Objection is first made by the petitioner that there was no separable controversy and so no jurisdiction. This question does not seem to have been presented to and was

certainly not considered by the Circuit Court of Appeals. By the stipulation made in the federal district court below, the transcript of the proceedings in the state district court from which the removal was had, as well as all abandoned pleadings, were omitted by the clerk in making out the record for the Circuit Court of Appeals as immaterial. The petition for removal from the state court to the federal court is not shown, nor is the motion to remand. There was repleading by all the parties after the motion to remand was overruled. The stipulation, therefore, would seem to constitute an acquiescence in the removal and indicates that the jurisdiction had been conceded by all parties, and that the question had been abandoned until it is now renewed in the briefs in this Court. Of course a question of jurisdiction can not be waived. Jurisdiction should affirmatively appear, and the question may be raised at any time. *Grace* v. *American Central Ins. Co.*, 109 U. S. 278, 283; *M. C. & L. M. Railway Co.* v. *Swan*, 111 U. S. 379, 382; *Mattingly* v. *Northwestern Virginia Railroad Co.*, 158 U. S. 53, 56, 57. Yet the action of the party in acquiescing may strengthen inferences of necessary facts from the record to sustain the jurisdiction, in the absence of a showing to the contrary. It sufficiently appears here that the controversy between the Brown-Crummer Company of Kansas and the city was as to the validity of the warrants and as to the ownership by that company of them and their acquisition by that company as a bona fide purchaser for value without notice. This was a controversy wholly between citizens of different states which could be fully determined as between them. The question of the guaranty as between the city and Head's estate and the surety on the guaranty needed not to be considered or determined in that controversy and had no bearing on it. The jurisdiction is sufficiently clear.

A further objection is made that the Circuit Court of Appeals erred in not deciding the issue made as between the city and the executor, Head, and the Surety Company, and in remanding it with directions to dismiss it. This objection is more serious. The necessary effect of the removal on such a ground was to remove the whole suit. This brought it all before the district court and the Circuit Court of Appeals for complete disposition.

By the Act of July 27, 1866 (c. 288, 14 St. 306), a defendant of a different State from that of the plaintiff was enabled to remove a separable controversy between them, leaving the plaintiff, if he so desired, to proceed in the state court against the other defendant or defendants on the other issues. But later came the Act of March 3, 1875 (c. 137, 18 St. pt. 2, p. 470) the language of which was repeated in the present section 28 of the Judicial Code, and with minor changes is now the law. (See 36 St. 1094.) It provides that "when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit to the district court of the United States for the proper district." In *Barney* v. *Latham,* 103 U. S. 205, 211, this Court held that in distinction from the removal provided in the Act of 1866, the Act of 1875 removed the whole case to the federal court for judgment. This conclusion was confirmed in *Brooks* v. *Clark,* 119 U. S. 502, 512, and in *Torrence* v. *Shedd,* 144 U. S. 527, 530. The rule established by these cases has never been varied or questioned.

It was the duty, therefore, of the Circuit Court of Appeals to consider the other issue in this case, which it erroneously remanded to the lower court to be dismissed. We must then reverse the judgment and send the cause

back to the Circuit Court of Appeals for further proceedings.

It may be suggested that we might consider the correctness of the judgment against the city in favor of the Brown-Crummer Company on the city warrants and decide that. We have been advised by counsel that a case involving the validity of such warrants under the state law is now pending in the Texas Supreme Court and that the Circuit Court of Appeals should have the benefit of that decision before passing on the question.

Without intimating that the decision of the Texas court on the question of city warrants will be controlling under the circumstances of this case, we deem it better to remand the whole case to the Circuit Court of Appeals for further proceedings and complete disposition.

Reversed.

DUGAN *v.* OHIO.

ERROR TO THE SUPREME COURT OF OHIO.

No. 766. Argued April 10, 1928.—Decided May 14, 1928.

Petitioner was convicted and fined by the mayor of a city for a violation of the Ohio liquor law committed within the city limits. The legislative powers of the city were exercised by a commission of five, of whom the mayor was one, and its executive powers by the commission and a manager, who was the active executive. The functions of the mayor, as such, were judicial only; his sole compensation was a salary fixed by the vote of the other commissioners, and payable out of a general fund to which the fines accumulated in his court under all laws contributed, the salary being the same whether the trials before him resulted in convictions or acquittals. *Held*, that the mayor's relations to the fund and to the financial policy of the city were too remote to warrant a presumption of bias toward conviction in prosecutions before him as judge; and that objection to the conviction in this case as wanting in due process of law must be overruled. *Tumey* v. *Ohio*, 273 U. S. 510, distinguished. P. 63.

117 Oh. St. 503, affirmed.

ERROR to a judgment of the Supreme Court of Ohio, sustaining petitioner's conviction by a mayor's court for an offense against the Ohio liquor law.

Mr. F. L. Johnson, with whom *Mr. Robert F. Cogswell* was on the brief, for plaintiff in error.

Mr. J. A. Finney, with whom *Mr. Herman E. Werner* was on the brief, for defendant in error.

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

M. J. Dugan was convicted before the Mayor's Court of the city of Xenia, Greene County, Ohio, for the unlawful possession of intoxicating liquor under Section 6212–15 of the General Code of Ohio. The conviction was sustained by the Common Pleas Court of Greene County, Ohio, by the Court of Appeals of the same county, and by the Supreme Court of the State. The defendant has duly raised the question of the constitutional impartiality of the mayor to try the case. This is the only issue for our consideration. The objection is based on the ground that for the mayor to act in this case was a violation of the Fourteenth Amendment to the Federal Constitution, in that the mayor occupied in the city government two practically and seriously inconsistent positions, one partisan and the other judicial; that as such mayor he had power under the law to convict persons without a jury of the offense of the possession of intoxicating liquor and punish them by substantial fines, half of which were paid into the city treasury, and as a member of the city commission he had a right to vote on the appropriation and the spending of city funds; and further that while he received only a fixed salary and did not receive any fees, yet all the fees taxed and collected under his convictions were paid into the city treasury

and were contributions to a general fund out of which his salary as mayor was payable.

The defendant, in February, 1924, pleaded guilty and was fined $400 for possessing intoxicating liquor, and thereafter was convicted and fined $1,000 for a subsequent similar offense. This is a review of the second conviction.

The city of Xenia is a charter city, and has a commission form of government, with five commissioners. The charter provides that a member of the city commission shall also be mayor. The mayor has no executive, and exercises only judicial, functions. The commission exercises all the legislative power of the city, and together with the manager exercises all its executive powers. The manager is the active executive. The mayor's salary is fixed by the votes of the members of the commission other than the mayor, he having no vote therein. He receives no fees. The offense charged here was committed within the corporate limits of the city of Xenia. Xenia is the capital of Greene County, having, according to the census of 1920, a population of 9,110. Greene County is a rural county with no larger city than Xenia.

Was the mayor disqualified as judge by the Fourteenth Amendment as interpreted and applied in *Tumey* v. *The State of Ohio,* 273 U. S. 510? We think not. The *Tumey* case does not apply to this. Tumey was arrested and charged with unlawful possession of intoxicating liquor at White Oak, a village in Hamilton County, Ohio, on a warrant issued by the mayor of North College Hill. The latter was a village of 1,100 in the county which included the city of Cincinnati with half a million population. The counsel for the State asserted in that case that the purpose of the law in its application to the mayor of a village in large counties was to extend jurisdiction to break up places of outlawry that were located on the municipal boundary just outside of large cities;

that in some of the cities the normal enforcement agencies under the law did not perform their duty, and the jurisdiction of mayors of village courts over the whole county was conferred so that there might be some courts through which effective prosecutions for city offenders could be had; and that the system by which the fines to be collected were divided equally between the State and the village was for the proper purpose of stimulating the activities of the village officers and agents to due enforcement over the county. The council of any village might by ordinance authorize the use of half of the fines collected for the violation of the prohibition law so that by contingent commissions to attorneys, detectives, or secret service officers they could secure the enforcement of the law and very much increase the revenue of the village.

The duties of the mayor of a village in Ohio like that of North College Hall were primarily executive. He was the chief conservator of the peace and directed to see that all ordinances were faithfully obeyed and enforced. He communicated to council from time to time a statement of the finances of the municipality. He supervised the conduct of all the officers of the corporation, including those engaged in prosecuting the liquor law violators.

This Court in the *Tumey* case held that it was a violation of due process of law to make the compensation of the mayor dependent upon his conviction of defendants in this especially organized "liquor" court, from which the mayor received, in addition to his salary, about $100 a month from convictions. The direct dependence of the mayor upon convictions for compensation for his services as a judge was found to be inconsistent with due process of law.

As the plaintiff in error contends, however, the mayor's individual pecuniary interest in his conviction of defendants was not the only reason in the *Tumey* case for hold-

ing the Fourteenth Amendment to be violated. Another was that a defendant brought into court might with reason complain that he was not likely to get a fair trial or a fair sentence from a judge who as chief executive was responsible for the financial condition of the village, who could and did largely control the policy of setting up a liquor court in the village with attorneys, marshals and detectives under his supervision, and who by his interest as mayor might be tempted to accumulate from heavy fines a large fund by which the running expenses of a small village could be paid, improvements might be made and taxes reduced. This was thought not to be giving the defendant the benefit of due process of law.

No such case is presented at the bar. The mayor of Xenia receives a salary which is not dependent on whether he convicts in any case or not. While it is true that his salary is paid out of a fund to which fines accumulated from his court under all laws contribute, it is a general fund, and he receives a salary in any event, whether he convicts or acquits. There is no reason to infer on any showing that failure to convict in any case or cases would deprive him of or affect his fixed compensation. The mayor has himself as such no executive but only judicial duties. His relation under the Xenia charter, as one of five members of the city commission, to the fund contributed to by his fines as judge, or to the executive or financial policy of the city, is remote. We agree with the Supreme Court of Ohio in its view that the principles announced in the *Tumey* case do not cover this.

Judgment affirmed.

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COMPAÑIA DE NAVEGACION INTERIOR, S. A., *v.* FIREMAN'S FUND INSURANCE COMPANY.*

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

Nos. 510 to 520, inclusive. Argued April 19, 1928.—Decided May 14, 1928.

1. A clause in a towage contract declaring that the towing boat shall not be responsible in any way for loss or damage to the tow, does not release the former from loss or damage due to the negligence of her master or crew. P. 73.
2. For a loss thus occasioned, the insurers of the tow would be subrogated to the claim of her owner. *Id.*
3. The meaning of the terms "seaworthiness" and "perils of the sea" applied to contracts of marine insurance, varies with the circumstances and the exceptional features of the risk known to both parties. Pp. 75–81.
4. Where a small vessel, constructed for service as a tug on inland waters, was insured for a voyage in tow over the open sea, under policies which exacted extra-heavy premiums because of the extraordinary risks and were entered into after the underwriters had made careful examination of her seaworthiness and had become informed of her character and condition, *held* that the implied warranty of "seaworthiness" was satisfied if the vessel was as fit for the voyage as reasonably could be expected of a vessel of her type, though, owing to her construction, she was unsuited to marine navigation; and that the "perils of the sea" against which she was insured included conditions of wind and water extremely dangerous in her case though not so to ordinary sea-going vessels. *Id.*

19 F. (2d) 493, 496, reversed.

CERTIORARI, 275 U. S. 518, to eleven decrees of the Circuit Court of Appeals, reversing the District Court and directing the dismissal of the libels. The suits were on policies of marine insurance covering the tugboat "Wash

* The ten other suits were by the petitioner against ten other insurance companies, severally.

Gray" which was lost in the Gulf of Mexico while in tow from Tampico to Galveston for a change of engines.

Mr. John D. Grace with whom *Messrs. M. A. Grace* and *Edwin H. Grace* were on the brief, for petitioner.

Mr. T. Catesby Jones, with whom *Messrs. Henry P. Dart, Jr., Robert H. Kelley* and *James W. Ryan* were on the brief, for respondents.

No peril of the sea was encountered. There was no catastrophe, suddenly encountered, which triumphed over those safeguards by which skillful and vigilant seamen usually bring ship and cargo to port in safety. *The Rosalia,* 264 Fed. 285. It has long been settled that the fact of sea-water entering a vessel's hull does not constitute in itself a peril of the sea. *The Folmina,* 212 U. S. 354; *The Jungshoved,* 290 Fed. 733.

The burden was on petitioner to prove seaworthiness. *Richelieu Navigation Co.* v. *Boston Insurance Co.,* 136 U. S. 408; *Pacific Coast S. S. Co.* v. *Bancroft-Whitney Co.,* 94 Fed. 180.

Wind and waves such as were encountered by the *Wash Gray* and which must be expected on a voyage, have uniformly been held not to amount to a peril of the sea. *The Rosalia,* 264 Fed. 285; *The G. R. Booth,* 171 U. S. 450; *The Gulnare,* 42 Fed. 861; *Morse* v. *St. Paul Insurance Co.,* 124 Fed. 451; *Higgie* v. *American Lloyds,* 14 Fed. 143; *The Rappahannock,* 184 Fed. 291; *Mr. Justice Story, in The Reeside,* Fed. Case No. 11,657; *Union Marine Ins. Co.* v. *Stone,* 15 F. (2d) 937; Winter on Marine Ins., 1919 ed., p. 140; *Bullard* v. *Roger Williams Ins. Co.,* 1 Curtis 148; *Swan* v. *Union Ins. Co.,* 3 Wheat. 168; *Donnell* v. *Columbian Ins. Co.,* 7 Fed. Cas. p. 891, Case No. 3987; *Prohaska* v. *St. Paul Insurance Co.,* 270 Fed. 91; *Leerdam etc., owners of S. S. Leerdam* v. *Mediterranean & General Traders, Inc.,* 17 F. (2d) 586; *The*

Asuarça, 291 Fed. 73. *The Tornado* (*Klein* v. *Globe & Rutgers Ins. Co.,* 2 F. (2d) 137), distinguished.

The dictum in *The Tornado, supra,* that what constitutes a peril of the sea depends upon the size of the vessel insured, does not correctly state the law. Its application to facts such as are involved in the present case would lead substantially to the conclusion that a policy of marine insurance is not, as Lord Herschell says, "an insurance against accidents which happen, but an insurance against events which must happen." See *The Xantho,* 12 App. Cas. 503; *British & Foreign Ins. Co.* v. *Gaunt,* 2 App. Cas. 41.

To insure such a vessel against perils of the sea, does not amount to the underwriter warranting that she is fit to encounter perils of the sea. The only warranty in the policy of insurance is the warranty of the assured, not the warranty by the underwriter. As Lord Mersey said in *Sasson* v. *Western Assurance Co.* (1912), A. C. 561: "An insurance against the 'perils of the sea or other perils' is not a guarantee that a ship will float."

The petitioner has failed to sustain the burden of proving that the sinking of the boat resulted from one of the few specified perils insured against in these policies.

Unseaworthiness of a vessel may be one or both of two things; first, a breach of the implied warranty of seaworthiness which is contained in every marine policy unless expressly excluded (*Hazard* v. *New England Ins. Co.,* 8 Pet. 557); second, a cause of loss. Considered as a breach of warranty, unseaworthiness may undoubtedly be waived by the underwriter. The waiver, however, should always be expressed in writing in the policy in the clearest language. Arnould on Marine Insurance, § 686. Considered as a cause of loss, even where there is no warranty, a loss from unseaworthiness is not a peril insured against. This was specifically decided in *N. O. T. & M. R. Co.* v. *Union Marine Ins. Co.,* 286 Fed. 32. See

also *Grant Smith & Co.* v. *Seattle Construction Co.*, 1920, A. C. 162.

In other words, even though the underwriter admits in the policy that the vessel is seaworthy, the assured is not entitled to recover where the loss is not shown to have been caused by a peril of the sea or other of the specific perils insured against. *A fortiori* this must also be so when the evidence indicates that the loss was caused by unseaworthiness.

It is undoubtedly true that unseaworthiness, considered as a breach of the implied warranty of seaworthiness, is a special defense which must be affirmatively pleaded and proved by the underwriters. Petitioner, however, overlooks the distinction between unseaworthiness as a breach of the implied warranty of seaworthiness, and as a possible cause of loss. If the loss was caused by unseaworthiness, the petitioner cannot recover and there is no need for the defendant underwriters to set up unseaworthiness as an affirmative defense. *New Orleans, T. & M. Ry. Co.* v. *Union Marine Ins. Co.*, 286 Fed. 32; *Swan* v. *Union Insurance Co.*, 3 Wheat. 168; *The Lakeland*, 1927, A. M. C. 1361; *Richelieu Navigation Co.* v. *Boston Ins. Co.*, 136 U. S. 408; *Firemen's Fund Ins. Co.* v. *Globe Navigation Co.*, 236 Fed. 618; *Coles* v. *Marine Ins. Co.*, Fed. Cases, No. 2988; *Cary* v. *Boylston Fire Ins. Co.*, 107 Mass. 140; *Van Vliet* v. *Greenwich Ins. Co.*, 14 Daly (N. Y.) 496.

If any cause of loss is shown, it is the uninsured risk of negligent towage. Obviously, it was negligence to tow this small tug at the rate of nine miles an hour, behind a large steamer with such a short tow line. *Peace River Mining Co.* v. *Mulqueen*, 285 Fed. 102; *The Mariner*, 1927, A. M. C. 363; *The Marie Palmer*, 191 Fed. 79; *The Inca*, 148 Fed. 363; *D. W. Ryan Towboat Co.* v. *Draper*, 263 Fed. 31; *The Manhattan*, 186 Fed. 329.

The fact that the contract of towage relieved the towing vessel from all responsibility for negligence was a fact material to the risk which should have been disclosed to the underwriters, and its concealment voided the policy. The policy specifically provided that any agreement whereby any right of recovery of the assured against any vessel or person is released, decreased, transferred or lost, voided the policy. *Sun Mutual Ins. Co.* v. *Ocean Ins. Co.,* 107 U. S. 485; *Tate & Sons* v. *Hyslop,* 15 Q. B. Div. 368; *Phoenix Ins. Co.* v. *Parson,* 129 N. Y. 86; *The Turret Crown,* 297 Fed. 766; *The Oceanica,* 170 Fed. 893; *Ten Eyck* v. *Director General,* 267 Fed. 974; *McWilliams* v. *Davis,* 285 Fed. 312; *Hand & Johnson Tug Line* v. *Canada S. S. Lines,* 281 Fed. 779; *British Columbia Barge Co.* v. *Mylroie,* 259 U. S. 1; *The Pacific Maru,* 8 F. (2d) 166; *The Sea Lion,* 12 F. (2d) 124.

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

These are eleven libels filed in the District Court of the United States for the Eastern District of Louisiana by a Mexican corporation known as the Compañia de Navegación, against as many different insurance companies, English and American, on eleven separate policies, insuring the tug "Wash Gray" in favor of the libelant as owner in different sums aggregating $85,000, and covering a voyage of the tug while in tow from Tampico, Mexico, to Galveston, Texas.

The tug was designed for inland waters. She was 87½ feet long, with 19 feet beam, 9 feet depth of hold, and was of 105 tons. She was insured specially for this sea voyage, to be towed as agreed with the Insuring Companies by the "Freeport Sulphur No. 1," a vessel engaged in regular trade on the Gulf of Mexico, and measuring 309 feet in length, 45 feet beam, with 22½ feet depth, and of approximately 3,000 tons displacement.

When application was made for insurance, the underwriters required an inspection for seaworthiness, general fitness and towing arrangements for that voyage. For that purpose two well known marine surveyors, representing the various underwriters, made a thorough, critical inspection, followed by recommendations for preparations for the voyage, including certain overhauling, particularly of her towing bitts and decking, and for the planking up of doors, ports, and other openings. They reported in writing to the underwriters that the requirements had been complied with, and certified her seaworthiness, and her fitness for the particular voyage. Because of the extra hazardous risk involved in the transit of this small inland vessel in tow at sea, the premiums were much increased by the underwriters. They varied, in the different policies, between one and one-half to two and one-eighth per cent., or from six to more than eight times the usual rate for a tow of the ordinary size and power to resist the sea. The voyage contemplated was first to Freeport, Texas, a distance of some four hundred and twenty miles, a trip taking some forty-five or fifty hours. From there, she was to go to Galveston by another towing vessel, also to be satisfactory to the underwriters. The weather from Tampico was fair and the sea calm. She followed nicely, handled well, and continued in tow through the first night and through the next day, making some nine miles per hour with no straining or difficulty. Ordinarily, under her own power, she was good for from ten to twelve miles per hour. During the second evening, came a fresh to strong northwesterly breeze. Later the weather grew squally, until, about 8 o'clock, the wind reached a velocity of twenty-five miles an hour, with occasional puffs or gusts. Because of these and a cross current and swell, the sea grew choppy, with waves running up four to five feet from trough to crest, and sufficient to break over her head. The rough weather and the choppy seas put a strain on

the vessel. As required by contract, she had up all steam necessary to work her pumps. The mate was sent below and in a few minutes reported to the captain that the forward bitts had worked loose, that her seams were opening, and she was taking water rapidly. The pounding and straining continued until she made more water than her pumps could discharge. She was then about 100 miles from Freeport, Texas, and had completed three-fourths of the voyage to that point. The "Wash Gray's" captain signalled to the towing ship to stop. The water in the tug had rolled forward, thus bringing her head down. The tow lines were then cut. This brought her head up and she righted herself. The larger vessel stood by. The captain of the "Wash Gray" notified the towing captain that the tug could stand no more pulling. Shortly thereafter the captain and crew of the tug were taken aboard the ship for safety. The latter then stood by until daylight when the master sent his engineer, mate and some six men on board the tug to attempt to save her. They found no water in the boiler for steam. They attempted by a hose to pump it in, but the leaking sea water put out the fire. The vessels then proceeded slowly at one mile per hour until half past ten when the tug began to sink slowly and went down at half past eleven.

The District Judge found for the owner of the "Wash Gray" on all the policies. The Insurance Companies appealed to the Fifth Circuit Court of Appeals, which without objecting to the facts as found by the District Court reversed the case with directions to dismiss the libels.

Counsel for the Insurance Companies seek to sustain the judgment of the Circuit Court of Appeals on four grounds. They say, first, that the Insurance Companies were released from liability because there was not disclosed to them before the voyage a contract of towage, a term of which was material to the risk and was concealed and the policies were thus avoided. The towage contract provided as follows:

"Freeport Sulphur No. 1 will furnish hawser. All other risk and expense to be borne by the tug. It is understood you will keep sufficient men on board to keep up steam and man the tug's pumps. S. S. Freeport No. 1 is not responsible in any way for loss or damage to the Wash Gray."

All the policies had attached to them by rider and rubber stamp a clause like the following:

"Any agreement, contract or act, past or future, positive or implied, by the Insured whereby any right of recovery of the insured against any vessel, person or corporation is released, decreased, transferred or lost, which would, on acceptance of abandonment, or payment of loss by this company, belong to this Company but for such agreement, contract or act, shall render this policy null and void as to the amount of any such loss or damage, but the Company's right to retain or recover the full premium shall not be affected."

We do not think that the towing contract has the effect claimed for it by the companies. It did not release the "Freeport" from any loss or damage to the "Wash Gray" due to the negligence of the master or crew of the towing vessel; and for a loss thus caused the companies would be subrogated to the claim of the owner of the "Wash Gray."

The rule laid down by this Court in *The Steamer Syracuse,* 12 Wall. 167, 171, covers the point. That was a libel by the owner of a canal boat against the Steamer Syracuse for negligence in towing the canal boat and running her into a vessel at anchor in the harbor of New York. The claim was made that there had been a special agreement between the canal boat and the steamboat by which the canal boat was being towed at her own risk. Upon this point the Court said:

"It is unnecessary to consider the evidence relating to the alleged contract of towage, because, if it be true, as the appellant says, that, by special agreement, the canal-

boat was being towed at her own risk, nevertheless the steamer is liable, if, through the negligence of those in charge of her, the canal-boat has suffered loss. Although the policy of the law has not imposed on the towing boat the obligation resting on a common carrier, it does require on the part of the persons engaged in her management, the exercise of reasonable care, caution, and maritime skill, and if these are neglected, and disaster occurs, the towing boat must be visited with the consequences."

In view of this state of the law, the towing contract here shown was not a fact material to the risk, a concealment of which from the underwriters would injure them or avoid the policy.

The second objection is that the tug was negligently towed at too great a speed, proximately causing the loss. There is really very little evidence to sustain the claim that there was any negligence on the part of the towing vessel or her master or her crew. The trial court specifically found that the towing was well done, that nine miles an hour was not too fast a speed to be maintained, but that on the contrary the maintenance of such speed was necessary in order to prevent the towed vessel from turning over or careening, and there is no finding to the contrary by the Court of Appeals.

The third objection is that the tug was not seaworthy and therefore the risk never attached. The finding by the trial court distinctly negatives any such claim. It said:

"Libellant's case, upon this point, does not depend entirely on the fact that, as a condition precedent to the underwriting, the insurers required and obtained inspections, detailed recommendations of two expert marine surveyors, and a certificate of compliance with all requirements deemed by them necessary to show that the Wash Gray was seaworthy and fit, equipped and apparelled with a view to the particular voyage, in tow of the particular

ship Freeport, to be thence towed by another approved by them to Galveston, for the specific known purpose of general overhauling and changing her engines. There is, additionally, the oral testimony which clearly shows that these surveyors were correct in their report and had competently functioned in making their recommendations and accepting the compliance by the owner, as per their certificate. The unwarranted assumption that the Wash Gray pulled apart, upon the contrary, as argued in the brief of respondents, is not sustained by the evidence. She did not pull apart in any particular. It is conclusively shown, and uncontradicted, that her forward bitts pulled loose because of the extraordinary straining and pounding under the stress of weather encountered. This was overcome, as the evidence shows, by the rigging of the Spanish windlass. The water which caused the sinking was shipped through her seams, from which the caulking had worked by the same cause. The only hope of overcoming this was by pumping, but pumping was inadequate."

This issue, however, brings up clearly the difference between the view of the District Court and that of the Court of Appeals in respect to liability in this case. What does "seaworthy" mean in the implied or expressed warranty to which the insured is to be held?

Arnould on Marine Insurance, Vol. II, tenth English edition, says:

"Sec. 710. It is obvious that there can be no fixed and positive standard of seaworthiness, but that it must vary, with the varying exigencies of mercantile enterprise. 'The ship,' said Lord Cairns, 'should be in a condition to encounter whatever perils of the sea a ship of that kind, and laden in that way, may be fairly expected to encounter' on the voyage. *Steel* v. *State Line S. S. Co.* (1877) 3 App. Cases, 72, 77. . . .

"Again the class of vessel may be such as will not admit of being put into that condition of seaworthiness

requisite in ordinary cases for the contemplated voyage. The effect of this is not to dispense with the implied warranty of seaworthiness, but to accommodate the warranty to what is reasonably practicable in the particular case. But the underwriter must be informed of the peculiar nature of the risk. Thus, if a steamer built for river navigation is to be sailed from this country to Calcutta or to Odessa, and the underwriter accept the risk with full information as to the class of vessel and the intended voyage, the assured is only required to make her as seaworthy for the voyage as is reasonably practicable with such a vessel by ordinary available means." *Burges* v. *Wickham* (1863) 3 B. & S. 669; *The Vortigern* (1899) P. 159; *Clapham* v. *Langton,* 34 Law Journal, Q. B. 46; *Turnbull* v. *Jenson,* 3 Aspinwall W. S. 433.

This view of varying seaworthiness according to the circumstances known to both parties is fully supported in the case of *Thebaud* v. *Great Western Insurance Company,* 155 N. Y. 516. There the plaintiff applied to the defendant insurance company to insure, for a voyage from Philadelphia to Frontera, Mexico, a steamer in course of construction for use on rivers and inland waters. The defendant caused the vessel to be examined by an engineer, and issued the usual marine policy, exacting, however, a double premium. The vessel proceeded part of the way on her voyage, avoiding the sea, but in reaching Mexico she had to put out to open sea and was lost. It was held that as both parties to the contract knew that the vessel was not a sea-going craft or suitable for the navigation of the high seas, and as the defendant issued its policy with full knowledge of the nature of the risk, the warranty of seaworthiness, implied in a contract of marine insurance, should not be construed in a way to be repugnant to the general purpose of the parties in executing the contract, nor held to be broken by the

fact that the vessel was not so constructed as to be fit for a sea voyage. See 4 Joyce on Insurance, § 2159.

In *Klein* v. *Globe & Rutgers Insurance Company,* 2 F. (2d) 137, decided by the Circuit Court of Appeals of the Third Circuit, the policy covered an upper river steamboat for a voyage down the Mississippi River to New Orleans, and from there in tow down the river and across the Gulf to Tampico, for which a higher premium than usual was paid. She was bulkheaded and otherwise prepared under the supervision of the agents of the insurance company for her voyage to Tampico. She was inspected and found to be thoroughly all right at the mouth of the Mississippi River, but after she was being towed in the Gulf, an examination disclosed considerable water in the hold and thereafter the vessel sank. It was held that the implied warranty of the insured was that the boat was seaworthy to the extent of being able to withstand all the ordinary perils of navigation of the upper river and that the perils of the sea in the Gulf, against which she was insured, were such perils as would be extraordinary to a vessel of her type. Judgment was given for the insured.

Again, in the *Farmers' Feed Company* v. *Insurance Company of North America,* 166 Fed. 111, affirming the District Court for the Southern District of New York, 162 Fed. 379, the defendant insurance company, knowing the age and exact condition of a barge, insured her for operation in waters adjacent to New York at a high premium. The loss occurred by reason of wind and tide near Brooklyn Bridge, and the defense was unseaworthiness. The Second Circuit Court of Appeals said:

"The Mackey was undoubtedly very old and somewhat decayed, but her condition, her history and all the facts regarding her were fully known to the company at the time the policy was executed, a written record stating

all the particulars being on file with the company. The underwriters knew that she was not a desirable risk, they knew they were taking more than an ordinary hazard and they guarded themselves against it by charging more than the ordinary premium. The theater of the Mackey's operations was, by the express terms of the policy, confined to the waters adjacent to New York, practically New York harbor. The ordinary perils of the sea were not intended, but only such perils as were to be encountered in the comparatively quiet waters referred to. The question of seaworthiness must be considered in the light of the service required. . . ."

The fourth objection claimed by the respondents is that no recovery could be had because the loss of the "Wash Gray" was not caused by any peril insured against. These policies all contained a clause like the following:

"It is the intent of this insurance company by this policy to fully indemnify the insured against the adventures and perils of the harbors, bays, sounds, seas, rivers and other waters above named."

It is urged by the Insurance Companies that weather when the wind did not exceed a velocity of twenty-five miles, though with squalls, and with a cross current and swell producing a choppy sea with waves five feet high and breaking over the head of the vessel, did not constitute a peril of the sea.

There was some emphasis too placed by counsel for the companies on the log of the "Sulphur No. 1" in which the state of the weather and of the sea seemed to be minimized. Upon this point the trial court finds it to be unreliable because the entries in the log do not seem to have been made at the times of the observations they record and moreover the entries were made from the standpoint of a vessel of 3,000 tons, and not one of a vessel of the size of the "Wash Gray." The court said:

"What amounts to a light breeze, or a small swell, or a choppy sea, as logged for a large ocean-going steel vessel, would be relatively, if logged for a little inland wooden tug, with two or three feet of freeboard, an extremely dangerous gale and rough sea. The first would ride comfortably, safely and easily, while the other would toss and pound furiously, strain her timbers, lose the caulking of her butts and seams, and so contrast the comparative calm for one to the comparative fury for the other. The oral testimony, however, makes such speculation and refinement unnecessary, since it convincingly shows that for the 'Wash Gray' in the open Gulf, the wind and the condition of the sea were extremely perilous; that both the towing ship, its officers and crew and the crew of the little tug omitted nothing that good seamanship, skill and prudence would indicate."

But it is contended on behalf of the insurance companies that the phrase "perils of the sea" has not a varying but an absolute meaning, and they rely on the language of Mr. Justice Story in the *Reeside,* 20 Federal Cases, No. 11,657, p. 458 (2 Sumn. 567), quoted and approved in *Garrison* v. *Memphis Insurance Company,* 19 How. 312. In the former case the question was whether great damage to bales of carpeting by absorbing oil which had leaked from a number of casks, said to have been improperly stowed, was occasioned by the perils of the sea and the extraordinary rolling of the schooner during the voyage. Justice Story said:

"The phrase 'danger of the seas,' whether understood in its most limited sense, as importing only a loss by the natural accidents peculiar to that element; or whether understood in its more extended sense, as including inevitable accidents upon that element, must still, in either case, be clearly understood to include such losses as are of extraordinary nature, or arise, from some irresistible

force, or some overwhelming power, which can not be guarded against by the ordinary exertions of human skill and prudence."

But we think the definition of "dangers of the sea" by Justice Story was meant by him to be applied in the ordinary case of a sea-going vessel with no special circumstances as to the exceptional character of the vessel known to both parties and recognized by both in a high premium charged and paid. A contract of maritime insurance is usually not different from any other contract except that the words and phrases used may have a technical nautical meaning to be understood by the parties and enforced accordingly. We have seen however from the cases that the term "seaworthiness" varies with the circumstances and the exceptional features of the risk known to both parties. The view of the Circuit Court of Appeals that "perils of the sea" has an absolute meaning and may not be varied by the knowledge of the parties as to the circumstances and must be maintained stiffly in favor of the insurance companies and against the insured, is not necessary or reasonable. The variation in the significance of "seaworthy," as shown by the above authorities, when caused by exceptional circumstances known to both parties, applies as well to the meaning of perils of the sea as to that of seaworthiness. The two terms in such cases are correlative terms. *Klein* v. *Globe & Rutgers Insurance Co.*, 2 F. (2d) 137, 139, 140.

The Circuit Court of Appeals distinguished *Klein* v. *Globe & Rutgers Insurance Company, The Farmers' Feed Company* v. *The Insurance Company* and *Thebaud* v. *Great Western Insurance Company,* and 4 Joyce on Insurance, Section 2159, as follows:

"Recovery was allowed in each of those cases on the actual contract which was held to be different from the contract evidenced by the insurance policy. It was merely

held that effect should be given to the actual contract. The facts in this case do not warrant the conclusion that appellant bound itself by its conduct or by any agreement to accept the risk of unseaworthiness."

We find ourselves unable to follow this distinction. In all these cases the recovery was on the contract, and the question was of the construction of the contract. Its construction was affected necessarily by the special circumstances surrounding the contract known to both parties and acted on by them in charging and paying an increased compensation for the risk run. The circumstances in this case are very like those shown in the cases cited. They certainly justify the conclusion to which we have come.

The judgment of the Circuit Court of Appeals is reversed.

GAINES v. WASHINGTON.

ERROR TO THE SUPREME COURT OF WASHINGTON.

No. 841. Submitted April 23, 1928.—Decided May 14, 1928.

1. Writ of error does not lie to a judgment of a state court when the validity of a federal treaty or statute, or of a state statute on the ground of repugnancy to the federal Constitution, treaties or laws, was not drawn in question. Jud. Code, § 237 (a). P. 83.
2. The Sixth Amendment does not apply to a state criminal prosecution. P. 85.
3. The question whether exclusion of the public from a murder trial is against due process of law, is not presented by a record showing only an oral order or announcement of the trial judge that the public would be excluded beginning the next day, which was not carried out. P. 86.
4. Criminal prosecutions in the state courts may be by information instead of indictment. *Id.*
5. Objection to an information for murder as violating due process because filed pending an investigation by the coroner and because the district attorney was in a "rage" are frivolous. P. 87.

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6. The contention that defendant was not present or that he could not hear the evidence at his trial for murder, cannot be entertained on affidavits filed after the State Supreme Court had affirmed his conviction. P. 87.
7. A record in a murder trial showing by daily entries all parties and counsel present is sufficient proof of attendance by the defendant. *Id.*
8. Where criminal cases are brought here from state courts on frivilous objections, mandate will be ordered issued forthwith on dismissal of writ of error, or denial of certiorari. *Id.*

Writ of Error to 144 Wash. 446, dismissed.

Certiorari denied.

ERROR to a judgment of the Supreme Court of Washington sustaining a conviction for murder.

Messrs. W. P. Guthrie, G. E. M. Pratt, and *Howard T. Ballard* were on the brief for plaintiff in error.

Mr. Ewing D. Colvin was on the brief for defendant in error.

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

The defendant was charged by information with the crime of murder in the first degree in the Superior Court of King County in the State of Washington. The trial resulted in a verdict of guilty as charged and a finding by the jury that the death penalty should be inflicted. Motions for a new trial and in arrest of judgment were made and overruled, and the judgment was entered upon the verdict.

The defendant appealed to the Supreme Court of the State. That court, after a consideration of the errors claimed to have been committed on the trial, affirmed the judgment and sentence. Final judgment was entered January 18, 1928. On February 6, 1928, a petition for a writ of error from this Court was presented to the Chief

Justice of the Supreme Court of the State. He allowed the writ and it was accordingly issued. In accordance with our practice, the Clerk brought to the attention of the Court the fact that this was a criminal case and was, therefore, to be expedited. An examination of the assignments of error and the record disclosed that the writ of error was improvidently allowed. The only law under which such a writ of error would lie was Section 237(a) of the Judicial Code, as amended by the Act of February 13, 1925 (c. 229, 43 Stat. 936, 937), which reads as follows:

"A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, 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 there 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, may be reviewed by the Supreme Court upon a writ of error."

The record and the assignments of error do not show that there was here drawn in question the validity of a treaty or statute of the United States, or the validity of a statute of the State of Washington on the ground of its being repugnant to the Constitution, treaties or laws of the United States. It followed that the writ of error would have to be dismissed. Thereupon the Court entered, March 19, 1928, a rule against the plaintiff in error, Wallace C. Gaines, to show cause before this Court on April 23rd, why, treating the writ of error inadvertently allowed in this cause as a petition for writ of certiorari herein, certiorari should not be denied for lack of a substantial federal question in the record giving this Court jurisdiction.

The order to show cause was issued in view of Section 237(c) of the Code of Judicial Procedure, as amended by

the Act of February 13, 1925 (c. 229, 43 Stat. 936, 938). That paragraph is as follows:

" If a writ of error be improvidently sought and allowed under this section in a case where the proper mode of invoking a review is by a petition for certiorari, this alone shall not be a ground for dismissal; but the papers whereon the writ of error was allowed shall be regarded and acted on as a petition for certiorari and as if duly presented to the Supreme Court at the time they were presented to the court or judge by whom the writ of error was allowed: *Provided,* That where in such a case there appears to be no reasonable ground for granting a petition for certiorari it shall be competent for the Supreme Court to adjudge to the respondent reasonable damages for his delay, and single or double costs, as provided in section 1010 of the Revised Statutes."

In obedience to the rule, the petitioner, Wallace C. Gaines, has filed a return in which he avers that the first federal question upon which he asks a writ of certiorari arises because of the action of the trial judge, as shown by the record as follows:

"At the close of the afternoon session on the ninth day of the trial, to wit, August 11th, Judge Jones, the trial judge, said:

" Before adjourning, I will state that the atmosphere is pretty unbearable. I know the jury must also feel it. I assume there is a certain part of the members of the Bar who from the standpoint of students desire to hear the testimony, but with those exceptions, court officers and members of the Bar, the general public will be excluded beginning tomorrow."

This action, the return alleges, was a violation of the Sixth Amendment to the Constitution of the United States, and of the due process clause of the Fourteenth Amendment to the same Constitution, and that this error

was duly urged in the trial court and the State Supreme Court, on both grounds.

The Sixth Amendment to the Constitution provides in part that "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed." Many state constitutions contain a substantially similiar guaranty and restriction. The question what constitutes a public trial the right to which is thus guaranteed and what discretion a court may exercise in limiting the audience and spectators is one upon which the cases differ. Two views are given in *Reagan* v. *United States,* 202 Fed. 488 and *Davis* v. *United States,* 247 Fed. 394, in both of which many state cases are cited. According to some of them, the order complained of here would be regarded as erroneous, while in others it would be held to be within the judicial discretion of the court.

But we are relieved from considering or reconciling the different views taken in these cases by the fact that the Sixth Amendment to the Federal Constitution does not apply to the trial of criminal prosecutions by a State. It has been well settled for years that the first ten Amendments apply only to the procedure and trial of causes in the federal courts and are not limitations upon those in state courts. *Spies* v. *Illinois,* 123 U. S. 131, 166, and cases cited.

It is contended, however, that due process of law exacted in the Fourteenth Amendment in causes tried in state courts must be construed as equivalent to the Sixth Amendment in federal trials. The question has not arisen in any case cited to us. It would involve a consideration of whether due process requires more than a trial that is not private or secret, or whether due process would not be satisfied except by such a restriction upon the discretion of the court in regulating attendance as the defend-

ant here insists upon and as is held in some of the authorities cited above in enforcing the Sixth Amendment and similar constitutional provisions of an affirmative character. But we need not pass on that question now.

For even if the due process clause requires the same kind of public trial as that contended for by the petitioner, the record does not disclose facts which would justify us in bringing the case before us for our review. The order of the court complained of was oral only. No formal order was entered, neither was there a minute entry nor a specific mention to any particular officer to see that it was executed so far as the record discloses. The State before the Supreme Court contended that the order to exclude the general public was never executed. This was an issue of fact before both Washington courts. After the fullest examination of affidavits filed by both sides upon the motion for a new trial the State Supreme Court's conclusion was as follows:

"Believing that the statement of the Court was not carried out but that the general public were admitted to the courtroom to the extent of its seating capacity during the trial, the rights of the appellant as guaranteed by the constitution of this state and by the Fourteenth Amendment to the Constitution of the United States were not invaded."

From an examination of the record, we find no reason for rejecting this conclusion of fact reached by the unanimous judgment of that court.

Another question raised on behalf of the defendant concerns the filing of the information for murder by the prosecuting attorney. Prosecution by information instead of by indictment is provided for by the laws of Washington. This is not a violation of the Federal Constitution. *Hurtado* v. *California,* 110 U. S. 516. Some objection is made to the filing of the information because made pend-

ing the investigation by the coroner and because the prosecuting attorney was in "a rage." The law of Washington prescribes no connection between the two inquiries. The objection is frivolous.

Then it is contended that the defendant was not personally present or was not in a place where he could hear the evidence. There is nothing in the record of the proceedings of the trial to support such a claim. No objection or exception was taken during the trial on this ground. It is based on affidavits filed in the case after the State Supreme Court had affirmed the conviction. This was much too late. *Frank* v. *Mangum,* 237 U. S. 309, 340.

A contention is also made that the presence of defendant at all times at the trial was not affirmatively shown by the record. The record was not well made up, but it contains daily entries showing "all parties and counsel present" during the trial. This certainly complies with due process of law required by the Fourteenth Amendment.

All the other objections said to involve federal questions are equally frivolous. Nothing in the record warrants us in granting a writ of certiorari.

It has not been the practice of the Court to write opinions and state its reasons for denying writs of certiorari, and this opinion is not to be regarded as indicating an intention to adopt that practice, but in view of the fact that the Court has deemed it wise to initiate a practice for speedily disposing of criminal cases in which there is no real basis for jurisdiction in this Court, it was thought proper to make an exception here, not to be repeated, and write an opinion.

The character of the case is such that we should proceed under Rule 31, as amended May 2, 1927 (274 U. S. 766), and shorten the time for issuing the mandate as provided therein and order that the mandate and notice of the rul-

ing herein be issued forthwith to the Supreme Court of the State of Washington for further proceeding.

The order will be entered dismissing the writ of error and denying the application for a certiorari.

Writ of error dismissed. Certiorari denied.

FERRY *v.* RAMSEY ET AL.

HARRIS, EXECUTOR, *v.* RAMSEY ET AL.

ERROR TO THE SUPREME COURT OF KANSAS.

Nos. 407 to 418, inclusive. Argued April 25, 1928.—Decided May 14, 1928.

1. A state statute making a bank director individually liable for deposits, the receipt of which by the bank was assented to by him with knowledge that it was insolvent, and which provides that his failure to examine the bank's affairs to learn of its condition shall charge him with knowledge of its insolvency, and that in suits against him for such deposits the fact of insolvency when the deposits were received shall be *prima facie* evidence that the director both knew of the insolvency and assented to the deposits—*held* consistent with due process of law. P. 94.
2. The statute might have made directors liable to depositors in every case. By accepting the office, they assume the risks it imposes. *Id.*

122 Kans. 675, 691, affirmed.

ERROR to judgments of the Supreme Court of Kansas, affirming recoveries against a director, and the executor of a deceased director, of a bank, in twelve suits by depositors.

Messrs. J. B. McKay and *L. J. Bond* were on the brief for Ferry.

Want of knowledge being a defense, the defendant in an action of this kind has the right to prove want of knowledge, and the effect of the statute creating against the officer a conclusive presumption of knowledge, is to

deprive the officer of property without due process of law. 12 C. J., p. 1233; 6 R. C. L., 462; *Railway Co.* v. *Simonson,* 64 Kans. 802; *Petersilie* v. *McLachlin,* 80 Kans. 176; *McFarland* v. *American Sugar Co.,* 241 U. S. 79; *Shellebarger Elevator Co.* v. *Ill. Cent. R. Co.,* 278 Ill. 333.

The statute attempts to establish rules of evidence under which the depositor may prove his case against the directors. It does not enact a rule of substantive law. To give the statute the effect which the Kansas Court announces, the statute would have to read that every director shall be liable to depositors if he fails to make an examination of the bank. The liability is based upon assent after knowledge of insolvency, and the conclusive presumption raised is a method provided for proving knowledge. Conceding for the moment the power of the legislature to establish a rule of absolute liability upon the part of a director who failed to examine, it is plain that the legislature had no intention of so doing. What the legislature did intend was to make it easier for the depositor to prove his case. *Schlesinger* v. *Wisconsin,* 270 U. S. 230.

And the legislature cannot impose upon a director liability on the ground that he would have had knowledge of the true condition of the bank had he made an examination, when the fact is such examination would not have disclosed the condition of the bank.

If the statute be treated as a rule of substantive law, it at the most imposes a civil liability to compensate the depositors for loss resulting from the failure of the director to perform the duty imposed by the statute, to examine the bank. Such a statute would be unconstitutional because of being unreasonable and arbitrary in placing such a liability upon the directors without regard to whether such neglect of duty to examine occasioned the loss or not. If an examination into the affairs of the bank would not have shown its true condition, then to

award compensatory damages to the depositors because of the failure to examine, is to take the property of the directors without due process of law, because their neglect had no causal relation to the injury. 29 Cyc., 439; *Hodgson* v. *Dexter,* 12 Fed. Cas. 6565, affirmed, 1 Cranch 345.

The statute very positively creates not a "mere *prima facie* presumption," but a conclusive presumption against a director who does not examine.

Section 9–164 is, we contend, also violative of the Fourteenth Amendment, but for a somewhat different reason. It is the rule as stated in many of the authorities, that even a *prima facie* presumption cannot be created where there is no rational or logical connection between the fact upon which the presumption is to rest and the fact to be proved. The existence of the established fact must reasonably tend to raise an inference of the main fact. Now how can it be said that the fact that a bank is insolvent reasonably tends to raise an inference that its officers assented to its receiving deposits? Ordinarily courts do not assume that persons intend to violate the law. *McFarland* v. *American Sugar Co.,* 241 U. S. 79.

The statute here provides that proof of insolvency shall constitute *prima facie* evidence not only of knowledge, but of assent. Therefore, inasmuch as assent is based in part upon knowledge, the statute provides for a presumption upon a presumption. One presumption cannot be based on another presumption. *Railroad Co.* v. *Baumgartner,* 74 Kans. 148; *United States* v. *Ross,* 92 U. S. 281; *Manning* v. *John Hancock Ins. Co.,* 100 U. S. 693; *Cunard Co.* v. *Kelley,* 126 Fed. 610; 10 R. C. L., 870; *Duncan* v. *Railroad,* 82 Kans. 230.

To provide that knowledge and assent are to be presumed from insolvency is to say that proof of insolvency presumes knowledge, and from this presumption of knowledge, assent is presumed. This cannot be legally done. *Simpkins* v. *State,* 249 Pac. 168.

Mr. S. M. Brewster, with whom *Messrs. John L. Hunt* and *Bruce A. Campbell* were on the brief, for Harris.

Section 9–164, Revised Statutes of Kansas, is unconstitutional as a violation of the Fourteenth Amendment, because it seeks to create a *prima facie* presumption of assent by proof of a fact entirely unrelated to the main fact sought to be established. *Railway Co.* v. *Turnipseed,* 219 U. S. 35; *Hawes* v. *Georgia,* 285 U. S. 1; *Manning* v. *John Hancock Ins. Co.,* 100 U. S. 693; *Luria* v. *United States,* 231 U. S. 9; *McFarland* v. *American Sugar Co.,* 241 U. S. 79; *Bailey* v. *Alabama,* 219 U. S. 219. And because it deprives plaintiff in error and his decedent's estate of property without due process of law by creating a presumption which is based upon a presumption. 5 C. J. 811; *Welch* v. *Sackett,* 12 Wis. 243; *Jewell* v. *Jewell,* 84 Me. 304; *Hanscom* v. *Home Ins. Co.,* 92 Me. 333; *Patterson* v. *Stewart,* 41 Minn. 84; 22 C. J. 84; *Railroad Co.* v. *Baumgartner,* 74 Kans. 148; *United States* v. *Ross,* 92 U. S. 281; *Manning* v. *John Hancock Ins. Co.,* 100 U. S. 693; *Cunard Steamship Co.* v. *Kelley,* 126 Fed. 610; *Duncan* v. *Railroad Co.,* 82 Kans. 230; 10 R. C. L. 870.

Section 9–163 violated the Fourteenth Amendment in that it required the decedent to do the impossible, and because it creates a conclusive presumption of knowledge on account of failure to examine the bank. *Bailey* v. *Alabama,* 219 U. S. 219; Cooley, Const. Lim., 5th ed., p. 453; *Choctaw O. & G. R. Co.* v. *Harrison,* 235 U. S. 292; *Galveston H. & S. A. R. Co.* v. *Texas,* 210 U. S. 217; *L. & N. Ry. Co.* v. *Melton,* 218 U. S. 36; *Luria* v. *United States,* 231 U. S. 9; *Milheim et al.* v. *Moffatt Tunnel Dist.,* 262 U. S. 710; *Meyer* v. *Berland,* 39 Minn. 438; *McFarland* v. *American Sugar Co.,* 241 U. S. 79; *Orient Ins. Co.* v. *Daggs,* 172 U. S. 557; *Railroad Co.* v. *Simonson,* 64 Kans. 802; *Railway Co.* v. *Payne,* 83 Ark. 816; *Railway Co.* v. *Parks,* 32 Ark. 131; *Railway Co.* v. *Turnipseed,* 219 U. S. 35; *Schlesinger* v. *Wisconsin,* 270 U. S.

230; *Vega S. S. Co.* v. *Elevator Co.*, 75 Minn. 308; *Yee Hem* v. *United States*, 260 U. S. 178; *Ziegler* v. *Railroad Co.*, 58 Ala. 599.

Mr. Karl M. Geddes, with whom *Messrs. John J. Jones* and *B. R. Leydig* were on the brief, for defendants in error.

The statutes are an exercise of the police power and do not contravene the Fourteenth Amendment. *Noble State Bank* v. *Haskell*, 219 U. S. 108; *Id.* 571; *Whitman* v. *Nat'l Bank*, 176 U. S. 559; *Jones Nat'l Bank* v. *Yates*, 240 U. S. 541.

The right to conduct business in the form of a corporation, is a creature of law, and a State in authorizing corporations to carry on business may qualify the privilege by imposing such conditions as reasonably may be deemed expedient. *L. & N. R. R. Co.* v. *Melton*, 218 U. S. 36; *Missouri ex rel. Herwitz* v. *North et al.*, 271 U. S. 40; *Zucht* v. *King et al.*, 260 U. S. 174; *Hess* v. *Pawloski*, 274 U. S. 352; *Buck* v. *Bell*, 274 U. S. 200; *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 465; *Tinsley* v. *Anderson*, 171 U. S. 101; *Williams* v. *Eggleston*, 170 U. S. 304; *Western Turf Ass'n* v. *Greenburg*, 204 U. S. 359; *Magoun* v. *Illinois Savings Bank*, 170 U. S. 294; *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557; *Minnesota Iron Co.* v. *Kline*, 199 U. S. 593; *Railway Co.* v. *Matthews*, 165 U. S. 1; *Barbier* v. *Connolly*, 113 U. S. 27; *Whitman* v. *Nat'l Bank*, 176 U. S. 559; *Prudential Ins. Co.* v. *Cheek*, 257 U. S. 530.

When a litigant has had full opportunity in the state courts to present his defense, there has been a full compliance with the Fourteenth Amendment, and he has not been denied due process of law.

The presumption of fact specified in the Kansas law, is not violative of any provision of the Fourteenth Amendment. A State may declare proof of one fact pre-

sumptive evidence of another if there is rational connection between them. *James-Dickinson Mortgage Co.* v. *Harry,* 273 U. S. 119; *Hawes* v. *Georgia,* 258 U. S. 1.

Mr. Justice Holmes delivered the opinion of the Court.

These writs of error are brought by Ferry, formerly a director of the Butler County State Bank, of Kansas, and by the executor of a deceased director, to set aside judgments against them in suits by depositors in the bank, on the ground that the statutes of Kansas purporting to establish the directors' liability were contrary to the Fourteenth Amendment of the Constitution of the United States. The statutes were upheld by the State Court. 122 Kans. 675. *Ibid.* 691.

The plaintiffs, (the defendants in error,) made deposits in the bank at a time when it was insolvent but had not closed its doors. The statutes under which the directors were held liable to depositors and which are attacked here are Revised Statutes of Kansas, 1923, Chapter 9, ¶¶ 163, 164. The former of these makes it unlawful for any director to assent to the reception of deposits by his bank after he shall have had knowledge of the fact that it is insolvent. The law makes it the duty of the directors to examine into the affairs of the bank, and, if possible, to know its condition, and in case of his failure to do as required, he is to be held to have had knowledge of the insolvency of the bank, and is made 'individually responsible for such deposits so received.' By 9–164, in suits for deposits against officers "the fact that such banking institution was so insolvent or in failing circumstances at the time of the reception of the deposit charged to have been so received . . . shall be prima facie evidence of such knowledge and assent to such deposit . . . on the part of such officer . . . so charged therewith." It is said that 163 denies due pro-

cess of law by creating a conclusive presumption of knowledge from ignorance and by implying that the director knowingly assented to a deposit that he should not have received, of which in fact he knew nothing. As to 164 it is said that facts are made prima facie evidence of other facts that they have no rational tendency to prove. The law as construed by the Supreme Court of Kansas meets its severest test in the cases against the executor of Kramer, because Kramer, although not so ignorant or incapable of knowledge as thought by the Court of first instance, was seriously ill at the time of the deposits and seemed to have much to be said in his behalf, if the actual state of his knowledge had any relevancy as an excuse.

It is said that the liability is founded by the statute upon the directors' assent to the deposit and that when this is the ground the assent cannot be proved by artificial presumptions that have no warrant from experience. But the short answer is that the statute might have made the directors personally liable to depositors in every case, if it had been so minded, and that if it had purported to do so, whoever accepted the office would assume the risk. The statute in short imposed a liability that was less than might have been imposed, and that being so, the thing to be considered is the result reached, not the possibly inartificial or clumsy way of reaching it. If without any mention of assent or presumptions or prima facie evidence the statute had said: 'Every director of a bank shall be personally liable to depositors for every deposit accepted by the bank after it has become insolvent,' all objections would be met by the answer, 'You took the office on those terms.' The statute would be none the worse if it allowed a defence in the single case of the defendants having made an honest examination and having been led to believe that the bank was solvent. The mention of assent and evidence of knowledge cannot be pressed to conclusions that the statute manifestly does

not allow. The conclusions that, as construed by the State Court, it does impose, it imposes however much it may cut down the significance of the assent or knowledge to which it refers. As a matter of law there is nothing new in charging a party with knowledge of what it is his duty to know, in this case the insolvency of the bank, or with assent to deposits that he must expect while the bank's doors remain open. But the essential thing is that, whether in a roundabout or a perfectly natural way, the statute has said if you take the office you must take the consequences of knowledge whether you have it or not. In most contracts men take the risk of events over which they have imperfect or no control. The acceptance of a directorship is as voluntary an act as a contract.

The Supreme Court of Kansas affirmed judgments against Ferry and reversed judgments in favor of the executor of Kramer based on Kramer's incapacity to know of or assent to the deposits in question and ordered judgments against him. In so doing it violated no provision of the Constitution of the United States.

Judgments affirmed.

MR. JUSTICE SUTHERLAND, dissenting.

In respect of the prima facie presumption created by § 9–164 of the Kansas statute, I am unable to agree with the opinion of the Court insofar as that section affects the cases against Harris, Executor of the Will of Kramer, deceased. The evidence shows very clearly that, at the time the deposits in question were made and for a long time prior thereto, Kramer was physically incapable of investigating and ascertaining the condition of the bank, or of assenting to the reception of deposits by the bank, because of his serious illness which resulted in his death after undergoing a major surgical operation. It was substantially so found by the jury in one of the cases and by the trial court in the others. Under these circumstances,

the application of the statutory presumption was obviously injurious. Section 9–163 provides that it shall be unlawful for any president, director, etc., to assent to the reception of deposits, etc., after he shall have had knowledge of the fact that the bank is insolvent. Section 9–164, which creates the objectionable presumption, provides that "the fact that such banking institution was so insolvent or in failing circumstances at the time of the reception of the deposit charged to have been so received . . . shall be prima facie evidence of such . . . assent to such deposit . . . on the part of such officer . . ." Of course, the state may provide that proof of one fact shall be prima facie evidence of another; but this can be done consistently with the due process of law clause of the Fourteenth Amendment only where there is a rational relation between the two facts. *Bailey* v. *Alabama,* 219 U. S. 219, 238; *McFarland* v. *American Sugar Co.,* 241 U. S. 79, 86. In the latter case this Court said, quoting from *Mobile, J. & K. C. R. R.* v. *Turnipseed,* 219 U. S. 35, 43:

"It is 'essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate.'"

To me it seems clear that there is no rational relation between the fact of insolvency and the fact here presumed, namely, assent to the reception of a particular deposit. Rather, the rational presumption is the other way, since the law itself requires that an insolvent bank shall not receive deposits; and the assent of the director thereto would be an assent to a violation of law. I do not quarrel with the suggestion that it was within the constitutional power of the state to create an absolute liability against a director if, while insolvent, the bank of which he is a director receive a deposit. But this the state did not do.

Instead, it adopted a statute creating a liability only in case the director *assents* to the deposit; and I should have supposed the liability of the director must be measured by what the state has enacted and not by what it had the power to enact. Under such a statute, without more, it is perfectly plain that proof by the state of such assent would be necessary. But here the state by legislative fiat substituted for such proof on its part the prima facie presumption set forth. It was said that the bank was open and doing business and that it is a reasonable presumption from that fact that assent was given to the receipt of particular deposits. But we are dealing with a specific statutory provision and must take it as we find it; and by that provision the general transaction of business by the bank at the time it received the particular deposits is not made the basis of the statutory presumption. If it were, a different question would be presented. Under these circumstances, as it seems to me, the rule, requiring a rational connection between the fact proved and the ultimate fact to be presumed therefrom, plainly applies; and consequently the statutory provision in question is void.

MR. JUSTICE BUTLER and MR. JUSTICE SANFORD concur in this opinion.

L. P. LARSON, JR., COMPANY *v.* WM. WRIGLEY, JR., COMPANY

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 603. Argued April 26, 1928.—Decided May 14, 1928.

Upon an accounting of net profits derived from sales of goods in packages simulating those of a competitor, the defendant, if the infringement was conscious and deliberate, is not entitled to deduct the federal income and excess profits taxes. P. 99.

20 F. (2d) 830, reversed.

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CERTIORARI, 275 U. S. 521, to a decree of the Circuit Court of Appeals, approving in the main, but remanding for the making of certain deductions, a decree of the District Court for net profits on an accounting in a suit for unfair competition. The only question upon which certiorari was allowed, was whether federal income and excess profits taxes should be deducted. See also 253 Fed. 914; 275 *Id.* 535; 5 F. (2d) 731, 739; 248 U. S. 580.

Messrs. Charles A. Aldrich and *George I. Haight,* with whom *Messrs. Chester D. Kern, Ralph L. Peck,* and *Charles R. Aldrich* were on the brief, for petitioner.

The remedy of the Wrigley Company for the recovery of taxes paid by it is provided by statute and this remedy is exclusive.

The action of the Court of Appeals deprives petitioner of its opportunity to use the special remedies provided by Congress in its system of corrective justice. It is opposed to the statute, the rules and regulations thereunder, and to the holdings of this court.

Income and excess profits taxes are an excise tax upon respondent's doing of corporate business and are not deductible under principles of equitable accounting in determining the profits awarded petitioner.

The action of the Circuit Court of Appeals in deducting the excess profits and income taxes paid by respondent on account of the infringing business, will result in a wrongful double taxation of petitioner, and is otherwise unconscionable and contrary to well-established legal principles.

Mr. Isaac H. Mayer, with whom *Mr. Wallace R. Lane* was on the brief, for respondent.

In ascertaining the net profits of an infringer, the federal income and excess profits taxes paid by him are deductible like any other expense necessarily incurred in the conduct of the infringing business. *Galveston Electric Co.* v. *Galveston,* 258 U. S. 388; *Sly Mfg. Co.* v. *Pang-*

born Corp'n, 276 Fed. 971, affirmed, 284 Fed. 217; *MacBeth-Evans Glass Co.* v. *Smith Glass Co.,* 23 F. (2d) 459; *Ransome Machinery Co.* v. *Moody,* 282 Fed. 29; *Neeson* v. *Sangamon County Mining Co.,* 316 Ill. 397; *Kaufman* v. *Bowers,* 11 F. (2d) 662; *Malleable Iron Range Co.* v. *United States,* 62 Ct. Cls. 425, certiorari granted, 273 U. S. 688.

Respondent should be allowed to deduct the amount of federal taxes which it actually paid on the infringing profits.

Mr. Justice Holmes delivered the opinion of the Court.

There has been long litigation between the parties in this suit, the last stage of which appears in 20 F. (2d) 830. The Wrigley Company was ordered to account for net profits on sales of its 'Doublemint' gum in a package dress that infringed the Larson Company's 'Wintermint' gum package. During the accounting, questions arose that were decided by the Circuit Court of Appeals. To review one of these questions a writ of certiorari was granted by this Court. That question is whether, as held below with modifications that need not be mentioned, the Wrigley Company should be allowed to deduct the federal income and excess profits taxes from the profits with which it is to be charged.

No doubt there are cases in which such a deduction would be proper. But the question cannot be answered by the merely formal reply that if the Larson Company chooses to make the Wrigley Company its agent or trustee *ex maleficio* and to demand the profits made by the agent it must take the burden with the benefit and can have no more than the agent made in fact. To call the infringer an agent or trustee is not to state a fact but merely to indicate a mode of approach and an imperfect analogy by which the wrongdoer will be made to hand over the pro-

ceeds of his wrong. Circumstances will affect the conclusion, including in them the knowledge and the conduct of the party charged. It would be unjust to charge an infringer with the gross amount of his sales without allowing him for the materials and labor that were necessary to produce the things sold, but it does not follow that he should be allowed what he paid for the chance to do what he knew that he had no right to do. That is the position of the Wrigley Company as we understand the findings in the successive stages of this suit. 253 Fed. Rep. 914, 916. 275 Fed. Rep. 535, 537, 538. 5 F. (2d) 731, 739. 20 F. (2d) 830, 831. Even if the only relief that the Wrigley Company can get is a deduction from gross income when the amount of its liability is finally determined, the Larson Company will have to pay a tax on the Wrigley profits when it receives them, and in a case of what has been found to have been one of conscious and deliberate wrongdoing, we think it just that the further deduction should not be allowed.

Decree as to allowance of federal taxes reversed.

KING MANUFACTURING COMPANY *v.* CITY COUNCIL OF AUGUSTA ET AL.

ERROR TO THE SUPREME COURT OF GEORGIA.

No. 392. Argued March 12, 1928.—Decided May 14, 1928.

1. In § 237 (a) of the Judicial Code, as amended by Act of February 13, 1925, which gives this Court jurisdiction to review the judgments of state courts of last resort in any case "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," the words "statute of any State" are used in their larger sense, including every act, legislative in character, to which the State gives its sanction, no distinction being made between acts of the state legislature and other exertions of the State's law-making power. P. 102.

2. An ordinance of a city fixing rates for water power supplied from a canal owned and maintained by the city, is a "statute" of the State in this sense. P. 114.
3. In cases where contract obligations are said to have been impaired by subsequent legislation, contrary to the constitutional restriction, the findings of state courts as to the existence and obligations of the contract are entitled to respect but do not bind this Court. *Id.*

164 Ga. 306, affirmed.

ERROR to a judgment of the Supreme Court of Georgia sustaining the dismissal of a suit by the petitioner to enjoin the enforcement of a city ordinance fixing rates for water power.

Mr. Bryan Cumming for plaintiff in error.

Mr. E. H. Callaway, with whom *Mr. Archibald Blackshear,* City Attorney, was on the brief, for defendants in error.

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

This is a suit brought in a state court in Georgia to restrain the enforcement of an ordinance of the City of Augusta fixing rates for water power supplied from a canal owned and maintained by the city. The plaintiff is a manufacturing company which operates a mill adjacent to the canal with water power supplied therefrom. The objection urged against the ordinance is that it is repugnant to the contract clause of the Constitution of the United States, and therefore invalid, in that it impairs the obligation of a prior contract whereby the city undertook to supply water power for the plaintiff's mill in perpetuity at a lower rate than that fixed in the ordinance. The court of first instance held the ordinance valid and accordingly dismissed the suit. This was affirmed by the Supreme Court of the State, 164 Ga. 306; and the case is

here on writ of error allowed by the Chief Justice of that court.

Counsel on both sides treat the case as one which rightly may be brought to this Court on writ of error, but some members of the Court doubt that it is such a case. Therefore this question will be given immediate consideration.

The jurisdiction of this Court to review on writ of error judgments or decrees of state courts of last resort is defined by § 237(a) of the Judicial Code, as set forth in the amendatory act of February 13, 1925, c. 229, 43 Stat. 936. As there defined this jurisdiction extends to two classes of cases—

(1) "where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity;"

(2) "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."

Plainly the present case is not within the first provision. Is it within the second? This depends on the sense in which the words "a statute of any State" are used therein. If they are used as narrowly comprehending only an enactment of the state legislature, the case is excluded; but if they are used as broadly comprehending any legislation proceeding from the law-making agencies of the State, the case is included.

In usage "statute" is a term which has both a restricted and a broad signification. This is reflected in the following excerpt from Bouvier's Law Dictionary, Rawle's Revision:

"STATUTE. A law established by the act of the legislative power. An act of the legislature. The written will of the legislature, solemnly expressed according to the forms necessary to constitute it the law of the state.

"This word is used to designate the written law in contradistinction to the unwritten law.

"Among the civilians, the term statute is generally applied to laws and regulations of every sort; every provision of law which ordains, permits or prohibits anything is designated a statute, without considering from what source it arises."

The Constitution of the United States does not use the term "statute," but it does employ the term "law," often regarded as an equivalent, to describe an exertion of legislative power. Thus it is declared that a bill presented in either house of Congress, if receiving prescribed favorable consideration, shall "become a law," Art. I, § 7; that Congress may "make all laws" necessary and proper for carrying into execution various enumerated powers, Art. I, § 8, cl. 18; that no State "shall pass" any "*ex post facto* law or law impairing the obligation of contracts," Art. I, § 10, cl. 1; that no State "shall make or enforce any law" abridging the privileges or immunities of citizens of the United States, Fourteenth Amendment, § 1; that the Constitution, "laws" and treaties of the United States shall be the supreme law of the land and the judges in every State shall be bound thereby, anything in the Constitution or "laws" of any State to the contrary notwithstanding, Art. 6, cl. 2, and that the judicial power of the United States shall extend, among others, to all cases in law and equity arising under the Constitution, "laws" and treaties of the United States, Art. 3, § 2.

It of course rests with each State to determine in what form and by what agencies its legislative power may be exerted. It may legislate little or much in its constitution, may permit the electorate to make laws by direct vote, may entrust its legislature with wide law-making functions and may delegate legislative authority to subordinate agencies, such as municipal councils and state com-

missions. But whether this power be exerted in one form or another, or by one agency or another, the enactments put forth, whether called constitutional provisions, laws, ordinances or orders, are in essence legislative acts of the State; they express its will and have no force otherwise. As respects their validity under the Constitution of the United States all are on the same plane. If they contravene the restraints which that instrument places on the legislative power of a State they are invalid, no matter what their form or by what agency put forth; for, as this Court has said, the protection which these restraints afford applies, "whatever the form in which the legislative power is exerted; that is, whether it be by a constitution, an act of the legislature, or an act of any subordinate instrumentality of the State exercising delegated legislative authority, like an ordinance of a municipality or an order of a commission." *Standard Scale Company* v. *Farrell*, 249 U. S. 571, 577.

The jurisdictional provision we are considering is designed to be in aid of such protection. It proceeds on the theory that through inadvertence or design those who are entrusted with the legislative power of a State may exercise the same in a manner forbidden by the Constitution of the United States, and that the state courts may uphold such legislation when it should be held invalid. Unlike other state action, legislation consists of rules having continuing force and intended to be observed and applied in the future; and this regardless of the state agency from which it proceeds.

Were the question an open one, these considerations would afford impelling reasons for holding that the jurisdictional provision uses the words "a statute of any State" in their larger sense and is not intended to make a distinction between acts of a state legislature and other exertions of the State's law-making power, but rather to include every act legislative in character to which the

State gives its sanction. But the question is not an open one; it heretofore has been resolved in keeping with the view just indicated.

The jurisdictional provision originally was part of § 25 of the act of September 24, 1789, c. 20, 1 Stat. 73, 85, which authorized this Court to review on writ of error judgments and decrees of state courts of last resort in cases—

(1) " where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; "

(2) " where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of such their validity; "

(3) " where is drawn in question the construction of any clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision is against the title, right, privilege or commission specially set up or claimed by either party under such clause of said Constitution, treaty, statute or commission."

By the act of February 5, 1867, c. 28, 14 Stat. 385, that section was reënacted—the first and second provisions without change and the third to read as follows:

(3) " where any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held, or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission, or authority."

The three provisions—the third as so amended—were carried into § 709 of the Revised Statutes of 1873 and into § 237 of the Judicial Code of 1911. By the act of September 6, 1916, c. 448, 39 Stat. 726, the third provision was

eliminated so far as a review on writ of error is concerned; and by the act of February 13, 1925, *supra*, the first and second provisions were amended by omitting from both the words "or an authority exercised under" and with that change were reënacted in § 237(a).

In order that the second provision—the material one in this case—and the change made therein may be accurately in mind we now quote the provision in both its original and its amended form—

[Act 1789] "where is drawn in question the validity of a statute of, or an authority exercised under, any State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the States, and the decision is in favor of its validity."

[Act 1925] "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."

It will be seen that the phrase "a statute of any State" has been in the provision from the time of its original enactment, and that this phrase was retained in the reënactment of 1925 without change or qualification. So, its meaning before the reënactment is its meaning now.

Before coming to decided cases which we deem relevant it is well to refer to some which, although cited as in point, appear to us not to be so. *Weston* v. *Charleston*, 2 Pet. 449 and *Home Insurance Company* v. *Augusta*, 93 U. S. 116, are examples. The first is a case where a tax ordinance of Charleston was sustained by the state court over the objection that it was in conflict with the Constitution of the United States. This Court's jurisdiction was invoked, and was by it sustained, p. 463, on the ground that the city's action in adopting the ordinance was the "exercise of an authority" under the State. Whether the ordinance was a statute of the State was not considered. The other case also involved a municipal

ordinance which the state court had upheld against the contention that it was in conflict with the contract clause of the Constitution. This Court took jurisdiction, p. 121, on the grounds (a) that the validity of an authority exercised under the State was in question and (b) that a right claimed under the Constitution was denied. There was no negation of other grounds.

Williams v. *Bruffy*, 96 U. S. 176, is the first case in which the phrase "a statute of any State" in the jurisdictional provision was considered and construed. There a debt arising on contract and owing by a citizen of Virginia to citizens of Pennsylvania had been sequestrated during the Civil War under an enactment of the Confederate States and collected from the debtor by that Government. After the war the creditors brought a suit against the debtor's administrator in a state court in Virginia to collect the debt. The defendant interposed pleas setting up the sequestration and collection under the confederate enactment. Judgment went for the defendant on these pleas over the plaintiffs' objection that the confederate enactment was invalid under the Constitution; and the Supreme Court of Appeals sustained that ruling. The case was brought to this Court on writ of error, its jurisdiction being invoked on the grounds that the case was one (a) where the validity of both a statute of the State and an authority under the State was drawn in question as repugnant to the Constitution and was sustained, and (b) where a right, privilege and immunity claimed under the Constitution was denied. The jurisdiction was contested, but was sustained expressly on "both" grounds in a considered opinion by Mr. Justice Field, speaking for entire Court. In sustaining the first ground he said pp. 182–183:

"The pleas aver that a confederation was formed by Virginia and other States, called the Confederate States of America, and that under a law of this confederation,

enforced in Virginia, the debt due to the plaintiffs was sequestrated. Now, the Constitution of the United States prohibits any treaty, alliance, or confederation by one State with another. *The organization whose enactment is pleaded cannot, therefore, be regarded in this Court as having any legal existence. It follows that whatever efficacy the enactment possessed in Virginia must be attributed to the sanction given to it by that State.* Any enactment from whatever source originating, to which a State gives the force of law is a statute of the State, within the meaning of the clause cited relating to the jurisdiction of this Court. It would be a narrow construction to limit the term to such enactments as have gone through various stages of consideration by the legislature. There may be many acts authorized by the constitution of a State, or by the convention that framed it, which have not been submitted to the consideration of its legislature, yet have all the efficacy of laws. By the only authority which can be recognized as having any legal existence, that is, the State of Virginia, this act of the unauthorized confederation was enforced as a law of the Commonwealth. Its validity was drawn in question on the ground that it was repugnant to the Constitution of the United States; and the decision of the court below was in favor of its validity."

Ford v. *Surget,* 97 U. S. 594, is much like the case just cited. The plaintiff sued in a state court in Mississippi to recover for cotton belonging to him which the defendant had destroyed in that State during the Civil War in obedience to an enactment of the Confederate States. By special pleas the defendant set up that enactment in justification of the trespass; and the plaintiff insisted by demurrers that the enactment was contrary to the Constitution. The demurrers were overruled and judgment was given for the defendant, which the Supreme Court affirmed. The case was brought to this Court by

writ of error. The jurisdiction, although contested, was sustained in an opinion of Mr. Justice Harlan. He quoted with approval the above extract from *Williams* v. *Bruffy,* and added, p. 603:

"The general orders of the state court overruling the demurrers must be accepted, in every essential sense, as an adjudication in favor of the validity of an act of the confederate congress, recognized and enforced as law in Mississippi, and which act, according to the rule laid down in that case, must be, therefore, regarded by us as a statute of that State, within the meaning of the provisions of the act declaring the appellate jurisdiction of this court. It results that we have power to review the final judgment of the Supreme Court of Mississippi."

Stevens v. *Griffith,* 111 U. S. 48, is a case where the Supreme Court of Tennessee had given effect to an enactment of the Confederate States. This Court there said, after reciting its ruling in *Williams* v. *Bruffy,* p. 51:

"So, in this case the Confederate enactment, under which the confiscation of the money was had, can be treated only as a statute of Tennessee, by whose sanction it was enforced as a law of that State."

New Orleans Waterworks Co. v. *Louisiana Sugar Refining Co.,* 125 U. S. 18, is a case wherein this Court was asked on writ of error to review a judgment of the Supreme Court of Louisiana giving effect to an ordinance of New Orleans against the contention that it impaired the obligation of a contract. The opinion was by Mr. Justice Gray. After stating that, to be within the contract clause of the Constitution, the impairment must be "by a law of the State," and that this Court "has no jurisdiction to review a judgment of the highest court of a State, on the ground that the obligation of a contract has been impaired, unless some legislative act of the State has been upheld by the judgment sought to be reviewed," and after quoting with approval the statement

in *Williams* v. *Bruffy*—"Any enactment, from whatever source originating, to which a State gives the force of law, is a statute of the State, within the meaning of the clause cited relating to the jurisdiction of this Court," he said, p. 31:

"So a by-law or ordinance of a municipal corporation may be such an exercise of legislative power delegated by the legislature to the corporation as a political subdivision of the State, having all the force of law within the limits of the municipality, that it may properly be considered as a law, within the meaning of this article of the Constitution of the United States."

In *North American Storage Co.* v. *Chicago,* 211 U. S. 306, which came to this Court from a Circuit Court of the United States, the question was presented whether a municipal ordinance was state action within the clause in the Fourteenth Amendment prohibiting "any State" from denying due process or equal protection. The Court said, p. 313:

"In this case the ordinance in question is to be regarded as in effect a statute of the State, adopted under a power granted by the state legislature, and hence it is an act of the State within the Fourteenth Amendment."

The construction which was put on the phrase "a statute of any State" in the jurisdictional provision by the decisions in *Williams* v. *Bruffy, Ford* v. *Surget* and *Stevens* v. *Griffith* did not stop with those cases, but has been approvingly followed and applied in later cases.

In *Atlantic Coast Line R. R. Co.* v. *Goldsboro,* 232 U. S. 548, this Court was asked to review on writ of error a judgment of the Supreme Court of North Carolina giving effect to a municipal ordinance over the objection that it was invalid under the Constitution of the United States. Mr. Justice Pitney, speaking for the entire court, sustained its jurisdiction and on that point said, p. 555:

"A municipal by-law or ordinance, enacted by virtue of power for that purpose delegated by the legislature of the State, is a state law within the meaning of the Federal Constitution. [Citing cases.]

"And any enactment, from whatever source originating, to which a State gives the force of law, is a statute of the State, within the meaning of the pertinent clause of § 709, Rev. Stat.; Judicial Code, § 237; which confers jurisdiction on this court. *Williams* v. *Bruffy,* 96 U. S. 176, 183."

Reinman v. *Little Rock,* 237 U. S. 171, came here from the Supreme Court of Arkansas on writ of error. The sole question involved was the validity of a municipal ordinance which the state court had sustained against the objection that it was in conflict with the Constitution of the United States. Mr. Justice Pitney again speaking for the entire court said, p. 176:

"The decision of the state court of last resort is conclusive upon the point that the ordinance under consideration is within the scope of the powers conferred by the state legislature upon the city council of Little Rock. It must therefore be treated, for the purposes of our jurisdiction, as an act of legislation proceeding from the law-making power of the State; for a municipal ordinance passed under authority delegated by the legislature is a state law within the meaning of the Federal Constitution; and any enactment, from whatever source originating, to which a State gives the force of law, is a statute of the State within the meaning of Judicial Code, § 237, which confers jurisdiction upon this court. *Atlantic Coast Line* v. *Goldsboro,* 232 U. S. 548, 555, and cases cited."

Zucht v. *King,* 260 U. S. 174, was brought here on writ of error solely on the ground that the state court had upheld a municipal ordinance against the contention that

it was invalid under the Constitution of the United States. This Court dealt with the initial question of jurisdiction as follows, p. 176:

"The validity of the ordinances under the Federal Constitution was drawn in question by objections properly taken below. A city ordinance is a law of the State within the meaning of § 237 of the Judicial Code as amended, which provides a review by writ of error where the validity of a law is sustained by the highest court of the State in which a decision in the suit could be had. *Atlantic Coast Line R. R. Co.* v. *Goldsboro,* 232 U. S. 548, 555."

Further applying the ruling in *Williams* v. *Bruffy* this Court repeatedly has held that an order of a state commission made in the exercise of delegated legislative authority is a statute of the State in the sense of the jurisdictional provision. Excerpts from some of the cases—all brought here from state courts on writs of error—will suffice to show the course of decision.

"Such an order, being legislative in its nature and made by an instrumentality of the State, is a state law within the meaning of the Constitution of United States and the laws of Congress regulating our jurisdiction." *Lake Erie & Western R. R. Co.* v. *Public Utilities Commission,* 249 U. S. 422, 424.

"The validity of the order prescribing the rates was directly challenged on constitutional grounds, and it was held valid by the highest court of the State. The prescribing of rates is a legislative act. The commission is an instrumentality of the State, exercising delegated powers. Its order is of the same force as would be a like enactment by the legislature. If, as alleged, the prescribed rates are confiscatory, the order is void. Plaintiff in error is entitled to bring the case here on writ of error and to have that question decided by this Court. The motion to dismiss will be denied." *Bluefield Waterworks & Improvement Co.* v. *Public Service Commission,* 262

U. S. 679, 683, specifically followed and applied in *Northern Pacific Ry. Co.* v. *Department of Public Works,* 268 U. S. 39, 42.

"The cause is here upon writ of error. Considering the circumstances disclosed by the record we have no jurisdiction unless it affirmatively appears that in the court below there was duly drawn in question the validity of a statute or an authority exercised under the State because of repugnance to the Constitution, treaties or laws of the United States. Jud. Code, § 237, as amended Sept. 6, 1916. Under repeated rulings here, for jurisdictional purposes the order of the Commission must be treated as though an Act of the Legislature." *Live Oak Water Users Ass'n* v. *R. R. Commission,* 269 U. S. 354, 356.

"The authority of the Dock Commissioner and the Sinking Fund trustees, under the Act of 1871 [they exercised delegated legislative power], is such as to make the plan and the refusal equivalent to a statute of the State, and, assuming that it is in conflict with the grant and covenants of relators' deeds, it is a law of the State impairing a contract obligation under § 10, Article I, of the Federal Constitution. [Citing *New Orleans Waterworks Co.* v. *Louisiana Sugar Refining Co.,* 125 U. S. 18; *Williams* v. *Bruffy,* 96 U. S. 176, 183; and other cases.] We have jurisdiction of the writ of error under § 237 of the Judicial Code." *Appelby* v. *Delaney,* 271 U. S. 403, 409.

A like view of an order, legislative in nature, of a state commission has been taken in other related cases. *Grand Trunk Western Ry. Co.* v. *Railroad Commission,* 221 U. S. 400, 403; *Louisville and Nashville R. R. Co.* v. *Garrett,* 231 U. S., 298, 318; *Arkadelphia Milling Co.* v. *St. Louis Southwestern Ry. Co.,* 249 U. S. 134, 141; *Oklahoma Natural Gas Co.* v. *Russell,* 261 U. S. 290, 292.

In no case has the phrase "a statute of any State" in the jurisdictional provision been construed otherwise than as shown in the foregoing review. With its use else-

where—especially in connections indicative of its use in a different sense—we are not now concerned.

It is said that the act of February 13, 1925, which amended the jurisdictional provision was enacted with the purpose of contracting the obligatory jurisdiction of this Court. We recognize that there was such a purpose and that effect should be given to it. But the act dealt with several jurisdictional provisions, including those relating to cases coming to this Court from the Circuit Courts of Appeals, the District Courts, the Court of Appeals of the District of Columbia and the Court of Claims. It shows that the purpose was to cut down and change our jurisdiction in particular respects and to leave it as before in others. We are concerned here with a particular jurisdiction, as to which there was no cutting down or change. The terms whereby it was defined in the original provision were retained, and thus it was left as before.

We accordingly hold that the ordinance in question is a statute of the State within the meaning of the jurisdictional provision, and therefore that this case is rightly here on writ of error.* So we turn to the merits.

The adoption and terms of the ordinance are not in dispute. Nor is it questioned that the city became obligated long before the ordinance to supply water power from its canal for the plaintiff's mill. But it is questioned that there was any engagement for a designated price or rate in perpetuity. Both courts below found for the city on this point. That finding is entitled to respect, but is not conclusive; for it rests with this Court in cases like this, where contract obligations are said to have been impaired by subsequent legislation contrary to the constitutional restriction, to determine whether there was a contract and what obligations arose from it. *St. Paul Gas Light Com-*

* Followed in *Sprout* v. *South Bend* and *Nectow* v. *Cambridge*, decided this day, *post*, pp. 163, 183.

pany v. *St. Paul,* 181 U. S. 142, 147; *Appleby* v. *New York,* 271 U. S. 364, 379–380. It is admitted that there was here no formal contract. But it is insisted that a contract arose from conversations and correspondence between representatives of the plaintiff and officers of the city, and that it included an engagement for a designated price or rate in perpetuity. The proofs have been considered. It would serve no purpose to review them in this opinion. We think they fall short of showing any engagement respecting the rate, other than that it was to be the established rate for users in general. The rate had been fixed by ordinance when the plaintiff obtained the right to have water power supplied to its mill, but there was, as we construe the proofs, no engagement that that rate should continue indefinitely. The city may be under a duty to supply the power at a reasonable rate [See *Millers* v. *Augusta,* 63 Ga. 772], but that question is not in this case. The plaintiff's objection is confined to the asserted impairment of a prior contract.

Judgment affirmed.

MR. JUSTICE BRANDEIS (with whom MR. JUSTICE HOLMES concurs), dissenting.

I think that the writ of error should be dismissed. The judgment below was entered after the effective date of the Act of February 13, 1925, c. 229, 43 Stat. 936, 937, 942. That Act struck from § 237 of the Judicial Code the words "or an authority exercised under any State."[1] The section as so amended limits the right of review by writ of error to cases where the highest court of a State has denied the validity of a treaty or statute of the United States, or has affirmed the validity of a statute of a State, challenged as repugnant to the Constitution, treaties, or laws of the

[1] The Act of 1925 also struck out the words "or an authority exercised under the United States."

United States. Other cases can be reviewed only if this Court, in the exercise of its discretion, grants a writ of certiorari. Here the challenge was to the validity of an ordinance of a city. I cannot believe that if Congress had intended to maintain our jurisdiction to review judgments sustaining such ordinances on writ of error, it would not have found clearer language in which to express its purpose.

The question before us is the interpretation, not of the word "laws," used in the Constitution, but the narrower term "statute," employed in the Judiciary Act of 1789, c. 20, § 25, 1 Stat. 73, 85. And our task is to construe, not the single word "statute," but the phrase "statute of any State." Laws or regulations adopted by a municipality are called, in common speech, either ordinances or by-laws, not "statutes." [2] In some connections, rules established by an institution are referred to as statutes. Thus, the rules adopted by a university or its founder are sometimes spoken of as statutes of the university. But no one would call them statutes of the State under whose law the university is incorporated. Nor would any one, in refer-

[2] These are the terms employed in the charters of American cities and towns both before and since the adoption of the Constitution. They have been continuously employed apparently by all text-writers on municipal corporations and government. "Local laws of a municipal corporation, duly enacted by the proper authorities, prescribing general, uniform and permanent rules of conduct, relating to the corporate affairs of the municipality, are, in this country, generally designated as ordinances. 'By-laws' or 'bye-laws' was the original designation." McQuillin, Municipal Ordinances, § 1; 2 McQuillin, Municipal Corporations, § 632. "The result of legislative action by a municipal council or assembly is a local law usually denominated an ordinance." 2 Abbott, Municipal Corporations, § 514. See also Dillon, Municipal Corporations, 1 ed., p. 270; Munro, Municipal Government and Administration, p. 209; Reed, Municipal Government, p. 173. No instance has been found where such writers have used the word "statutes" in referring to municipal ordinances.

ring to the laws or regulations adopted by municipal or other corporations, speak of them as "statutes of the State." Has the phrase as originally used in § 25 of the Judiciary Act of September 4, 1789, c. 20, 1 Stat. 73, 85, and as reënacted in § 2 of the Act of February 5, 1867, c. 28, 14 Stat. 385, 386, in § 709 of the Revised Statutes, in § 237 of the Judicial Code, and finally in the Act of 1925, acquired a different, conventional, meaning so that it must be held to include municipal ordinances?

Our jurisdiction to review a judgment of a state court sustaining the validity of a municipal ordinance alleged to be repugnant to the Federal Constitution, was first invoked in *Weston* v. *City Council of Charleston*, 2 Pet. 449, 463–464. Section 25 of the Judiciary Act of 1789, which was then in force without amendment, authorized a review by writ of error in any case "where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of such their validity, or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute or commission." The jurisdiction having been questioned, because of the nature of the proceeding, Mr. Chief Justice Marshall took occasion to specify the clause of § 25 on which he conceived the jurisdiction to rest:

"In this case the city ordinance of Charleston is the exercise of an 'authority under the State of South Carolina,' 'the validity of which has been drawn in question on the ground of its being repugnant to the constitution,' and 'the decision is in favor of its validity'."

The jurisdiction then declared was exercised, without question, in the cases involving municipal ordinances that came before the Court during the next half century.[3] In 1876 the subject was carefully reconsidered in *Home Insurance Co.* v. *City Council of Augusta,* 93 U. S. 116, 121. After stating the possible bases of jurisdiction under § 709 of the Revised Statutes, the Court said:

"Here there was drawn in question the authority exercised by the city council under the State in passing the ordinance imposing the tax complained of. The question raised was as to its repugnancy to the Constitution of the United States; and the decision was in favor of the validity of the authority so exercised. A right was also claimed under the Constitution of the United States. The decision was adverse to the claim. The case is, therefore, within two of the categories we have stated. The jurisdictional objection cannot be maintained."

The Court would hardly have omitted to say that review might also have been had by virtue of the "statute" clause if it had been of opinion that a municipal ordinance could be properly so described.

The second of the categories mentioned in *Home Insurance Co.* v. *City Council of Augusta,* was eliminated, so far as the right to review by writ of error was concerned, by the Act of September 6, 1916, c. 448, § 2, 39 Stat. 726. In cases where the showing was merely that a title, right, privilege or immunity guaranteed by the Constitution had been claimed and denied, that Act provided that there could be no review except by certiorari. But as it left unchanged the clause regarding the validity of an authority, on which Mr. Chief Justice Marshall had based the power of this Court to review judgments sustaining municipal ordinances, our jurisdiction over such judgments remained unaffected. When, in 1925, the "authority" clause was

[3] *Waring* v. *The Mayor,* 8 Wall. 110; *Woodruff* v. *Parham,* 8 Wall. 123; *Osborne* v. *Mobile,* 16 Wall. 479; *Cannon* v. *New Orleans,* 20 Wall. 577. Compare *Barron* v. *Baltimore,* 7 Pet. 243, 245–246.

struck from § 237 of the Judicial Code and our jurisdiction on writ of error under that section was limited to cases involving the validity of a statute, Congress cannot have been unaware of the difference, for jurisdictional purposes, between a statute of a State and a municipal ordinance. For attention had been called to the difference by numerous decisions under several jurisdictional acts—the most recent being of wide public interest.

The Act of June 18, 1910, c. 309, 36 Stat. 539, 557, § 17 of which was embodied in the Judicial Code as § 266, declared that "no interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute" should issue except upon a hearing before three judges as there provided. An unbroken line of decisions, beginning in 1911, has held that a municipal ordinance is not a statute within the meaning of that section. *Sperry & Hutchinson Co.* v. *City of Tacoma,* 190 Fed. 682; *Cumberland Telephone & Telegraph Co.* v. *City of Memphis,* 198 Fed. 955; *Birmingham Water Works Co.* v. *City of Birmingham,* 211 Fed. 497, affirmed, 213 Fed. 450; *Calhoun* v. *City of Seattle,* 215 Fed. 226; *City of Des Moines* v. *Des Moines Gas Co.,* 264 Fed. 506; *City of Dallas* v. *Dallas Telephone Co.,* 272 Fed. 410. See also *Land Development Co.* v. *City of New Orleans,* 13 F. (2d) 898, reversed on the merits, 17 F. (2d) 1016. The principal ground of these decisions, namely, "that the natural meaning of 'statute of a state' is a statute or law directly passed by the Legislature of the state, and the natural meaning of 'any officer of such state' is an officer whose authority extends throughout the state, and is not limited to a small district," (198 Fed. 955, 957) is, of course, equally applicable to § 237 of the Judicial Code. It cannot have been unknown to Congress. The construction had already been established when the Act of March 4, 1913, c. 160, 37 Stat. 1013, amended § 266 so as to make

it clearly applicable to suits to enjoin the orders of a state commission.[4] The amending Act inserted after the words "in the enforcement or execution of such statute," the words "or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such State." Congress did not include in the amendment any reference to municipal ordinances. The fact that it did not is significant.[5]

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[4] See the debate in the Senate at the preceding session, 48 Cong. Rec. 8120–8123. The House Committee on the Judiciary was "of the opinion that the statute should be broadened, so as to prevent this kind of interference (i. e., by a single judge) with State officials who are performing their duties under the provisions of a statute enacted by the legislature of a State." House Report, 62d Cong., 3d Sess., No. 1584, p. 2. Mr. Clayton, who was in charge of the bill in the House, said that its purpose was "to put the order of a State railroad commission upon an equality with a statute of a State; in other words, to give the same force and effect to the order of a State railroad commission fixing rates as is accorded under existing law to a State statute." 49 Cong. Rec. 4773.

[5] This Court has not passed expressly on the construction to be given § 266 in this respect. Until amended by the Act of February 13, 1925, § 266 did not require the presence of three judges at the final hearing; and on appeal to this Court from the final decree the propriety of the action of the single judge in granting or denying a temporary injunction was not strictly in issue. *Shaffer* v. *Carter*, 252 U. S. 37, 44. But if this Court had doubted the power of a District Judge to act in such cases, it would hardly have mentioned without comment the fact that such a judge had granted or denied a temporary injunction. This it has done in a number of cases. See *United Railroads* v. *San Francisco*, 249 U. S. 517, 519; *Southern Iowa Electric Co.* v. *Chariton*, 255 U. S. 539, 541; *Galveston Electric Co.* v. *Galveston*, 258 U. S. 388, 390; *Paducah* v. *Paducah Ry. Co.*, 261 U. S. 267, 271; *St. Cloud Public Service Co.* v. *St. Cloud*, 265 U. S. 352, 355. Since the effective date of the Act of 1925, this Court has decided, on certiorari to Circuit Courts of Appeals, a number of cases in which an application for a temporary injunction against the enforcement of a municipal ordinance had been heard before, and the final decree rendered by, a single district judge. See *Hammond* v.

Prior to the Act of 1925, the difference, for purposes of appellate review, between a statute and a law enacted by a subordinate legislative body, had been called to the attention of Congress also by the cases which settled that the enactments of the legislatures and other law-making bodies of the territories and of the District of Columbia are not statutes of the United States within the meaning of legislation governing the jurisdiction of this Court. The question appears to have arisen first under the Act of March 3, 1885, c. 355, § 2, 23 Stat. 443. The phraseology of this statute was similar to that of § 25 of the Judiciary Act of 1789, and this Court has always recognized that decisions under it and its later reënactments are authoritative with regard to the construction of § 237 of the Judicial Code.[6] It permitted

Schappi Bus Line, 275 U. S. 164; *Hammond* v. *Farina Bus Line & Transportation Co.*, 275 U. S. 173; *Delaware, Lackawanna & Western R. R. Co.* v. *Morristown*, 276 U. S. 182. If a municipal ordinance had been a statute within § 266, the decrees of the district judges in these cases would have been void for want of jurisdiction.

[6] See *Ireland* v. *Woods*, 246 U. S. 323, 328, citing and following *Champion Lumber Co.* v. *Fisher*, 227 U. S. 445, 451; *Erie R. R. Co.* v. *Hamilton*, 248 U. S. 369, 372, citing and following *Baltimore & Potomac R. R. Co.* v. *Hopkins*, 130 U. S. 210, *District of Columbia* v. *Gannon*, 130 U. S. 227, and *United States* v. *Lynch*, 137 U. S. 280, 285; *Jett Bros. Distilling Co.* v. *City of Carrollton*, 252 U. S. 1, 6, citing and following *Baltimore & Potomac R. R. Co.* v. *Hopkins*, 130 U. S. 210, and *Champion Lumber Co.* v. *Fisher*, 227 U. S. 445, 450, 451; *Schaff* v. *Famechon Co.*, 258 U. S. 76, 81, citing and following *Baltimore & Potomac R. R. Co.* v. *Hopkins*, 130 U. S. 210; *Zucht* v. *King*, 260 U. S. 174, 177, citing and following *Taylor* v. *Taft*, 203 U. S. 461, and *Champion Lumber Co.* v. *Fisher*, 227 U. S. 445; *Lancaster* v. *McCarty*, 267 U. S. 427, 430, citing and following *Champion Lumber Co.* v. *Fisher*, 227 U. S. 445, 451. The significance of decisions under the Act of 1885 is confirmed by the legislative history of the Act, which shows, as seemed probable from its language, that the provision with respect to "a treaty or statute of or an authority exercised under the United States," was derived, like § 237 of the Judicial Code, from § 25 of the Judiciary Act of 1789. See 16 Cong. Rec. 670–671.

review of any judgment of the Supreme Court of a Territory or of the District of Columbia where "is drawn in question the validity of a treaty or statute of or an authority exercised under the United States." Thereafter, that provision, as modified by the Act creating the Court of Appeals for the District, February 9, 1893, c. 74, § 8, 27 Stat. 434, 436; District Code, § 233, 31 Stat. 1189, 1227, governed our appellate jurisdiction over the highest courts of the continental territories (other than Alaska) and of the District until the enactment of the Judicial Code, in which it was embodied as § 245 and, with important changes, as § 250. That our appellate jurisdiction over judgments involving the validity of acts of territorial legislatures and of the legislative body of the District, depended on the clause in the Act of 1885 allowing such review where the validity of an authority exercised under the United States had been challenged, was indicated in *Maricopa & Phoenix R. R. Co.* v. *Arizona,* 156 U. S. 347, 350–351, and *Parsons* v. *District of Columbia,* 170 U. S. 45, 49–50. The subject was fully discussed in more recent opinions. Thus, in *McLean* v. *Denver & Rio Grande R. R. Co.,* 203 U. S. 38, 47–48, our jurisdiction to review a judgment of the Supreme Court of New Mexico upholding the validity of a territorial law was sustained on the ground that "the validity of an authority exercised under the United States in the passage and enforcement of the law is directly challenged, and the case does involve the validity of an authority exercised under the power derived from the United States." The right to review on appeal a judgment involving the validity of an ordinance or regulation of the District of Columbia was rested upon the same ground in *Smoot* v. *Heyl,* 227 U. S. 518, 522, although the statute authorizing the District Commissioners to make regulations provided that they should "have the same force and effect within the District of Columbia as if enacted by Congress." Act

of June 14, 1878, c. 194, 20 Stat. 131. See also *Walker* v. *Gish*, 260 U. S. 447, 449.

A similar ruling was made in *Board of Public Utility Commissioners* v. *Manila Electric R. R. Co.*, 249 U. S. 262, where this Court dismissed an appeal and a writ of error to review, under § 248 of the Judicial Code, a judgment of the Supreme Court of the Philippine Islands. That section, until amended by the Act of September 6, 1916, c. 448, 39 Stat. 726, 727, authorized review by writ of error or appeal, of a judgment of the highest court of the Philippine Islands where either the validity or the construction of a statute of the United States was involved. *Reavis* v. *Fianza*, 215 U. S. 16, 21–22; *Gsell* v. *Insular Collector*, 239 U. S. 93, 94–96. The Railroad challenged an order of the Commissioners purporting to be made in execution of an Act of the Philippine Commission authorizing the city of Manila to grant a franchise ordinance passed under the powers thereby granted. This Court dismissed the appeal and writ of error for want of jurisdiction, necessarily holding "that the mere construction by the court of the franchise ordinance, and its consequent ruling that the duty did not rest on the Railroad Company to give the free transportation which the orders of the Commissioners had directed to be given" did not involve either the construction or the validity of a statute of the United States.

Obviously, the statutes of territorial legislatures, the regulations of the Commissioners of the District of Columbia, and the Philippine statutes and ordinances bear a relation to acts of Congress that is wholly comparable to that borne by municipal ordinances to the statutes passed by the legislature of a State. Congress cannot have intended that in the Act of 1925, the phrase "statute of any State" should be read as including municipal ordinances within a State while, under like circumstances, the phrase "statute of the United States" does not include

the ordinances of the District of Columbia, even where the enabling act provides that the ordinances shall have the same force as if enacted by the Congress of the United States.

Moreover, if municipal ordinances are deemed to be statutes of a State within the meaning of § 237 (a) of the Judicial Code, legislative orders of state commissions, boards, and officials must be also. Prior to the Act of 1925, judgments sustaining the validity of such orders were reviewable on writ of error as fully as judgments sustaining the validity of states and ordinances. Between the effective date of the Act of 1916 and that of the Act of 1925, this Court wrote opinions in 21 cases in which a judgment of the highest court of a State involving the validity of an order of a commission was reviewed on writ of error.[7] In none of the opinions was it stated that jurisdiction existed because an order is a statute of a State.[8] On the other hand, in *Lancaster* v. *McCarty,* 267

[7] In *Live Oak Water Users Association* v. *Railroad Commission,* 269 U. S. 354, the Court, while asserting its jurisdiction over judgments sustaining such orders, dismissed a writ of error, as the judgment below rested on adequate non-federal grounds.

[8] The jurisdiction was first challenged in *Bluefield Water Works & Improvement Co.* v. *Public Service Commission,* 262 U. S. 679. The Court said at p. 683: "The prescribing of rates is a legislative act. The commission is an instrumentality of the State, exercising delegated powers. Its order is of the same force as would be a like enactment by the legislature. If, as alleged, the prescribed rates are confiscatory, the order is void. Plaintiff in error is entitled to bring the case here on writ of error and to have that question decided by this Court." In *Northern Pacific Ry. Co.* v. *Department of Public Works,* 268 U. S. 39, 42, jurisdiction was assumed on the authority of the Bluefield case. In *Live Oak Water Users Association* v. *Railroad Commission,* 269 U. S. 354, 356, the Court said that "for jurisdictional purposes the order of the Commission must be treated as though an Act of the Legislature." This was said, of course, with reference to the situation under the Act of 1916, for the judgment under review was entered October 23, 1923.

U. S. 427, 430, where our jurisdiction was invoked to review, on writ of error, the judgment of a state court denying the validity of an order of the Interstate Commerce Commission, the jurisdiction was sustained on the ground that the order " is an authority exercised under the United States which by the contention of the shippers was drawn in question, and its validity denied by the state court." Can it be that, while our power to review on writ of error a judgment of a state court denying the validity of an order of the Interstate Commerce Commission rested on the " authority " clause, our power to review a judgment sustaining the validity of an order of a state commission did not? [9]

The difference between a statute and an ordinance for purposes of appellate review—a difference which rests wholly on expediency—had been acted upon by Congress half a century earlier, when it undertook to deal with the congestion of business in this Court by regulating the

[9] Since the effective date of the Act of 1925, no judgment of a state court has been reviewed by this Court on writ of error, where the sole claim was that a commission order was unconstitutional. In the following cases, governed by the Act of 1925, in which this Court reviewed on writ of error a judgment of a state court sustaining the validity of a commission order, the validity of the underlying statute as well as of the order was attacked: *Frost & Frost Trucking Co.* v. *Railroad Commission,* 271 U. S. 583; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Railroad Commission,* 272 U. S. 605; *Miller Lumber Co.* v. *Floyd,* 273 U. S. 672 (Per Curiam); *Fox River Paper Co.* v. *Railroad Commission,* 274 U. S. 651; *Pierce* v. *Barker,* 274 U. S. 718 (Per Curiam); *Stimson Lumber Co.* v. *Kuykendall,* 275 U. S. 207; *International Great Northern R. R. Co.* v. *Railroad Commission,* 275 U. S. 503 (Per Curiam). In *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Public Utilities Commission,* 274 U. S. 344, and in *Aetna Insurance Co.* v. *Hyde,* 275 U. S. 440, the review was by certiorari. In *Aetna Insurance Co.* v. *Baker,* 276 U. S. 628, certiorari was denied. Compare *Phillips* v. *Oklahoma,* 274 U. S. 721 (Per Curiam); *Phillips* v. *Oklahoma,* 275 U. S. 489 (Per Curiam); *Missouri* v. *Public Service Commission,* 275 U. S. 489 (Per Curiam).

priority of hearings in revenue cases. Act of June 30, 1870, c. 181, 16 Stat. 176; *Davenport City* v. *Dows,* 15 Wall. 390, 392.[10] It was reaffirmed when Congress, in 1925, withdrew the right to a direct appeal from the District Court in cases involving the validity of municipal ordinances, though allowing such an appeal in certain cases involving the validity of statutes and orders of commissions. On the other hand, the essential identity of statutes, ordinances, and orders, where the question concerns substantive rights, has always been recognized. Since all regulations established by competent authority are laws, the comprehensive term "laws" has been used when it was desired to include all forms of legislative action.[11] Thus, as the enactments of a subordinate body exercising legislative authority are a part of the laws of a State, an ordinance or an order is a law within the meaning of the contract clause and is state action within the prohibitions of the Fourteenth Amendment. *North*

[10] Mr. Chief Justice Chase explained why the Act should be construed as applying only to statutes and not to municipal ordinances: "This preference is given, plainly enough, because of the presumed importance of such cases to the administration and internal welfare of the States, and because of their dignity as equal members of the Union. The reasons for preference do not apply to municipal corporations, more than to railroad and many other corporations." p. 392.

[11] In procedural matters—which, like jurisdiction, rest upon considerations of expediency—the difference between statutes and ordinances has been observed, in some instances even when in the legislation the more comprehensive term "laws" was used. Such was the case in *Davenport City* v. *Dows,* supra. Again, while municipal ordinances are "laws of the several states" within the meaning of § 34 of the Judiciary Act of 1789, 1 Stat. 73, 92, and § 721 of the Revised Statutes, they will not be judicially noticed in the federal courts; for "an ordinance is not a public statute, but a mere municipal regulation." *Robinson* v. *Denver Tramway Co.,* 164 Fed. 174, 176. Compare *Garlich* v. *Northern Pacific Ry. Co.,* 131 Fed. 837, 839; *Choctaw, O. & G. R. R. Co.* v. *Hamilton,* 182 Fed. 117, 121.

American Cold Storage Co. v. *Chicago,* 211 U. S. 306, 313; *Grand Trunk Ry. Co.* v. *Railroad Commission,* 221 U. S. 400, 403; *Ross* v. *Oregon,* 227 U. S. 150, 162–163; *Lake Erie & Western R. R. Co.* v. *Public Utilities Commission,* 249 U. S. 422, 424; *Standard Scale Co.* v. *Farrell,* 249 U. S. 571, 577. For, as this Court has pointed out in *New Orleans Water Works Co.* v. *Louisiana Sugar Refining Co.,* 125 U. S. 18, 30, 31; "it is not strictly and literally true, that a law of a State, in order to come within the constitutional prohibition, must be either in the form of a statute enacted by the legislature in the ordinary course of legislation, or in the form of a constitution established by the people of the State as their fundamental law." [12]

Prior to the Act of 1925, final judgments of a district or circuit court involving the constitutional validity of a municipal ordinance could be brought directly to this Court by writ of error or appeal under § 5 of the Court of Appeals Act, Act of March 3, 1891, c. 517, 26 Stat. 826, 827–828, and § 238 of the Judicial Code, because such review was authorized "in any case that involves the construction or application of the Constitution of the United States," and "in any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States." *Davis & Farnum Manufacturing Co.* v. *City of Los Angeles,* 189 U. S. 207, 216; *Boise Artesian Water Co.* v. *Boise City,* 230 U. S. 84, 90; see *Standard Scale Co.* v. *Farrell,* 249 U. S. 571, 577. And likewise a case involving the constitutional validity of an

[12] It was on this statement of Mr. Justice Gray's that the Court relied in *North American Cold Storage Co.* v. *Chicago,* 211 U. S. 306, 313, where it answered a contention that a bill alleging only municipal legislative action presented no constitutional question sufficient to sustain the jurisdiction of the circuit court, by saying: "In this case the ordinance in question is to be regarded as in effect a statute of the State, adopted under a power granted it by the state legislature, and hence it is an act of the State within the Fourteenth Amendment."

ordinance could be brought here on writ of error to or on appeal from the Circuit Court of Appeals if the jurisdiction of the district or circuit court had been invoked in part on constitutional grounds. *City of Vicksburg* v. *Henson,* 231 U. S. 259, 267. But in 1925 Congress amended § 238 so as to confine the right to a direct appeal in cases involving the validity of state action to those which fell within the provisions of § 266—provisions which had already been construed as not including municipal ordinances. Unless the phrase "statute of any State" as used in §§ 237(a) and 240(b) of the Judicial Code as amended, includes municipal ordinances, no case from any lower court involving only the validity of a municipal ordinance can now be reviewed by this Court otherwise than upon certiorari.

When it is borne in mind that the severe limitations upon the right of review by this Court imposed by the Act of 1925 were made solely because the increase of the Court's business compelled, the reasons why Congress should have taken away the right to a review by writ of error to the highest court of a state in cases involving the validity of ordinances, while leaving unaffected the right in cases involving the validity of statutes, becomes clear. There are only 48 States. In 1920 there were 924 municipalities in the United States of more than 8,000 inhabitants.[13] The validity of ordinances of even smaller municipalities had come to this Court for adjudication.[14]

[13] Fourteenth Census of the United States (1920), vol. I, table 27.

[14] See, e. g., *Brennan* v. *Titusville,* 153 U. S. 289; *Wabash R. R. Co.* v. *Defiance,* 167 U. S. 88; *Wilson* v. *Eureka City,* 173 U. S. 32; *Skaneateles Water Co.* v. *Skaneateles,* 184 U. S. 354; *Western Union Telegraph Co.* v. *New Hope,* 187 U. S. 419; *Williams* v. *Talladega,* 226 U. S. 404; *Pierce Oil Corporation* v. *Hope,* 248 U. S. 498. In *Village of Terrace Park* v. *Errett,* 273 U. S. 710, and *Village of University Heights* v. *Cleveland Jewish Orphans Home,* 275 U. S. 569, the Court denied petitions for certiorari in cases where Circuit Courts of Ap-

The increasingly complex conditions of urban life have led, as this Court noted in *Village of Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 386–387, to a corresponding increase in municipal police legislation. Recently, two classes of municipal ordinances, new in character—those relating to zoning and those relating to motor vehicles—had become the subject of many controversies. The constitutionality of these ordinances can rarely be determined simply by applying a general rule. The Court must consider the effect of the ordinance as applied. As the validity of the particular ordinance depends ordinarily upon special facts,[15] these must be examined whenever there is jurisdiction. *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282. Though no burdensome factual inquiry is involved, the controversy may often be of trifling significance, as in the case at bar. Thus, persuasive reasons existed why Congress should have denied, in 1925, review by writ of error in cases which involved only the validity of a municipal ordinance.

If, by striking out from § 237 of the Judicial Code the clause "or an authority exercised under any State," Congress did not exclude from review by writ of error cases involving the validity of municipal ordinances and commission orders, it wholly failed to accomplish what, in view of the statements made to it in regard to the

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peals had held the zoning ordinances of small suburban districts to be unconstitutional as applied to the respondents. If ordinances are statutes of a State, these cases could have been brought here by writ of error under § 240(b). In *Gorieb* v. *Fox*, 274 U. S. 603, a judgment of a state court sustaining a zoning ordinance was reviewed by certiorari. Compare *Township of Maplewood* v. *Margolis*, 276 U. S. 617, certiorari denied; *Nectow* v. *City of Cambridge*, *post*, p. 183.

[15] The Court has noted this dependence with respect both to zoning ordinances and to bus regulations. See *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 395; *Hammond* v. *Schappi Bus Line*, 275 U. S. 164, 170.

effect of the amendment,[16] must be deemed to have been its purpose in so amending the section. That is, to relieve this Court, in many cases, of the burden of obligatory review. For, other than these, there had been considered by this Court, in the nine years between the effective dates of the Jurisdictional Acts of 1916 and 1925, and decided with opinions, not more than eight cases involving the validity of an authority exercised under a State or under the United States.[17] On the other hand the forty cases in which judgments of state courts sustaining municipal ordinances or commission orders had been reviewed on writ of error, had entailed a burden out of all proportion to their number. The evidence introduced to establish the facts in cases involving the validity either of orders or of municipal ordinances is often both volum-

[16] See Hearing before a Subcommittee of the Committee on the Judiciary of the United States Senate, 68th Cong., 1st Sess., on S. 2060, p. 35; Hearing before the Committee on the Judiciary of the House of Representatives, 68th Cong., 2d Sess., on H. R. 8206, p. 13.

[17] In only three cases in which opinions were written, aside from those involving municipal ordinances and commission orders, does jurisdiction appear to have been exercised under the clause in the Act of 1916 allowing a writ of error in cases where the validity of an authority exercised under a State has been challenged and sustained: *Schwab* v. *Richardson,* 263 U. S. 88; *Love* v. *Griffith,* 266 U. S. 32; *Appleby* v. *Delaney,* 271 U. S. 403. Possibly, under the view announced by the Court, even such state action as was involved in these cases amounts to "a statute of a state." In five cases jurisdiction seems to have been based on the clause allowing a writ of error where the validity of an authority exercised under the United States has been denied: *American Express Co.* v. *Caldwell,* 244 U. S. 617; *Northern Pacific Ry. Co.* v. *North Dakota,* 250 U. S. 135; *Dakota Central Telephone Co.* v. *South Dakota,* 250 U. S. 163; *Davis* v. *Newton Coal Co.,* 267 U. S. 292; *Lancaster* v. *McCarty,* 267 U. S. 427. The first and the last of this group concerned orders of the Interstate Commerce Commission which, presumably, must be held to be statutes of the United States if the orders of state commissions are statutes of a state. Perhaps the other three as well were statutes of the United States under the view now taken by the Court.

inous and conflicting.[18] Condensation of the evidence is not required, as in cases coming from the lower federal courts. See Equity Rule 75 (b), 226 U. S. Appendix 23; Rule 7 (2), 266 U. S. 657–658. Compare *Barber Asphalt Paving Co.* v. *Standard Asphalt & Rubber Co.*, 275 U. S. 372. Although the evidence is often conflicting, findings of fact are not required. Compare *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Tompkins,* 176 U. S. 167, 179; *Lincoln Gas & Electric Light Co.* v. *Lincoln,* 223 U. S. 349, 364; *City of Hammond* v. *Schappi Bus Line,* 275 U. S. 164, 171. Congress must have had the threatening volume and the heavy burden of this litigation in mind when it struck from § 237 of the Judicial Code the words "or an authority exercised under any State."

From the decision of *Weston* v. *City Council of Charleston,* 2 Pet. 449, 463–464, in which Mr. Chief Justice Marshall rested the jurisdiction of this Court to review the judgments of state courts involving the validity of municipal ordinances upon the clause "or an authority exercised under any State," to the passage of the Act of 1925, ninety-six years elapsed. During that period the Court wrote opinions in a multitude of cases in which that specific jurisdiction was exercised. In only two of them has there been found any statement that the jurisdiction could be sustained on the ground that a municipal ordinance is a statute of a State, within the meaning of § 25 of the Judiciary Act of 1789 or its later reenact-

[18] Thus, in *Southwestern Bell Telephone Co.* v. *Public Service Commission,* 262 U. S. 276, the record was 685 pages in length. In *Bluefield Water Works & Improvement Co.* v. *Public Service Commission,* 262 U. S. 679, the record extended over 1398 pages. The record in *Northern Pacific Ry. Co.* v. *Department of Public Works,* 268 U. S. 39, contained 1131 pages in addition to numerous exhibits. In *Hammond* v. *Schappi Bus Line,* 275 U. S. 164, and *Hammond* v. *Farina Bus Line & Transportation Co.*, 275 U. S. 173, the Court found itself compelled to remand to the District Court in order for that court to make proper findings of fact.

ments. These two opinions were written at successive terms by the same member of the Court. *Atlantic Coast Line R. R. Co.* v. *Goldsboro,* 232 U. S. 548, 555; *Reinman* v. *Little Rock,* 237 U. S. 171, 176. An examination of the record and briefs in the two cases seems to make it clear that the statements were obiter and were made inadvertently. No question of the jurisdiction of this Court under § 237 of the Judicial Code was raised or discussed by counsel in either case; and this Court could not, under the legislation then in force, have entertained a doubt as to the existence of the jurisdiction. Neither opinion of the Court refers to *Weston* v. *City Council of Charleston,* 2 Pet. 449, 463–464, or to *Home Insurance Co.* v. *City Council of Augusta,* 93 U. S. 116, 121—the cases which, on full consideration, had settled that the basis of our jurisdiction was the clause relating to the validity of an authority. Neither refers to *McLean* v. *Denver & Rio Grande R. R. Co.,* 203 U. S. 38, 47–48, or to *Smoot* v. *Heyl,* 227 U. S. 518, 522—the cases which had recently confirmed that ruling. There was obviously no intention to overrule these cases.

The only authority cited in support of the statement in the *Goldsboro* and *Little Rock* cases, *Williams* v. *Bruffy,* 96 U. S. 176, 183, furnishes no basis for them. That case involved an act of the Congress of the Confederate States—a body whose legislation would obviously be described in common speech as "statutes." It was conceded that the particular act was a "statute." The question was whether it was a statute "of any State."[19] The Court

[19] That the sole question discussed was whether the act of the Congress of the Confederate States was an act of "any State" appears from the briefs on file in the office of the Clerk. See Supplemental Brief of Enoch Totten for the Plaintiff in Error, pp. 10–11; Brief of Henry W. Garnett for the Defendant in Error, p. 3; Brief of William A. Maury, as *amicus curiae,* pp. 4, 5, 7. The question was thus stated by Mr. Maury on p. 5 of his brief: "Upon what ground, then, can it

held that since the enactment had been given the force of law in Virginia, it was as much the action of that State as if it had been originally passed by an authorized legislative body. In being so adopted by Virginia the enactment clearly did not lose the quality which it had had from its inception, namely, that of being a "statute." It was in this connection that Mr. Justice Field said: "Any enactment, from whatever source originating, to which a State gives the force of law is a statute of the State, within the meaning of the clause cited relating to the jurisdiction of this court." This language was used with reference to the acts of an irregular legislative body whose enactments would be commonly described as "statutes." It had no reference to the acts of a regular legislative body whose enactments would never be characterized as statutes, in ordinary speech. That Mr. Justice Field would not so have applied it, is clear. For in the term of Court preceding that in which *Williams* v. *Bruffy* was decided, he had participated in the decision in *Home Insurance Co.* v. *City Council of Augusta,* 93 U. S. 116, 121, in which the Court had plainly indicated that a municipal ordinance was not a "statute of any State."

The dicta concerning our jurisdiction in *Atlantic Coast Line R. R. Co.* v. *Goldsboro,* and in *Reinman* v. *Little*

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be maintained that a statute of, or authority exercised under, the hostile *de facto* Government of Virginia was the statute of or authority of a State, in the sense of the law which is this Court's commission to take cognizance of appeals from the state tribunals? (5. How., *Scott* vs. *Jones*)." The case cited by Mr. Maury, 5 How. 343, 376, held that the statutes of an unorganized political body were not statutes "of a State" within the meaning of § 25 of the Judiciary Act, although that body later became a State. In *Miners Bank* v. *Iowa,* 12 How. 1, a territorial statute was held not to be a statute "of a State" within § 25, though the Territory had since become a State. The language in *Ford* v. *Surget,* 97 U. S. 594, 603, 604, and *Stevens* v. *Griffith,* 111 U. S. 48, 50, also makes clear the exact point of the decision in *Williams* v. *Bruffy.*

Rock, have never been repeated in any later case dealing with municipal ordinances, even where the decisions in the two cases have been relied upon. Some care seems to have been taken not to repeat the expression that a municipal ordinance was a statute of a State. See *Thomas Cusack Co.* v. *Chicago,* 242 U. S. 526, 529; *Zucht* v. *King,* 260 U. S. 174, 176. To construe the phrase "statute of any State" as applying to a municipal ordinance disregards the common and appropriate use of the words; ignores decisions which for nearly a century have governed our jurisdiction to review judgments of state courts sustaining the validity of such ordinances; and tends to defeat the general purpose of the Act of 1925 "to relieve this Court by limiting further the absolute right to a review by it." *Moore* v. *Fidelity & Deposit Co.,* 272 U. S. 317, 321; *Smith* v. *Wilson,* 273 U. S. 388, 390.[20] It completely frustrates the particular purpose which Congress must have had in striking from § 237 the clause "or an authority exercised under any state."[21] The trival character of the substan-

[20] Much weight was given to this purpose in construing earlier acts reducing our jurisdiction. Compare *McLish* v. *Roff,* 141 U. S. 661, 666; *Robinson* v. *Caldwell,* 165 U. S. 359, 362; *American Sugar Refining Co.* v. *New Orleans,* 181 U. S. 277, 281, all construing the Circuit Court of Appeals Act, March 3, 1891, c. 517, 26 Stat. 826; *American Security & Trust Co.* v. *District of Columbia,* 224 U. S. 491, 495, construing § 250 of the Judicial Code; *Inter-Island Steam Navigation Co., Ltd.,* v. *Ward,* 242 U. S. 1, construing § 246 of the Judicial Code, as amended by the Act of January 28, 1915, c. 22, 38 Stat. 803.

[21] Since the effective date of the Act of 1925, judgments of state courts sustaining the validity of municipal ordinances have been reviewed on writ of error in a number of cases. *Beery* v. *Houghton,* 273 U. S. 671 (Per Curiam); *Ohio ex rel. Clarke* v. *Deckebach,* 274 U. S. 392; *Angelo* v. *Winston-Salem,* 274 U. S. 725 (Per Curiam); *Bloecher & Schaaf* v. *Baltimore,* 275 U. S. 490 (Per Curiam); *Kresge Co.* v. *Dayton,* 275 U. S. 505 (Per Curiam). Compare *Natchez* v. *McNeely,* 275 U. S. 502 (Per Curiam). But in none of them did

tive question presented by this case—in which a writ of certiorari, if applied for, would plainly not have been granted—illustrates the wisdom of Congress in limiting our jurisdiction on writ of error.

SULTAN RAILWAY & TIMBER COMPANY *v.* DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON ET AL.

ECLIPSE MILL COMPANY *v.* SAME.

ERROR TO THE SUPREME COURT OF WASHINGTON.

Nos. 274 and 275. Argued March 5, 1928.—Decided May 14, 1928.

1. An order of a state bureau requiring a manufacturer to report the number and wages of employees, and to pay premiums or assessments into the state workmen's compensation fund out of which injured employees are compensated, is a "statute" of the State within the meaning of Jud. Code, § 237 (a). *King Mfg. Co.* v. *Augusta, ante,* p. 100. P. 136.
2. Employment on a navigable river in assembling saw logs there in booms for towage elsewhere for sale, and the breaking up of booms which have been towed on such a river to a saw mill and the guiding of the logs to a conveyor extending into the river by which they are drawn into the mill for sawing, is employment of a local character having only an incidental relation to navigation and commerce, and the rights and obligations of the employees and their employers arising from injuries suffered by the former may be regulated by the local compensation law. P. 137.

141 Wash. 172, affirmed.

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counsel question the jurisdiction of this Court, or call to our attention the significance of the amendment of § 237 made by the Act of 1925. It is well settled that the exercise of jurisdiction under such circumstances is not to be deemed a precedent when the question is finally brought before us for determination. *United States* v. *More,* 3 Cranch, 159, 172; *Snow* v. *United States,* 118 U. S. 346, 354; *Cross* v. *Burke,* 146 U. S. 82, 86; *Louisville Trust Co.* v. *Knott,* 191 U. S. 225, 236; *Arant* v. *Lane,* 245 U. S. 166, 169.

ERROR to judgments of the Supreme Court of Washington, affirming judgments which upheld an order of the respondent, requiring the petitioners to make reports and deposits under the State Workmen's Compensation Law.

Mr. Frederic E. Fuller, with whom *Messrs. James W. McBurney* and *John H. O'Brien* were on the brief, submitted for plaintiffs in error.

Mr. Mark H. Wight, with whom *Mr. John H. Dunbar* was on the brief, for defendants in error.

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

These suits present the same questions, were heard together and may be disposed of in one opinion, as they were below.

They were brought to restrain the enforcement of an order, legislative in character, made by a state bureau—the objection to the order being that it is repugnant to the Constitution and laws of the United States in that it impinges on the admiralty and maritime jurisdiction of the United States. The order was upheld by the trial court and by the Supreme Court of the State, 141 Washington 172. The cases are here on writs of error sued out under § 237(a) of the Judicial Code.

The order is a statute of the State within the meaning of that section, and therefore our jurisdiction is invoked in the right mode. *John P. King Manufacturing Co.* v. *Augusta,* ante, p. 100, and cases there cited.

The order requires each of the plaintiffs from time to time to report the number of men employed by it in the work about to be described; together with the wages paid to them, and to pay into the State's workmen's compensation fund, out of which injured employees are compensated, premiums or assessments based on such wages.

The plaintiff in one suit is conducting logging operations, a part of which consists in putting sawlogs into booms, after they have been thrown into a navigable river, so that they conveniently may be towed elsewhere for sale. The men are employed in the booming work. The plaintiff in the other suit conducts a saw mill on the bank of a navigable river. Logs are towed in booms to a point adjacent to the mill and then anchored. The booms afterwards are taken apart and the logs are guided to a conveyor extending into the river and then drawn into the mill for sawing. The men are employed in taking apart the booms and guiding the logs to the conveyor. In both instances the place of work is on navigable water—in one it is done before actual transportation begins and in the other after the transportation is completed.

It is settled by our decisions that where the employment, although maritime in character, pertains to local matters, having only an incidental relation to navigation and commerce, the rights, obligations and liabilities of the parties, as between themselves, may be regulated by local rules which do not work material prejudice to the characteristic features of the general maritime law or interfere with its uniformity. *Grant Smith-Porter Co.* v. *Rohde,* 257 U. S. 469; *Millers' Indemnity Underwriters* v. *Braud,* 270 U. S. 59; *Alaska Packers Association* v. *Industrial Accident Commission,* 276 U. S. 467.

We think the order in question as applied to the situations disclosed comes within that rule.

Judgments affirmed.

MR. JUSTICE BRANDEIS.

For reasons stated in *John P. King Manufacturing Co.* v. *City Council of Augusta,* ante, p. 100, MR. JUSTICE HOLMES and I think that the writs of error in these cases also should be dismissed. Treating these writs of error as

petitions for certiorari (see *Gaines* v. *Washington,* ante, p. 81), we think that the petitions should be denied. The trivial character of the questions presented illustrates again the wisdom of not granting, in cases involving the orders of administrative boards, a review as of right—with its attendant right to oral argument. It is true that each of these cases presents a question involving the Federal Constitution. But in both the controlling principle is well settled, and the question presented is simply whether on the particular facts it is applicable. Obviously such a question is of no general importance. The number of administrative boards, state and municipal, with like power to issue orders is now very large. Each board issues many orders. And each order may, by its application to varying facts, give rise to many distinct constitutional questions. *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282.

HAMBURG-AMERICAN LINE TERMINAL & NAVIGATION COMPANY *v.* UNITED STATES.

SAME *v.* SAME.

ATLAS LINE STEAMSHIP COMPANY *v.* SAME.

APPEALS FROM THE COURT OF CLAIMS.

Nos. 3, 4, 5. Argued April 25, 1928.—Decided May 14, 1928.

1. Under the Trading With the Enemy Act of October 6, 1917, § 2, property in this country owned by a domestic corporation was non-enemy property even though an enemy owned all of its stock. P. 140.
2. Where property of a domestic corporation whose stock was enemy-owned was taken over during the war and the compensation fixed by the President was paid, interest on the sum paid is not recoverable from time of taking to time of payment, in the absence of anything showing that due allowance for the delay was not made in fixing the compensation. P. 141.

3. Petitions in these cases alleging taking and use of plaintiffs' property by the United States, state causes of action but should be made more definite and certain by amendment. P. 141.

59 Ct. Cls. 461; *Id.* 974, reversed.

APPEALS from judgments of the Court of Claims dismissing petitions based on the taking and use of plaintiffs' property during the war.

Mr. Charles H. Le Fevre for appellants.

Solicitor General Mitchell for the United States.

Congress has adopted the policy of determining the status of corporations as enemy or not without regard to the nationality of their stockholders, and the United States admits error in the decision of the Court of Claims in so far as it held that the property of New Jersey corporations was enemy-owned because all their stock was enemy-owned.

As the appellant in each case is to be dealt with as a citizen of the United States, notwithstanding its stock was enemy-owned, then upon the taking of the use of its property a contract to pay just compensation for that use was implied.

The claim for interest on the award of compensation for the taking of the title must fail because there is nothing on the face of the award or in the petition to indicate that any item of just compensation was omitted.

The United States concedes that the judgments should be reversed and compensation awarded for the value of the use.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

These appeals were taken June 16, 1924, from judgments of the Court of Claims which sustained demurrers to the petitions. For the views of that Court see *Deutsch-Australische Dampfschiffs-Gesellschaft, Appellant,* v. *The*

United States, 59 Ct. Cls. 461. Appellants are incorporated under the laws of New Jersey and their entire capital stock has long been owned by the Hamburg-American Line, a German corporation.

In Cause No. 3 the appellant seeks to recover (1) compensation for the use of certain docks and piers, New York harbor, seized by the United States April 6, 1917, and used by them until June 28, 1918; and (2) interest on the sum awarded by the President (December 3, 1918) as compensation for the same property, from June 28, 1918, when title was taken thereto until January 5, 1919, the date of actual payment. In Cause No. 4 the claim is for the value of two tug-boats, launch, barge, and coal hoister requisitioned and taken by the United States April 6, 1917, at the port of New York; and in No. 5 judgment is asked because of three barges, likewise taken on the same day.

The court below evidently proceeded upon the view that the property of appellant corporations should be treated as owned by an enemy because their entire capital stock belonged to a German corporation. And as the property was seized during the war with Germany it held there could be no recovery. Without doubt Congress might have accepted and acted upon that theory. It was adopted in the *St. Tudno,* Lloyd's Reports of Prize Cases, Vol. V, p. 198, and the *Michigan,* Lloyd's Reports of Prize Cases, Vol. V, p. 421. But Congress did not do so; it definitely adopted the policy of disregarding stock ownership as a test of enemy character and permitted property of domestic corporations to be dealt with as non-enemy. The prescribed plan was to seize the shares of stock when enemy owned rather than to take over the corporate property.

The Trading With The Enemy Act, approved October 6, 1917 (c. 106, 40 Stat. 411), provides—

"Sec. 2. That the word 'enemy,' as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—

"(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory. . . ."

In *Behn, Meyer & Co.* v. *Miller, Alien Property Custodian,* 266 U. S. 457, 472, we held the status of the corporation was not fixed by the stockholders' nationality, and said—

"Before its passage the original Trading with the Enemy Act was considered in the light of difficulties certain to follow disregard of corporate identity and efforts to fix the status of corporations as enemy or not according to the nationality of stockholders. These had been plainly indicated by the diverse opinions in *Daimler Co.* v. *Continental Tyre & Rubber Co.,* 2 A. C. (1916) 307. . . ."

The petition in No. 3 states a good cause of action for the use of the docks and piers from April 6, 1917, to June 28, 1918. As Congress might have directed forfeiture of all property beneficially owned by enemy subjects, it had power to provide for seizure followed by such compensation as the President might determine. Here such compensation was fixed and ultimately paid; and we find nothing to show that due allowance was not made for the delay in payment.

In No. 4 the petition fails clearly to show what action was taken by the United States. It does allege that the property was taken and used and to that extent discloses adequate ground for recovery. It ought to be made more certain by amendment.

If title to the vessels described in Cause No. 5 was actually taken, the United States became liable for their value. For any use of such vessels before acquisition of title the United States should pay. The allegations of the petition are not entirely clear and should be made more definite.

The judgments appealed from are reversed. The causes will be remanded to the Court of Claims for further proceedings in conformity with this opinion.

Reversed.

LONG, COMMISSIONER, *v.* ROCKWOOD.

SAME *v.* SAME.

CERTIORARI TO THE SUPERIOR COURT FOR THE COUNTY OF WORCESTER, MASSACHUSETTS.

Nos. 201 and 202. Argued January 20, 1928.—Decided May 14, 1928.

A State may not tax the income received by one of her citizens as royalties for the use of patents issued to him by the United States. P. 145.

257 Mass. 572, affirmed.

CERTIORARI, 274 U. S. 729, 730, to judgments of the Superior Court of Massachusetts abating taxes, entered on rescripts from the Supreme Judicial Court. The judgments were recovered by Rockwood in actions against Long, Commissioner of Corporations and Taxation of the Commonwealth.

Mr. F. Delano Putnam, Assistant Attorney General of Massachusetts, with whom *Messrs. Arthur K. Reading,* Attorney General, and *R. Ammi Cutter,* Assistant Attorney General, were on the brief, for petitioner.

All that a patentee obtains by his patent is the right to exclude others from the use, manufacture, or sale of the process patented. A patent once granted is merely

an intangible property interest of the patentee. The right to exclude alone is unique. *Missouri* v. *Bell Tel. Co.,* 23 Fed. 539; *Grant* v. *Raymond,* 6 Pet. 220; *Bloomer* v. *McQuewan,* 14 How. 539; *Paper Bag Patent Case,* 210 U. S. 405; *Bauer* v. *O'Donnell,* 229 U. S. 1; *Motion Picture Patents Co.* v. *Universal Film Co.,* 243 U. S. 502.

The sole federal purpose is accomplished when the patent is granted—viz., the promotion of science and the useful arts by obtaining from inventors a public announcement of their progressive achievements in exchange for the monopoly granted to them for a limited time. *Denning Wire & Fence Co.* v. *American Steel & Wire Co.,* 169 Fed. 793; *O'Brien Worthen Co.* v. *Stempel,* 209 Fed. 847; *I. T. S. Rubber Co.* v. *Essex Co.,* 276 Fed. 478; *Pennock* v. *Dialogue,* 2 Pet. 1; *Kendall* v. *Winsor,* 21 How. 322; *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.,* 243 U. S. 502.

Neither the federal purpose behind the patent powers given to Congress by the Constitution nor the patentee's right to exclude is hampered in any way by state taxation of the net income of the patentee computed upon a gross income in which is included patent royalties. Once a patent is granted, it is within the power of a state to legislate within a wide range of discretion with respect to the exercise of the patent rights and to the use and manufacture of patented articles, so long as no interference with the right to exclude takes place. *Patterson* v. *Kentucky,* 97 U. S. 501; *Webber* v. *Virginia,* 103 U. S. 344; *Allen* v. *Riley,* 203 U. S. 347; *Woods & Sons Co.* v. *Carl,* 203 U. S. 358; *Ozan Lumber Co.* v. *Union County Bank,* 207 U. S. 251; *Ager* v. *Murray,* 105 U. S. 126; *Pacific Bank* v. *Robinson,* 57 Cal. 520; *Luckett* v. *Delpark,* 270 U. S. 496; *Machine Co.* v. *Gage,* 100 U. S. 676; *Emert* v. *Missouri,* 156 U. S. 296.

In order that a property interest may be permitted to escape state taxation as a federal instrumentality, it must

appear that the interest in question bears some substantial and intimate relation to the continued operation of a federal constitutional purpose. A patent is merely the reward given for the disclosure of an invented process by virtue of a contract with the government which by its terms includes no provision that the reward or its avails shall be exempt from state taxation. By far the greater number of cases dealing with the implied prohibition of the exercise of the States' taxing power with respect to federal instrumentalities have dealt with the taxation by the State of property interests in active use in accomplishing a decided federal purpose. *McCulloch* v. *Maryland,* 4 Wheat. 316; *Home Savings Bank* v. *Des Moines,* 205 U. S. 503; *Farmers Bank* v. *Minnesota,* 232 U. S. 516; *Smith* v. *Kansas City Title & Trust Co.* 255 U. S. 180; *Clallam County* v. *United States,* 263 U. S. 341; *First Nat. Bank* v. *Anderson,* 269 U. S. 341; *Northwestern Mut. Life Ins. Co.* v. *Wisconsin,* 275 U. S. 136.

It can hardly be said that the patentee is in any sense an agent of the Federal Government, yet even if he were such an agent, he could be taxed with respect to the property employed by him as such an agent so long as no governmental function performed by him was taxed.

Railroad Co. v. *Peniston,* 18 Wall. 5, so clearly supports the jurisdiction of a State under the Constitution to lay a "tax which remotely affects the efficient exercise of a federal power" that it would be difficult to see how it could be contended that taxation of a patent or of the avails of a patent in any way hampered the Federal Government in promoting science and the useful arts by the process of exclusion (the only constitutional method available to the Federal Government), were it not for the dictum in *McCulloch* v. *Maryland,* 4 Wheat. 316, and for the decisions in the Oklahoma tax cases where the Federal Government's functions with respect to the pro-

tection of the Indians were held to be impeded by the state taxes there involved. Distinguishing *Choctaw & Gulf R. R. Co.* v. *Harrison,* 235 U. S. 292; *Railroad Co.* v. *Peniston,* 18 Wall. 5; *Indian etc. Oil Co.* v. *Oklahoma,* 240 U. S. 522; *Gillespie* v. *Oklahoma,* 257 U. S. 501; *Jaybird Mining Co.* v. *Weir,* 271 U. S. 609. See *Dyer* v. *Melrose,* 197 Mass. 99.

Commonwealth v. *Westinghouse Electric Co.,* 151 Pa. 265, and *People* v. *Assessors,* 156 N. Y. 417, fall into the error of considering patents on the same footing as the federal franchise drawn in question in *California* v. *Central Pacific R. R. Co.,* 127 U. S. 1, and as the mails and the mint.

People v. *Assessors, supra,* relies largely on cases overruled by this Court in *Allen* v. *Riley,* 203 U. S. 347, and *Campbell* v. *Haverhill,* 155 U. S. 610.

The tax imposed no perceptible or appreciable burden upon the ability of the Federal Government or any agent thereof to perform any federal function.

Mr. Merrill S. June, with whom *Mr. Thomas H. Gage* was on the brief, for respondent.

Mr. Justice McReynolds delivered the opinion of the Court.

These causes present the question whether the State of Massachusetts may tax, as income, royalties received by one of her citizens for the use of patents issued to him by the United States. The Supreme Judicial Court of that State held such an imposition would amount to a tax upon the patent right itself and was prohibited by the Federal Constitution. We agree with that conclusion.

The Constitution (Art. 1, Sec. 8) empowers Congress "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the

exclusive right to their respective writings and discoveries; . . . " The first Congress provided for issuance, in the name of the United States, of letters patent granting " for any term not exceeding fourteen years, the sole and exclusive right and liberty of making, constructing, using and vending to others to be used, the said invention or discovery . . . " Act April 10, 1790, Sec. 1, Chap. 7, 1 Stat. 109.

Chap. 230, Act July 8, 1870, 16 Stat. 201 (Rev. Stat. Sec. 4884; Sec. 40, Title 35, U. S. Code)—

" Sec. 22. *And be it further enacted,* That every patent shall contain a short title or description of the invention or discovery, correctly indicating its nature and design, and a grant to the patentee, his heirs or assigns, for the term of seventeen years, of the exclusive right to make, use and vend the said invention or discovery throughout the United States and the Territories thereof, . . . "

Chief Justice Marshall, speaking for the court in *Grant* v. *Raymond,* 6 Pet. 218, 241–242, stated the general purpose for which patents issue—

" To promote the progress of useful arts, is the interest and policy of every enlightened government. . . . This subject was among the first which followed the organization of our government. It was taken up by the first congress . . . The amendatory act of 1793 contains the same language, and it cannot be doubted that the settled purpose of the United States has ever been, and continues to be, to confer on the authors of useful inventions an exclusive right in their inventions for the time mentioned in their patent. It is the reward stipulated for the advantages derived by the public for the exertions of the individual, and is intended as a stimulus to those exertions. The laws which are passed to give effect to this purpose ought, we think, to be construed in the spirit in which they have been made. . . . The public yields

nothing which it has not agreed to yield; it receives all which it has contracted to receive. . . ."

Kendall v. *Winsor,* 21 How. 322, 327–328—

"It is undeniably true, that the limited and temporary monopoly granted to inventors was never designed for their exclusive profit or advantage; the benefit to the public or community at large was another and doubtless the primary object in granting and securing that monopoly."

Bloomer v. *McQuewan,* 14 How. 539, 549—

"The franchise which the patent grants, consists altogether in the right to exclude every one from making, using, or vending the thing patented, without the permission of the patentee. This is all he obtains by the patent."

See also *Paper Bag Patent* case, 210 U. S. 405, 423; *Bauer & Cie* v. *O'Donnell,* 229 U. S. 1, 11.

The power to exclude others granted by the United States to the patentee subserves a definite public purpose—to promote the progress of science and useful arts. The patent is the instrument by which that end is to be accomplished. It affords protection during the specified period in consideration of benefits conferred by the inventor. And the settled doctrine is that such instrumentalities may not be taxed by the States.

In *California* v. *Pacific Railroad Co.,* 127 U. S. 1, the State sought to sustain a tax laid upon a franchise granted by the United States; but its power therein was denied. Through Mr. Justice Bradley this court said—"Recollecting the fundamental principle that the Constitution, laws and treaties of the United States are the supreme law of the land, it seems to us almost absurd to contend that a power given to a person or corporation by the United States may be subjected to taxation by a State." The same general doctrine was approved by *McCullough* v. *Maryland,* 4 Wheaton, 316; *Home Savings Bank* v. *Des Moines,* 205 U. S. 503; *Farmers, etc. Bank* v. *Min-*

nesota, 232 U. S. 516; *Choctaw & Gulf R. R. Co.* v. *Harrison,* 235 U. S. 292; *Indian Terr., etc. Oil Co.* v. *Oklahoma,* 240 U. S. 522; *Smith* v. *Kansas City Title & Trust Co.,* 255 U. S. 180; *Gillespie* v. *Oklahoma,* 257 U. S. 501; *Clallam County* v. *United States,* 263 U. S. 341; *First National Bank* v. *Anderson,* 269 U. S. 341; *Jaybird Mining Co.* v. *Weir,* 271 U. S. 609; *Northwestern Mutual Life Ins. Co.* v. *Wisconsin,* 275 U. S. 136.

The courts of last resort in Pennsylvania and New York have held that a State may not tax patents granted by the United States. *Westinghouse Elec. Mfg. Co.* v. *Commonwealth,* 151 Pa. 265; *People, etc.* v. *Assessors,* 156 N. Y. 417. And no opinion to the contrary has been cited.

As United States patents grant only the right to exclude, our conclusion is not in conflict with those cases which sustain the power of the States to exercise control over articles manufactured by patentees, to regulate the assignment of patent rights, and to prevent fraud in connection therewith. *Patterson* v. *Kentucky,* 97 U. S. 501; *Webber* v. *Virginia,* 103 U. S. 344; *Allen* v. *Riley,* 203 U. S. 347; *John Woods & Sons* v. *Carl,* 203 U. S. 358; *Ozan Lumber Co.* v. *Union County National Bank,* 207 U. S. 251.

The challenged judgments are affirmed.

Affirmed.

MR. JUSTICE HOLMES.

These are complaints brought by the respondent against the Commissioner of Corporations and Taxation of Massachusetts for the abatement of income taxes for the years 1921 and 1922. The question raised as stated by the Supreme Judicial Court of the State is whether the Commonwealth has the right to tax the income received from royalties for the use of patents issued by the United States. That Court held that the Commonwealth had no such right under the Constitution of the United States

and the Commissioner obtained a writ of certiorari from this Court.

The reasoning of the Court is simple. If the State 'cannot tax the patent, it cannot tax the royalties received from its use'. The postulate is founded on the casual intimation of Chief Justice Marshall in *McCulloch* v. *Maryland,* 4 Wheat. 316, 432, and is said to have been conceded below by the Commissioner. It hardly is conceded here and, whether it is or is not, if this Court should be of opinion that the conclusion urged by the Commissioner can be supported upon broader grounds than he felt at liberty to take, the Court is not estopped by his doubts. Why then cannot a State tax a patent by a tax that in no way discriminates against it? Obviously it is not true that patents are instrumentalities of the Government. They are used by the patentees for their private advantage alone. If the Government uses them it must pay like other people. *Richmond Screw Anchor Co.* v. *United States,* 275 U. S. 331. The use made by the patentee may be not to make and sell the patented article but simply to keep other people from doing so in aid of some collateral interest of his own. *Continental Paper Bag Co.* v. *Eastern Paper Bag Co.,* 210 U. S. 405, 422, 424. National banks really are instrumentalities of the Government and directly concern the national credit. Indians are wards of the nation. Interstate commerce is left expressly to regulation by Congress and the States can intermeddle only by its consent. In this case the advantages expected by the Government are mainly the benefits to the public when the patent has expired and secondarily the encouragement of invention, *Pennock* v. *Dialogue,* 2 Peters, 1, 19. The most that can be said is that a tax is a discouragement so far as it goes and to that extent in its immediate operation runs counter to the Government intent. But patents would be valueless to their owner without the organized societies constituted by the

States, and the question is why patents should not contribute as other property does to maintaining that without which they would be of little use.

Most powers conceivably may be exercised beyond the limits allowed by the law. Rights that even seem absolute have these qualifications. *American Bank & Trust Co.* v. *Federal Reserve Bank of Atlanta,* 256 U. S. 350, 358.

But we do not on that account resort to the blunt expedient of taking away altogether the power or the right. *Board of Trade* v. *Christie Grain & Stock Co.,* 198 U. S. 236, 247, 248. The power to tax is said to be the power to destroy. But, to repeat what I just now have had occasion to say in another case, this Court, which so often has defeated the attempt to tax in certain ways, can defeat an attempt to discriminate or otherwise to go too far without wholly abolishing the power to tax. The power to fix rates is the power to destroy, but this Court while it endeavors to prevent confiscation does not prevent the fixing of rates. Even with regard to patents some laws of a kind that might destroy the use of them within the State have been upheld. *Patterson* v. *Kentucky,* 97 U. S. 501. *Webber* v. *Virginia,* 103 U. S. 344. *Emert* v. *Missouri,* 156 U. S. 296. They must be reasonable or they will be held void, but if this Court deems them reasonable they stand. *Allen* v. *Riley,* 203 U. S. 347, 355.

The fact that the franchise came from a grant by the United States is no more reason for exemption, standing by itself, than is the derivation of the title to a lot of land from the same source. *Tucker* v. *Ferguson,* 22 Wall. 527. In *Baltimore Shipbuilding & Dry Dock Co.* v. *Baltimore,* 195 U. S. 375, the land was conveyed subject to a condition that a dry-dock should be built upon it which the United States was to have the right to use free from charge for docking and which was to revert to the United States on a diversion of the land to any other use or on

the dry-dock being unfit for use for six months. Certainly a case in which the United States was much more clearly interested than in an ordinary patent. Yet there it was held that neither the company nor the land was an instrumentality of the United States and that there was nothing to hinder the right of the State to tax. See further *Forbes* v. *Gracey*, 94 U. S. 762.

Mr. Justice Brandeis, Mr. Justice Sutherland and Mr. Justice Stone agree with this opinion.

PLAMALS *v.* S. S. "PINAR DEL RIO," etc.

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

No. 225. Argued February 27, 1928.—Decided May 14, 1928.

1. The cause of action of a seaman under § 33 of the Jones Act for personal injuries suffered on shipboard in the course of his employment, not due to unseaworthiness of the ship, is not a lien upon the ship, and its enforcement in admiralty cannot be by a suit *in rem*. P. 154.
2. The ordinary maritime privilege or lien, though adhering to the vessel, is a secret one which may operate to the prejudice of general creditors and purchasers without notice, and is therefore *stricti juris*. It cannot be extended by construction, analogy or inference. P. 156.
3. Seamen may invoke, at their election, the relief accorded by the old rules against the ship, or that provided by the new against the employer; but not both. *Id.*

16 F. (2d) 984, affirmed.

Certiorari, 274 U. S. 733, to a decree of the Circuit Court of Appeals, which affirmed the dismissal of a libel *in rem* brought by a seaman for the recovery of damages on account of personal injuries.

Mr. Charles A. Ellis, with whom *Mr. Silas B. Axtell* was on the brief, for petitioner.

An American court of admiralty having jurisdiction of a cause under the circumstances here involved, should apply the American Maritime Law to the case as the *lex loci delicti.*

In a suit in an American court, § 33 of the Jones Act is applicable to a tort which occurs upon a foreign vessel while lying in the territorial waters of the United States, and applicable to this case.

The right given to seamen under § 33 of the Jones Act to recover for personal injuries suffered in the course of their employment as the result of negligence, may be enforced in admiralty by a proceeding *in rem,* in accordance with the principles of the maritime law under which a lien and right *in rem* is recognized in favor of seamen suing for personal injuries. The Jones Act is not a local statute of a State merely seized on by the courts as supplementary to the maritime law in absence of any similar right afforded by that law. *Cf. The Corsair,* 145 U. S. 335; *The Albert Dumois,* 177 U. S. 240; *The Hamilton,* 207 U. S. 398; *The J. E. Rumbell,* 148 U. S. 1. On the contrary, it is a part of the general maritime law, enacted by Congress, the legislative body empowered to declare and modify the maritime law, and concerns itself only with seamen and their own and their employers' relative rights—a subject peculiarly maritime—and is uniformly applicable throughout the country wherever the American maritime law applies. *Panama R. R. Co.* v. *Johnson,* 264 U. S. 375.

The right of an injured seaman to a lien, or to proceed against the vessel *in rem* to enforce such rights to indemnity as he had under the maritime law prior to the enactment of the Jones Act, is well recognized. *The Lafayette,* 269 Fed. 917.

The statute leaves the seaman free under the general maritime law to enforce his right under the new rules by proceeding *in rem* on the admiralty side of the court,

and permits the jurisdiction of the admiralty court to be invoked and exercised through a proceeding *in rem*, "as it has been from the beginning" in cases involving personal injury to a seaman in the course of his employment on a ship. *The Osceola*, 189 U. S. 158; *International Stevedore Co.* v. *Haverty*, 272 U. S. 50; *Sparling* v. *United States*, (*The Princess Matoika*), 1925 A. M. C. 1547.

Under the general maritime law, independent of the Jones Act, libelant was entitled to recover for respondent's failure to supply and keep in order, proper appliances, including a proper bos'n's chair and proper gantline, properly rigged, and for the unseaworthiness of the vessel in this respect.

Mr. Cletus Keating, with whom *Mr. Vernon S. Jones* was on the brief, for respondent.

Petitioner's rights are governed by British law, the law of the ship's flag.

No maritime lien was created, and the rights of the petitioner would be a suit either at law or in admiralty against his employer. *Panama Railroad Co.* v. *Johnson*, 264 U. S. 375; *Western Fuel Co.* v. *Garcia*, 257 U. S. 233; *The Corsair*, 145 U. S. 335; *The Albert Dumois*, 177 U. S. 240; Benedict on Admiralty, 5th ed., Vol. 1, p. 215.

Under the British law, petitioner had no lien against the vessel which would support a libel *in rem*. Even if American law as laid down by this Court in *The Osceola*, 189 U. S. 158, is applicable to this case, petitioner failed to make out any cause of action because the accident was due to the negligence of a fellow servant.

Mr. Justice McReynolds delivered the opinion of the Court.

Plamals, the petitioner, a subject of Spain, belonged to the crew of the British ship "Pinar Del Rio." She was

anchored at Philadelphia, April 27, 1923. He was being hoisted up to paint the smoke stack; a rope broke; he fell to the deck and sustained serious injuries. The accident resulted from the negligence of the mate who selected a defective rope. An abundant supply of good rope was on board.

Six months after the accident Plamals began this proceeding *in rem* against the ship in the District Court, Southern District of New York. The libel alleged that his injuries "were due to the fault or neglect of the said steamship or those in charge of her in that the said rope was old, worn and not suitable for use, in that libellant was ordered to perform services not within the scope of his duties, and in other respects that libellant will point out on the trial of this action."

There is nothing to show that painting the smoke stack was beyond the scope of the duties assumed.

In the District Court the petitioner asserted by his proctor that he claimed under Sec. 33, Jones Act, 41 Stat. 1007, which follows—

"That section 20 of such Act of March 4, 1915, be, and is, amended to read as follows:

'Sec. 20. That any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the

defendant employer resides or in which his principal office is located.' "

The District Court ruled that the rights and liabilities of the parties were fixed by the law of the ship's flag and was of opinion that the British Workmen's Compensation Act afforded the only remedy. It accordingly dismissed the libel. The Circuit Court of Appeals held that a lien against the vessel is essential to every proceeding *in rem* against her; and that no such lien arose by reason of Sec. 33 of the Jones Act in favor of the injured seaman. Upon that ground it affirmed the questioned decree.

We agree with the view of the Circuit Court of Appeals and find it unnecessary now to consider whether the provisions of Section 33 are applicable where a foreign seaman employed on a foreign ship suffers injuries while in American waters.

The record does not support the suggestion that the " Pinar Del Rio " was unseaworthy. The mate selected a bad rope when good ones were available.

We must treat the proceeding as one to enforce the liability prescribed by Sec. 33. It was so treated by petitioner's proctor at the original trial; and the application for certiorari here spoke of it as based upon that section. The evidence would not support a recovery upon any other ground.

Sec. 20, Act of March 4, 1915 (38 Stat. 1185), originally provided—" That in any suit to recover damages for any injury sustained on board vessel or in its service seamen having command shall not be held to be fellow-servants with those under their authority." *Chelentis* v. *Luckenbach Steamship Co.* (1918), 247 U. S. 372, 384, pointed out that this imposed no new liability upon the shipowner.

Sec. 33 brings into our maritime law the provisions of certain statutes which define the liability of masters to employees originally intended to be enforced in actions at

law. They imposed personal liability and gave no lien of any kind. The statute which extended them to seamen expressly provided that the employer might be sued only in the district where he resides or has his principal office. This provision repels the suggestion that the intention was to subject the ship to *in rem* proceedings. Generally, at least, proceedings of that nature may be brought wherever the ship happens to be.

The ordinary maritime privilege or lien, though adhering to the vessel, is a secret one which may operate to the prejudice of general creditors and purchasers without notice and is therefore *stricti juris*. It cannot be extended by construction, analogy or inference. The *Corsair,* 145 U. S. 335, 347; The *Albert Dumois,* 177 U. S. 240, 257; *Osaka Shosen Kaisha* v. *Lumber Co.,* 260 U. S. 490, 499.

Panama R. R. Co. v. *Johnson,* 264 U. S. 375, 386, 391, declares—Sec. 33 " is concerned with the relative rights and obligations of seamen and their employers arising out of personal injuries sustained by the former in the course of their employment." " The injured seaman is permitted but not required to proceed on the common-law side of the court." " The statute leaves the injured seaman free under the general law—Secs. 24 (par. 3) and 256 (par. 3) of the Judicial Code—to assert his right of action under the new rules on the admiralty side of the court."

In the system from which these new rules come no lien exists to secure claims arising under them and, of course, no right to proceed *in rem.* We cannot conclude that the mere incorporation into the maritime law of the rights which they create to pursue the employer was enough to give rise to a lien against the vessel upon which the injury occurred. The section under consideration does not undertake to impose liability on the ship itself, but by positive words indicates a contrary purpose. Seamen may invoke, at their election, the relief accorded by the old

rules against the ship, or that provided by the new against the employer. But they may not have the benefit of both.

To subject vessels during all the time allowed by the statute of limitations to secret liens to secure undisclosed and unlimited claims for personal injuries by every seaman who may have suffered injury thereon would be a very serious burden. One desiring to purchase, for example, could only guess vaguely concerning the value. "An Act to provide for the promotion and maintenance of the American Merchant Marine" ought not to be so construed in the absence of compelling language.

The judgment of the court below must be affirmed.

Affirmed.

ST. LOUIS & SOUTHWESTERN RAILWAY COMPANY *v.* NATTIN, TAX COLLECTOR.

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

No. 263. Argued March 2, 1928.—Decided May 14, 1928.

1. A state statute empowering a local governing body, like the police jury in Louisiana, to create road districts and with the approval of a popular vote to construct roads and issue bonds to pay for them, to be met by taxation *ad valorem* of the land in the district, need not allow the taxpayer a hearing on these matters (aside from the valuation of his land for taxation), to be valid under the Fourteenth Amendment. P. 159.
2. The Constitution of Louisiana did not inhibit the collection in 1926 of a tax partly intended to supply funds to meet instalments of principal and interest upon bonds maturing in March, 1927. *Id.*
3. The legality of a general *ad valorem* tax on the property in the road district to pay for construction or improvement of roads, does not depend on receipt of any special benefit by the taxpayer. *Id.*
4. Louisiana statutes provide ample opportunity for contesting valuations of property for taxation purposes. *Id.*

5. A local *ad valorem* tax on the property of a carrier engaged in interstate commerce does not amount to regulation of interstate commerce. P. 159.

27 F. (2d) 766, affirmed.

APPEAL from a decree of the District Court, dismissing the bill of the Railway Company, seeking to enjoin the collection of taxes levied on its property for the purposes of satisfying road improvement bonds.

Mr. John D. Wilkinson, with whom *Messrs. J. R. Turney, C. Huffman Lewis,* and *William Scott Wilkinson* were on the brief, for appellants.

Messrs A. M. Wallace, Roberts C. Milling, and *R. E. Milling, Jr.,* were on the brief, for appellee.

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

This cause was heard by a specially constituted District Court—three judges. Jud. Code, Secs. 283, 266. It dismissed the bill and directed that the costs, together with ten per cent. damages, be assessed against appellant. The opinion of the court, considered with the argument here, so plainly demonstrates the lack of merit in the claims advanced that we need not discuss them at length.

The appellant owns a line of railroad lying partly in Bossier Parish, Louisiana, also all stock of the corporate owner of the bridge over Red River at Bossier City. Purporting to proceed as directed by the state statute, the Police Jury of that Parish undertook to create from the major part of its territory a Consolidated Road District, to issue bonds thereof to pay for constructing a highway therein and to lay an ad valorem tax upon all property within the District to meet the obligation. Appellant asked for an injunction prohibiting any attempt to

collect the taxes levied and assessed for the year 1926. None of the alleged grounds for relief is substantial.

In Louisiana the police jury, subordinate to the state legislature, is the governing body of the parish. A statute of the State empowers these juries to create road districts from such portions of their parishes as they may determine and, with the approval of a popular vote, to construct roads and issue bonds to pay therefor.

The validity of this statute is challenged upon the ground that it fails to provide the taxpayer with proper opportunity to be heard. A sufficient short answer is that under the repeated decisions here this is not essential. *Valley Farms Co.* v. *Westchester County,* 261 U. S. 155, *Hancock* v. *Muskogee,* 250 U. S. 454. But here in fact the appellant had abundant opportunity to present objections to the proposed plan.

We find nothing in the Constitution of Louisiana, when reasonably construed, which inhibited the collection in 1926 of a tax partly intended to supply funds to meet installments of principal and interest upon bonds maturing in March, 1927.

As the assailed tax was general and ad valorem, its legality does not depend upon the receipt of any special benefit by the taxpayer.

The local statutes provided ample opportunity for the appellant to contest the valuation of its property for taxation purposes.

Without doubt a local legislative body, when properly authorized, may lay general ad valorem taxes upon all property within its jurisdiction, including that of common carriers engaged in interstate commerce, without violating the Federal Constitution. That such taxation does not amount to regulation of interstate commerce is settled doctrine.

The decree below is affirmed.

Affirmed.

STANDARD PIPE LINE COMPANY *v.* MILLER COUNTY HIGHWAY & BRIDGE DISTRICT

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 577. Argued April 20, 1928.—Decided May 14, 1928.

The part of an interstate oil pipe line which traversed a special road improvement district, and which was constructed at less than $9,000 per mile, was taxed for benefits at $5,000 per mile, though the benefit that it actually received from the road, if any, was small. *Held* that the assessment was arbitrary and unreasonable in amount. P. 162.

19 F. (2d) 3, reversed.

CERTIORARI, 275 U. S. 520, to a decree of the Circuit Court of Appeals, which reversed a decree of the District Court enjoining the collection of a special improvement tax.

Mr. Wm. H. Arnold, with whom *Messrs. T. M. Milling, W. H. Arnold, Jr.,* and *David C. Arnold* were on the brief, for petitioner.

Mr. Henry Moore, Jr., for respondent.

MR. JUSTICE MCREYNOLDS announced the opinion of the Court.

This suit, begun in the United States District Court, Western District of Arkansas, May 21, 1924, seeks an injunction to restrain the Miller County Highway & Bridge District from attempting to collect road improvement taxes upon petitioner's property.

Apparently, petitioner—complainant in the original bill—owns twenty-five miles of pipe, laid in two parallel and adjacent lines through respondent District used for interstate transportation of oil; also, for use in connec-

tion therewith, some miles of telegraph and telephone wire, of small value, strung upon leased poles. The total average original cost of the pipe lines (constructed partly in 1909 and partly in 1915) was less than $9,000 per mile. The officers of the District seem to have assessed benefits to be received by all this property from proposed improvements to highways at $60,000. Claiming that the assessment was "wholly unwarranted, unlawful, grossly disproportionate and palpably arbitrary and in discrimination against the property," the bill asked for an injunction, etc.

After answer much proof was taken. The District Court made the following findings of fact and law—

1. That the construction of the highway has not added anything and will add nothing to the value of the property of plaintiff taxed for its construction and maintenance.

2. The construction of the highway of defendant has not added and will not add anything to the revenue which is obtained by plaintiff by the transportation of oil through its pipe lines.

3. The levy of a tax of $5,000.00 a mile upon plaintiff's right of way, the pipe line and telegraph and telephone wires and lines in the Miller County Highway and Bridge District, is not laid upon the same plan that is followed with regard to other lands in the district.

4. The levy of $5,000.00 a mile is palpably arbitrary.

5. The alleged benefit to plaintiff's property by the construction of the highway is speculative and conjectural.

6. Plaintiff is not estopped from maintaining this suit.

7. The Act of the Legislature of Arkansas purporting to validate generally the levy of the tax made by the defendant upon the property in the District is not effective to validate the levy upon plaintiff's right of way and pipe lines, because as to plaintiff's property, such levy is arbitrary.

And upon these findings it ordered an injunction as prayed.

The Circuit Court of Appeals rendered a written opinion April 18, 1927, wherein it held that the pipe lines were real property subject to assessment for benefits like other realty, and that the evidence indicated petitioner's lines received some benefit from the improved highways. Also "That the procedure by which the value of the particular property of the appellee was arrived at and the amount of the benefits determined, does not commend itself to us as altogether fair, nor is the tax imposed against appellee entirely equitable as between it and other property owners within the district; but this, standing alone, is not decisive of the question." After citing a number of cases decided here and in the lower federal courts it further said—"The tendency of these very late authorities is to greatly narrow the constitutional grounds of objection to assessments of this character. They forbid us to weigh the benefits against the burdens, and require us to hold in the instant case that under all the circumstances there was sufficient justification for the legislative determination that appellee's property was benefited." It made no ruling upon the claim set up by the District that as petitioner had failed to avail itself of the appeal to Commissioners, provided by the statute, it could not maintain the bill.

While it may be that the pipe lines received some small benefit from the road improvements, we regard the assessment actually made against them as arbitary and unreasonable in amount.

The Circuit Court of Appeals announced its conclusion without knowledge of our opinion in *Road Improvement District No. 1, etc.* v. *Missouri Pacific R. R. Co.*, 274 U. S. 188. Its opinion indicates that if our views there stated had been known, a different conclusion might have been reached. In the circumstances, it seems

best to reverse the challenged decree and remand the cause to the Circuit Court of Appeals for a new hearing, as though upon the original appeal; and for such other action as may be necessary properly to protect the rights of the parties.

Reversed.

SPROUT *v.* CITY OF SOUTH BEND.

ERROR TO THE SUPREME COURT OF INDIANA.

No. 208. Submitted January 20, 1928.—Decided May 14, 1928.

Plaintiff in error operated a motor bus for passengers between a city in Indiana and points in Michigan. He required all passengers from the city to pay fare to Michigan, but habitually allowed those desiring to do so to alight in the suburbs short of the state line. He objected to an ordinance of the city which forbade operation of motor buses in the city streets unless licensed by the city and which conditioned the issuance of licenses upon payment of a fee adjusted to the seating capacity of the bus—in his case $50—and upon the filing of a contract of liability insurance, to be furnished by a corporation authorized to do business in the State, covering damages to property or persons from negligent operation of the bus within the city. *Held*—

1. The requirement that the insurance must be by a company authorized to do business in Indiana did not violate the rights of the plaintiff in error under the Fourteenth Amendment, because it was reasonable as applied to his case. P. 167.

2. Objection that this requirement discriminates against insurance companies not authorized to do business in Indiana is not open to plaintiff in error. *Id.*

3. The suburban traffic was not interstate commerce, since the destination intended by the passenger when he begins his journey and known to the carrier, determines the character of the commerce. P. 168.

4. As respects the interstate commerce, the license fee cannot be sustained as one exacted to defray expenses of regulating traffic for the public safety and convenience, it not appearing that such fees were imposed or applied for that purpose, or that the amount collected was no more than was reasonably required for it. P. 169.

5. The license fee cannot be sustained as a charge imposed on motor vehicles as their fair contribution to the cost of constructing and maintaining highways, it being a flat tax, substantial in amount, the same for buses plying the streets continually as for those making only a single trip daily, and there being no suggestion in the language of the ordinance or its construction by the state court that the proceeds are in any part to be applied to such construction or maintenance. P. 170.

6. The license fee cannot be sustained as an occupation tax, because not shown to be imposed solely on account of the intrastate business. P. 171.

7. *Semble* that the requirement of liability insurance, so far as it concerns damages suffered by persons other than passengers, is not an unreasonable burden on interstate commerce. *Id.*

198 Ind. 563, reversed.

ERROR to a judgment of the Supreme Court of Indiana, which affirmed a judgment for a penalty inflicted on Sprout for violating an ordinance of the city which forbade operation of motor buses without a license.

Mr. Dudley M. Shively, with whom *Messrs. Isaac K. Parks, Frank Gilmer,* and *Walter R. Arnold* were on the brief, submitted for plaintiff in error.

If the ordinance be held valid as not a burden on interstate commerce, then a like ordinance in the State of Michigan would be upheld on the same principle. Result: Every city and village through which an exclusively interstate carrier would be obliged to effect a passage from Grand Rapids, Michigan, to Indianapolis, Indiana, could make similar exactions. Thirty-three municipal corporations each compelling the payment of a $50.00 annual license fee (to say nothing of the $200.00 tax), a total of $1,650.00, for the privilege of making, say, only two trips a month between the city of Grand Rapids, Michigan, and the city of Indianapolis, Indiana. And if the trip be extended further, into Kentucky, proportionately more. It was precisely to avert such unconscionable practices that

the interstate commerce clause was written into the Federal Constitution.

Besides leaving each village, town and city to exact such tribute, nothing was to prevent each village, town and city—under the holding of the Indiana Supreme Court—from requiring the carrier to take out insurance in companies in Indiana. No end to the qualifications and specifications touching the companies in which the insurance must be taken before licenses can be issued by the several municipalities. Each at liberty to make requirements entirely inconsistent with all the others. The municipalities of Michigan (and of Kentucky, if the course of carriage be extended to that State) would, naturally, not be content with a policy of insurance written in some corporation of Indiana.

Mr. Iden S. Romig, City Attorney, submitted for defendant in error.

Requiring an indemnity bond did not violate any provision of the Constitution. *Ex parte Cardinal,* 170 Cal. 519; *Ex parte Sullivan,* 77 Tex. Cr. R. 72; *Ex parte Dickey,* 76 W. Va. 576; *Memphis* v. *State,* 133 Tenn. 83; *Willis* v. *Fort Smith,* 121 Ark. 606; *LeBlanc* v. *New Orleans,* 138 La. 243; *Auto Transit Co.* v. *Fort Worth,* (Tex. Civ. App.) 182 S. W. 685; *Nolen* v. *Riechman,* 225 F. 812; *Hazelton* v. *Atlanta,* 144 Ga. 775; *Huston* v. *Des Moines,* 176 Iowa 255; *Commonwealth* v. *Theberge,* 231 Mass. 386; *West* v. *Asbury Park,* 89 N. J. L. 402; *Jitney Bus Ass'n* v. *Wilkes-Barre,* 256 Pa. 462; *Ex parte Parr,* 82 Tex. Cr. R. 525; *Hadfield* v. *Lundin,* 98 Wash. 657; *State ex rel.* v. *Dillon,* 82 Fla. 276; *Packard* v. *Banton,* 264 U. S. 140.

Requiring that the insurance be obtained from a company authorized in the State of Indiana did not make the ordinance unconstitutional. *Lutz* v. *New Orleans,* 235 Fed. 978, affirmed 237 Fed. 1018; *Puget Sound L.*

& P. Co. v. *Grassmeyer,* 102 Wash. 482; *State* v. *Seattle Taxicab Co.,* 90 Wash. 416; *Ex parte Cardinal,* 170 Cal. 519; *Memphis* v. *State,* 133 Tenn. 83.

Use of the city streets as a place for the indiscriminate solicitation and acceptance of passengers brought the bus owner within the police power of the State to license and regulate both driver and vehicle by way of providing for the safety, security, and general welfare of the public, so long, at least, as Congress had not legislated on the subject. *Hendricks* v. *Maryland,* 235 U. S. 610; *Kane* v. *New Jersey,* 242 U. S. 160; *Wiggins Ferry Co.* v. *East St. Louis,* 107 U. S. 365; *Martine* v. *Kozer,* 11 F. (2d) 645.

Mr. Justice Brandeis delivered the opinion of the Court.

By ordinance adopted in 1921, South Bend, Indiana, prohibited, with exceptions not here material, the operation on its streets of any motor bus for hire unless licensed by the city. Sprout, a resident of that State, operated regularly a bus with seats for twelve persons between points within South Bend and the City of Niles, Michigan. He paid the state registration fee but refused to apply for a city license. In 1923, he was prosecuted by the city in a local court for violation of the ordinance and defended on the ground that it was invalid as applied to him. The case was heard on agreed facts. Sprout claimed, among other things, that the ordinance violated the commerce clause and the equal protection clause of the Fourteenth Amendment. These claims were overruled; a penalty of $50 was imposed; and the judgment of the trial court was affirmed by the highest court of the State, 198 Ind. 563. The case is here on writ of error. Compare *John P. King Manufacturing Co.* v. *City Council of Augusta,* ante p. 100.

The ordinance prescribes license fees varying with the seating capacity of the bus. That for a bus with seats for twelve persons is $50 a year. Before the license can issue, the applicant must file with the city a contract of liability insurance providing for the payment of any final judgment that may be rendered for damages to property or the person resulting from the negligent operation of the bus within the city. The amount of insurance required is limited to a liability of $1,000 to any one person and of $2,500 for damages arising from a single accident. The insurance must be furnished by a company authorized to do business within the State. These requirements apply alike to busses operating wholly within the city and to those operating from points within it to points without. The ordinance makes no distinction between busses engaged exclusively in interstate commerce, those engaged exclusively in intrastate commerce, and those engaged in both classes of commerce. Nor does the ordinance, in its requirement of liability insurance, distinguish in terms between liability to passengers traveling interstate and other liability resulting from negligent operation.

The claim that the ordinance violates the Fourteenth Amendment is rested mainly upon the ground that Sprout is required to furnish insurance issued by a company authorized to do business in Indiana. That contention may be quickly disposed of. The provision limiting the insurance to such companies is obviously a reasonable one so far as Sprout is concerned. Compare *La Tourette* v. *McMaster,* 248 U. S. 465, 468. The further objection that the requirement discriminates against insurance companies not authorized to do business within the State is not open to the plaintiff in error. *Cronin* v. *Adams,* 192 U. S. 108, 114; *Erie R. R. Co.* v. *Williams,* 233 U. S. 685, 705; *Arkadelphia Milling Co.* v. *St. Louis Southwestern Ry. Co.,* 249 U. S. 134, 149.

The claim that the ordinance violates the commerce clause presents questions requiring serious consideration. Sprout did not carry passengers from one point in South Bend to another. He was not a local carrier. Primarily his business was interstate. But the agreed facts show that he was not engaged exclusively in interstate commerce. The distance from the north city limits of South Bend to Niles is about nine miles. Half of this distance lies within Indiana. Along the highway traversed within that State lie many suburban residences and one village tributary to South Bend. Sprout purported to offer transportation from that city only to persons destined to points in Michigan. He required that all passengers from South Bend pay the fare to some Michigan point. But, in fact, he served suburban passengers. He made stops habitually at points within Indiana in order to permit passengers from South Bend to leave the bus before the state-line was reached. The legal character of this suburban bus traffic was not affected by the device of requiring the payment of a fare fixed for some Michigan point or by Sprout's professing that he sought only passengers destined to that State. The actual facts govern. For this purpose, the destination intended by the passenger when he begins his journey and known to the carrier, determines the character of the commerce. Compare *Philadelphia & Reading Ry. Co.* v. *Hancock,* 253 U. S. 284; *Baltimore & Ohio R. R. Co.* v. *Settle,* 260 U. S. 166, 171. The suburban traffic was intrastate commerce.

The Supreme Court of Indiana did not pass upon the question whether Sprout, by reason of the suburban traffic, was engaged also in intrastate traffic. Nor did it consider whether his rights as an interstate carrier would be affected by his engaging also in intrastate business. It affirmed the judgment of the trial court on the broad ground that, since Sprout made use of the streets in "the

indiscriminate solicitation and acceptance of passengers," he was "within the police power of the state to license and regulate both driver and vehicle by way of providing for the safety, security and general welfare of the public."

It is true that, in the absence of federal legislation covering the subject, the State may impose, even upon vehicles using the highways exclusively in interstate commerce, non-discriminatory regulations for the purpose of insuring the public safety and convenience; that licensing or registration of busses is a measure appropriate to that end; and that a license fee no larger in amount than is reasonably required to defray the expense of administering the regulations may be demanded. *Hendrick* v. *Maryland,* 235 U. S. 610, 622; *Kane* v. *New Jersey,* 242 U. S. 160; *Morris* v. *Duby,* 274 U. S. 135; *Clark* v. *Poor,* 274 U. S. 554. Compare *Hess* v. *Pawloski,* 274 U. S. 352. These powers may also be exercised by a city if authorized to do so by appropriate legislation. Compare *Erb* v. *Morasch,* 177 U. S. 584, 585; *Mackay Telegraph Co.* v. *Little Rock,* 250 U. S. 94, 99. Such regulations rest for their validity upon the same basis as do state inspection laws, *Patapsco Guano Co.* v. *Board of Agriculture,* 171 U. S. 345; *Red "C" Oil Co.* v. *Board of Agriculture,* 222 U. S. 380, and municipal ordinances imposing on telegraph companies, though engaged in interstate commerce, a tax to defray the expense incident to the inspection of poles and wires. *Western Union Telegraph Co.* v. *New Hope,* 187 U. S. 419; *Postal Telegraph-Cable Co.* v. *Richmond,* 249 U. S. 252, 258; *Mackay Telegraph Co.* v. *Little Rock,* 250 U. S. 94, 99. But it does not appear that the license fee here in question was imposed as an incident of such a scheme of municipal regulation; nor that the proceeds were applied to defraying the expenses of such regulation; nor that the amount collected under the ordinance was no more than was reasonably required for such a purpose. It follows that the exaction of the license fee

cannot be sustained as a police measure. *Atlantic & Pacific Telegraph Co.* v. *Philadelphia,* 190 U. S. 160, 164; *Postal-Telegraph Cable Co.* v. *New Hope,* 192 U. S. 55; *Adams Express Co.* v. *New York,* 232 U. S. 14, 32. Compare *Foote & Co.* v. *Stanley,* 232 U. S. 494, 503.

It is true also that a State may impose, even on motor vehicles engaged exclusively in interstate commerce, a reasonable charge as their fair contribution to the cost of constructing and maintaining the public highways. *Hendrick* v. *Maryland,* 235 U. S. 610, 622; *Interstate Busses Corporation* v. *Blodgett,* 276 U. S. 245. And this power also may be delegated in part to a municipality by appropriate legislation. Compare *St. Louis* v. *Western Union Telegraph Co.,* 148 U. S. 92, 98; 149 U. S. 465. An exaction for that purpose may be included in a license fee. *Hendrick* v. *Maryland, supra; Kane* v. *New Jersey,* 242 U. S. 160, 168–169; *Clark* v. *Poor,* 274 U. S. 554. But no part of the license fee here in question may be assumed to have been prescribed for that purpose. A flat tax, substantial in amount and the same for busses plying the streets continuously in local service and for busses making, as do many interstate busses, only a single trip daily, could hardly have been designed as a measure of the cost or value of the use of the highways. And there is no suggestion, either in the language of the ordinance or in the construction put upon it by the Supreme Court of Indiana, that the proceeds of the license fees are, in any part, to be applied to the construction or maintenance of the city streets. Compare *Tomlinson* v. *City of Indianapolis,* 144 Ind. 142; *City of Terre Haute* v. *Kersey,* 159 Ind. 300; *Hogan* v. *City of Indianapolis,* 159 Ind. 523.

It follows that on the record before us the exaction of the license fee cannot be sustained either as an inspection fee or as an excise for the use of the streets of the city. It remains to consider whether it can be sustained as an occupation tax. A State may, by appropriate legisla-

tion, require payment of an occupation tax from one engaged in both intrastate and interstate commerce. *Postal Telegraph Cable Co.* v. *Charleston,* 153 U. S. 692; *Osborne* v. *Florida,* 164 U. S. 650; *Kehrer* v. *Stewart,* 197 U. S. 60; *Watters* v. *Michigan,* 248 U. S. 65; *Raley & Bros.* v. *Richardson,* 264 U. S. 157. Compare *Interstate Busses Corporation* v. *Holyoke Street Ry. Co.,* 273 U. S. 45; *Arnold* v. *Hanna,* 276 U. S. 591. And it may delegate a part of that power to a municipality. Compare *Postal Telegraph-Cable Co.* v. *Richmond,* 249 U. S. 252, 257. But in order that the fee or tax shall be valid, it must appear that it is imposed solely on account of the intrastate business; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the imposition; and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate business. *Leloup* v. *Port of Mobile,* 127 U. S. 640; *Crutcher* v. *Kentucky,* 141 U. S. 47, 58; *Adams Express Co.* v. *New York,* 232 U. S. 14, 30; *Bowman* v. *Continental Oil Co.,* 256 U. S. 642, 647. Compare *Williams* v. *Talladega,* 226 U. S. 404, 417; *Postal Telegraph-Cable Co.* v. *Richmond,* 249 U. S. 252. The Supreme Court of Indiana, far from construing the ordinance as applicable solely to busses engaged in intrastate commerce, assumed that it applied to busses engaged exclusively in interstate commerce and that Sprout was so engaged. The privilege of engaging in such commerce is one which a State cannot deny. *Buck* v. *Kuykendall,* 267 U. S. 307; *Bush & Sons Co.* v. *Maloy,* 267 U. S. 317. A State is equally inhibited from conditioning its exercise on the payment of an occupation tax.

Objection under the commerce clause is made also to the requirement of liability insurance. There being grave dangers incident to the operation of motor vehicles, a State may require users of such vehicles on the public

highways to file contracts providing adequate insurance for the payment of judgments recovered for certain injuries, resulting from their operation. *Packard* v. *Banton,* 264 U. S. 140. Compare *Kane* v. *New Jersey,* 242 U. S. 160, 167; *Hess* v. *Pawloski,* 274 U. S. 352; *Clark* v. *Poor,* 274 U. S. 554, 557. It may, consistently with the Federal Constitution, delegate by appropriate legislation a part of this power to a municipalty. Such provisions for insurance are not, even as applied to busses engaged exclusively in interstate commerce, an unreasonable burden on that commerce, if limited to damages suffered within the State by persons other than the passenger. Whether the insurance here prescribed is, because of its scope, obnoxious to the commerce clause, we need not inquire. Compare *Adams Express Co.* v. *New York,* 232 U. S. 14, 33; *Michigan Public Utilities Commission* v. *Duke,* 266 U. S. 570, 577. For the ordinance is void because of the imposition of the license fee.

Reversed.

GREAT NORTHERN RAILWAY COMPANY *v.* UNITED STATES ET AL.

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

No. 612. Argued April 27, 1928.—Decided May 14, 1928.

1. The special remedy given by the Urgent Deficiencies Act of October 22, 1913, for reviewing orders of the Interstate Commerce Commission by suit against the United States, applies only to orders dealing with subjects within the scope of the Commission's duty to regulate commerce. P. 181.
2. This special remedy is inapplicable to a certificate issued by the Commission to the Secretary of the Treasury under § 209, Transportation Act, 1920, stating the Commission's finding of the amount required of the United States to make good to a railroad company its guaranty of operating income during the six months following

the termination of Federal Control, and stating also the aggregate amount theretofore certified, and thus showing (in this case) an overpayment by the Government. P. 182.
22 F. (2d) 865, affirmed.

APPEAL from a decree of the District Court dismissing, for want of jurisdiction, a bill brought by the Railway Company to annul two certificates issued by the Interstate Commerce Commission.

Mr. F. G. Dorety, with whom *Messrs. Thomas Balmer* and *Fletcher Rockwood* were on the brief, for appellant.

The Commission's certificate is an "order" within the meaning of the Commerce Court and Urgent Deficiencies Acts. *I. C. C.* v. *Northern Pacific Ry Co.,* 216 U. S. 538; *I. C. C.* v. *D. L. & W. R. R. Co.,* 216 U. S. 531; *Southern Pacific* v. *I. C. C.,* 219 U. S. 433; *United States* v. *Diffenbaugh,* 222 U. S. 42; *United States* v. *B. & O. R. R. Co.,* 231 U. S. 274; *Tap Line Cases,* 234 U. S. 1; *Philadelphia & Reading Ry.* v. *United States,* 240 U. S. 334; *Central R. R.* v. *United States,* 257 U. S. 247; *United States* v. *New York Central,* 263 U. S. 603; *I. C. C.* v. *Union Pacific R. R.,* 222 U. S. 541; *United States* v. *Abilene & Southern Ry.,* 265 U. S. 274; *I. C. C.* v. *L. & N. R. R.,* 227 U. S. 88.

A few of the numerous cases in which the Court has held that it had jurisdiction, but declined to give the relief sought are *Intermountain Rate Cases,* 234 U. S. 476; *Los Angeles Switching Case,* 234 U. S. 234; *United States* v. *Pennsylvania R. R.,* 266 U. S. 191. A recent case of this nature is *C. C. C. & St. L. Ry.* v. *United States,* 275 U. S. 404.

Cases in which injunction has been denied because of lack of jurisdiction are cases in which the so-called order of the Commission did not change the status or obligations of any individual or body, and was, therefore, held to be not an order within the meaning of the statute. *Procter & Gamble* v. *United States,* 225 U. S. 282; *Hooker*

v. *Knapp,* 225 U. S. 302; *Lehigh Valley R. R. Co.* v. *United States,* 243 U. S. 412; *United States* v. *New River Coal Co.,* 265 U. S. 533; *United States* v. *Illinois Central R. R.,* 244 U. S. 82; *United States* v. *Los Angeles, etc., R. R.,* 273 U. S. 299. See further, *United States* v *B. & O. R. R.,* 231 U. S. 274; *The Tap Line Cases,* 234 U. S. 1; *United States* v. *New York Central,* 263 U. S. 603.

It is not necessary that the act complained of constitute a command or a direction in order that the court may have jurisdiction. *Chicago Junction Case,* 264 U. S. 258; *Colorado* v. *United States,* 271 U. S. 153; *Texas* v. *Eastern Texas R. R. Co.,* 258 U. S. 204; *Home Furniture Co.* v. *United States,* 271 U. S. 456; *Venner* v. *Michigan Central R. R. Co.,* 271 U. S. 127.

The situation is very similar to that in *Dayton-Goose Creek Ry.* v. *United States,* 263 U. S. 456.

It is true that the cases where the court has declined to take jurisdiction or has assumed jurisdiction under the Urgent Deficiencies Act, are all cases arising under the Interstate Commerce Act. These cases then throw no light upon the question whether the order must be made under the Interstate Commerce Act.

The right to enjoin unlawful acts or orders of administrative bodies or officials, has been recognized in *O. R. & N. Co.* v. *Fairchild,* 224 U. S. 510; *N. P. Ry.* v. *Department of Public Works,* 268 U. S. 39. It is obvious therefore that the right to injunction applies in a proper case to an unlawful order or act, either of the Commission or of any other administrative body purporting to act under any law whatever. The only question is whether the case at bar is a proper case for injunction, and not whether the order purports to be made under one Act or another.

Neither the Hepburn Act, nor the Commerce Court Act, nor the Urgent Deficiencies Act, restricts the jurisdiction of the courts to orders made under the Interstate Commerce Act. When Congress has conferred jurisdic-

tion on an inferior court in particular classes of cases, the court has jurisdiction in cases of that class which arise under statutes subsequently passed. *In re Metzger,* Fed. Cas. No. 9511. Just as the courts have power to review by injunction, orders of the Commission made under amendments to the Interstate Commerce Act passed subsequent to the Urgent Deficiencies Act (*Chicago Junction Case, supra; Colorado* v. *United States, supra; Texas* v. *Eastern Texas R. R. Co., supra; Venner* v. *Michigan Central R. R., supra*), so has the court jurisdiction to review by injunction, orders made by the Commission under any other Acts giving powers to it.

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

The amended certificate issued by the Commission to the Secretary of the Treasury is not an "order." *Procter & Gamble* v. *United States,* 225 U. S. 282; *Lehigh Valley R. R.* v. *United States,* 243 U. S. 412; *United States* v. *Illinois Central R. R.,* 244 U. S. 82; *Delaware & Hudson* v. *United States,* 266 U. S. 438; *New York etc. R. R.* v. *United States,* 273 U. S. 652; *United States* v. *Los Angeles etc. R. R.,* 273 U. S. 299.

The amended certificate is not even directed to the Great Northern. Knowledge or notice of the certificate comes to it through a demand made by the Secretary of the Treasury. Even if the order is evidence in a suit against the Great Northern, it would seem that it would be time enough to assail its validity when the certificate is brought forward in the suit. Suits may not be brought before the specially constituted District Court under Urgent Deficiencies Act to suppress evidence or a cause of action. *Meeker* v. *Lehigh Valley,* 236 U. S. 412; *Mills* v. *Lehigh Valley,* 238 U. S. 473; *Spiller* v. *Atchison, T. & S. F.,* 253 U. S. 117; *St. Louis Southwestern* v. *Commission,* 264 U. S. 64; *Pittsburgh & West Va. Ry.* v. *United States,*

6 F. (2d) 646; *United States* v. *Los Angeles etc. R. R., supra.*

The transaction is between the Great Northern and the United States exclusively. Consent that the United States may be sued in such a transaction in the specially-constituted District Court is not found in the Urgent Deficiencies Act and does not exist. *Minnesota* v. *Hitchcock,* 185 U. S. 373; *Oregon* v. *Hitchcock,* 202 U. S. 60; *Illinois Central R. R.* v. *Public Utilities Comm'n,* 245 U. S. 493. The decree of the court would be no more than 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. *I. C. C.,* 258 U. S. 158.

In a suit to set aside an order of the Commission under Urgent Deficiencies Act, the United States is made by statute a necessary party, and this means that it is to stand in judgment as representing the public. *Illinois Central R. R.* v. *Public Utilities Comm'n,* 245 U. S. 493. In this case, the United States is sued in a money transaction with which Great Northern alone is concerned.

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

That special jurisdiction, created as an amendment to the Interstate Commerce Act, was intended solely for review of orders relating to commerce regulation directed to carriers subject to the regulatory authority, and was never intended to afford review of a certificate directed, not to the carriers subject to regulatory authority, but to the Secretary of the Treasury, and relating, not to matters of commerce regulation, but to a governmental guaranty significantly excluded by the Act of its creation, Transportation Act, 1920, from those portions of that Act that were named amendments to the Interstate Commerce Act.

Los Angeles Valuation Case, 273 U. S. 299; *Procter & Gamble* v. *United States,* 225 U. S. 282.

While the Urgent Deficiencies Act authorizes suits in name against the Government in respect of matters of commerce regulation, that authority cannot be consistently or harmoniously enlarged to embrace suits involving the public money, which are suits in substance as well as name, against the Government and, where authorized at all, are provided for before a special tribunal, or by jurisdiction conferred upon the district courts limiting the monetary amount of the claim.

The court's jurisdiction under the Urgent Deficiencies Act to enjoin orders of the Commission bears a reciprocal relationship to its jurisdiction to enforce such orders, and the Commission's certificate, directed to the Secretary of the Treasury rather than to the carriers, and being, moreover, for the payment of money, clearly falls outside the enforcement side of the court's special jurisdiction over regulatory orders and therefore should be reciprocally excluded from the enjoining side of the jurisdiction.

The fact that the guaranty section is in substance a gratuity, and the fact that its terms, agreed to by the carriers, clothe the Commission with broad discretion in the premises without provision for appeal from its determination, rebut any possible implication that the Government intended that the Urgent Deficiencies Act should constitute its consent to be sued in respect of the amount of its gift.

The Government's consent to this suit cannot be found in any other legislation providing for suits against the United States in the district courts.

Mr. Justice Brandeis delivered the opinion of the Court.

This suit, under the Act of June 18, 1910, c. 309, 36 Stat. 539, as amended by Urgent Deficiencies Act of Octo-

ber 22, 1913, c. 32, 38 Stat. 208, 220, was brought by the Great Northern Railway Company against the United States, in the federal court for Minnesota, to annul two certificates issued by the Interstate Commerce Commission to the Secretary of the Treasury, pursuant to § 209 of Transportation Act, 1920, February 28, 1920, c. 91, 41 Stat. 456, 464–468, as amended by Act of February 26, 1921, c. 72, 41 Stat. 1145. The Company claims that these certificates are orders of the Commission; that they were issued without authority of law; and that they are void. The United States and the Commission moved to dismiss on the ground that the certificates sought to be annulled are not orders of the Commission within the meaning of the Commerce Court and Urgent Deficiencies Acts; and that the United States had not consented to be sued. The case was heard before three judges who dismissed the bill for want of jurisdiction. 22 F. (2d) 865. Whether they erred in so doing is the only question presented by the appeal.

Certificates under § 209 are an incident of the termination of the federal control of the railroads on March 1, 1920. They are provided for in Title II of Transportation Act, 1920. By § 209(c) of that Act, the United States guaranteed to each company that its railway operating income for the following six months should be not less than one-half of the amount of the annual compensation to which it was entitled during the period of federal control. Paragraph (g) provided that: "The Commission shall, as soon as practicable after the expiration of the guaranty period, ascertain and certify to the Secretary of the Treasury the several amounts necessary to make good the foregoing guaranty. . . . ." Paragraph (h) provided for the issue, during the guaranty period, of certificates for payment on account, if the carrier furnishes an adequately secured contract to repay to the United

States any amount received in excess of that which shall be finally determined as the sum to which the carrier is entitled under the guaranty. Section 212, added by the Act of February 26, 1921, c. 72, 41 Stat. 1145, provided for payments on account after the expiration of the guaranty period, the Commission being authorized to "make its certificate for any amount definitely ascertained by it to be due, and . . . thereafter in the same manner make further certificates, until the whole amount due has been certified." Upon receipt of certificates the Secretary of the Treasury was directed "to draw warrants in favor of each such carrier upon the Treasury of the United States, for the amount shown in such certificate as necessary to make good such guaranty."

Upon certificates of the Commission issued to the Secretary of the Treasury under paragraph (h), he paid the Company $6,500,000 in 1920. Upon certificate issued under § 212, he paid it $6,000,000 in 1921. Several years later, in the course of the proceedings for final settlement of the amount due the Company under § 209, the Commission issued to the Secretary of the Treasury the two certificates here in suit. Only the second of them is of importance. It certified that the total amount required to make good to the Company the guaranty provided for in § 209 was $11,170,214.02. *Guaranty Settlement with Great Northern Railway Co. et al.,* 99 I. C. C. 231; 111 I. C. C. 318. As the Secretary of the Treasury had paid $12,500,000 to the Company, he demanded reimbursement, as an overpayment, of $1,329,785.98, being the difference between the aggregate amounts received by the Company and the total amount certified as payable under the guaranty. Pending settlement of that claim, the Government withheld payment to the Company of all amounts accruing for transportation services, but the payments were resumed upon the Company's deposit of Liberty bonds as

collateral. Thereupon, this suit was brought by the Company to annul the certificates and to restrain the Government from enforcing its claim by sale of the Liberty bonds or otherwise.

The function imposed upon the Commission by § 209 is solely that of determining the amount required to make good the Government's guaranty. It is not an exertion of the delegated power to regulate interstate commerce. It is an incident of the World War—a temporary, non-recurrent task, which might appropriately have been performed for the Treasury by its Comptroller or auditors, or by other trusted official. Congress selected the Commission for this service, doubtless, because of its special fitness. For the Commission had knowledge of railroads and experience in railroad accounting; it had the custody of the records of railroad operations; and its staff was competent to make speedily the necessary investigations.

Transportation Act, 1920, did not confer upon the Commission power to order anything in connection with the issue of the certificates. There is in the certificates no direction, no word of command. They are the recital of a finding of fact. They are addressed to the Secretary of the Treasury; and only to him. The form of the certificate expresses appropriately the character of the service performed by the Commission. The final certificate does not purport to declare that the carrier is indebted to the United States in any sum. It states the total amount required of the United States to make good the guaranty and the aggregate amount theretofore certified. It discloses the facts, but does not certify that there was an overpayment.[1] Congress distinguished clearly, in fram-

[1] The certificate reads (111 I. C. C. 318, 338–339):

"To The Secretary of the Treasury of the United States: . . .

"2. The commission has ascertained, and hereby certifies to the Secretary of the Treasury, that the amount necessary to make good

ing Transportation Act, 1920, between provisions which were amendments of the Interstate Commerce Act and those which, while relating to railroads, were not. The amendments were grouped under Title IV. The provisions here involved, which related solely to the termination of federal control, were grouped under Title II. Those which provided for the Railroad Labor Board, under Title III. Because issuing certificates is not a part of the Commission's delegated power to regulate commerce and is not an incident of such regulation, the special remedy provided by the Urgent Deficiencies Act is not available to review the legality or correctness of its action in doing so.

The Company points out that the action of the Commission here in question was affirmative, not negative, as in *Procter & Gamble Co.* v. *United States,* 225 U. S. 282; that it relates to a matter of substance and not merely to a step in procedure, as in *United States* v. *Illinois Central R. R. Co.,* 244 U. S. 82; that it determines legal rights and

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to said Great Northern Railway Company the guaranty provided by section 209 of the transportation act, 1920, is $11,170,214.02; . . .

"3. The commission has heretofore certified to the Secretary of the Treasury as advances under section 209(h) to said Great Northern Railway Company an aggregate amount of $6,500,000, as follows:

Certificate No. 65, June 25, 1920..... $3,000,000
Certificate No. 225, August 31, 1920..... 2,000,000
Certificate No. 276, November 4, 1920..... 1,500,000

and as partial payment to said Great Northern Railway Company under section 209(g), as amended by section 212, an amount of $6,000,000 on March 1, 1921, under certificate No. A–329.

"4. The commission has made final determination as aforesaid of the amount of the guaranty provided for by section 209 of the transportation act, 1920.

"Dated this 8th day of June, 1926."

The two certificates here involved deal with the same subject matter. The issue of the second canceled the earlier one, which differed as to the amount due to the Company and which had contained a certification of the fact of overpayment. 99 I. C. C. 231, 234, 235.

obligations, and is not simply the tentative or final report of an investigation, as were the orders which we declined to review in *Delaware & Hudson Co.* v. *United States,* 266 U. S. 438, and *United States* v. *Los Angeles & Salt Lake R. R. Co.,* 273 U. S. 299; and that its being entitled as a certificate rather than as an order is not fatal to the equity jurisdiction of the District Court under the Urgent Deficiencies Act. Compare *Chicago Junction Case,* 264 U. S. 258, 263; *Colorado* v. *United States,* 271 U. S. 153; *Home Furniture Co.* v. *United States,* 271 U. S. 456. But these considerations are irrelevant. For the inapplicability of the special remedy given by the Urgent Deficiencies Act is due to the fact that the certificate deals with a subject matter not within the scope of the Commission's duty to regulate commerce, and hence, not within the purview of that remedy. In this respect, among others, it differs from the order involved in *Dayton-Goose Creek Ry. Co.* v. *United States,* 263 U. S. 456.

It is said that, unless this remedy is available, the Company may be without redress. The argument is that the determination by the Commission of the amount required to make good the guaranty, may be likened to an award of arbitrators; that the ground of the attack upon the certificates is that they were made under a mistake of law; and that an award can be set aside for mistake of law only in equity, *Hartford Fire Insurance Co.* v. *Bonner Mercantile Co.,* 44 Fed. 151; *McLaurin* v. *McLauchlin,* 215 Fed. 345. We have no occasion to enquire whether a remedy at law or some other remedy in equity is available. The mere fact that the certificate may be conclusive, if it be a fact, would not entitle the Company to a judicial review. Compare *United States* v. *Babcock,* 250 U. S. 328, 331; *Work* v. *Rives,* 267 U. S. 175. We find no reason for thinking that because Congress confided to the Commission the task of certifying the amount to be paid to carriers from the public treasury, as an incident to the World

War, it thereby consented that the United States should be sued in the special proceeding in equity devised long before to control the Commission's execution of its regular functions in enforcing the Interstate Commerce Act.

Affirmed.

NECTOW *v.* CITY OF CAMBRIDGE ET AL.

ERROR TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

No. 509. Argued April 19, 1928.—Decided May 14, 1928.

The inclusion of private land in a residential district under a zoning ordinance, with resulting inhibition of its use for business and industrial buildings to the serious damage of the owner, violates the Fourteenth Amendment if the health, safety, convenience or general welfare of the part of the city affected will not be promoted thereby. P. 188.

260 Mass. 441, reversed.

ERROR to a judgment of the Supreme Judicial Court of Massachusetts which dismissed a bill brought in that court by Nectow for a mandatory injunction directing the city and its building inspector to pass upon an application to erect any lawful buildings upon his land without regard to an ordinance including it within a restricted residential district.

Messrs. Judson Hannigan and *John E. Hannigan* for plaintiff in error.

Mr. Peter J. Nelligan, with whom *Messrs. J. Edward Nally* and *Joseph P. Lyons* were on the brief, for defendants in error.

The master does not find any unreasonable or arbitrary use of power or abuse of discretion on the part of the City Council in passing the zoning ordinance. *Reinman* v.

Little Rock, 237 U. S. 171; *Albion* v. *Toledo,* 99 Oh. St. 416; *Jardine* v. *Pasadena,* 199 Cal. 64.

The ordinance will be sustained in its application to the plaintiff's land if it tends to promote the health, safety, convenience, and general welfare of the inhabitants. *Zahn and Ross* v. *Board of Public Works,* 195 Cal. 497; *Cusack Co.* v. *Chicago,* 242 U. S. 526.

The preservation of the residential district to the west and north of the locus from the intrusion of business and incongruous commercial buildings is sufficient justification for the placing of the plaintiff's land in a residential zone. *Miller* v. *Board of Public Works,* 195 Cal. 477.

The principles justifying the establishment of residential zones, apply with equal force to the preserving of these zones once established. *Welch* v. *Swasey,* 193 Mass. 364; *Wulfsolin* v. *Burden,* 281 N. Y. 288.

The action of the city government in placing the plaintiff's land in a residential district was a reasonable use of its discretion. *Stillman* v. *Lynch,* 56 Utah 540; *Inspector of Buildings* v. *Stoklosa,* 250 Mass. 52; *Dobbins* v. *Los Angeles,* 195 U. S. 223.

It was necessary for the City Council to draw a line of demarcation between the thickly settled district lying to the west, northwest, and north of plaintiff's land, and the mercantile district lying to the south, southeast, and east. *Reinman* v. *Little Rock,* 237 U. S. 171; *Village of Euclid* v. *Ambler Realty Co.,* 272 U. S. 365.

It would appear reasonable that the City Council should draw this line through the plaintiff's land so as to preserve the residential character of Brookline Street north of the Ford factory and the residential character of Henry Street along the frontage of the locus upon said street. The fact that the inclusion of the plaintiff in error's property in R–3 district rather than in a business zone depreciates its value, is not of controlling significance. *Spector* v. *Building Inspector,* 250 Mass. 63.

The plaintiff has suffered no greater disadvantage than may be suffered by any person whose land is on the border line between a business and a residential district. If the ordinance, as applied to the plaintiff's land, is nullified, the owners of residential property opposite, would have no protection from damages caused by the erection of such commercial or manufacturing buildings as plaintiff may see fit to construct. *Village of Euclid* v. *Ambler Realty Co.,* 272 U. S. 365.

There is no finding that the land in question, taken with the adjoining land of the plaintiff, could not be used profitably for residential or other purposes. *Jardine* v. *Pasadena,* 199 Cal. 64.

The question resolves itself into one of reasonableness. The Court should not substitute its opinion for that of the Legislature or City Council. *Cusack Co.* v. *Chicago,* 242 U. S. 526; *Reinman* v. *Little Rock,* 237 U. S. 171; *Village of Euclid* v. *Ambler Realty Co.,* 272 U. S. 365.

Mr. Justice Sutherland delivered the opinion of the Court.

A zoning ordinance of the City of Cambridge divides the city into three kinds of districts: residential, business and unrestricted. Each of these districts is sub-classified in respect of the kind of buildings which may be erected. The ordinance is an elaborate one, and of the same general character as that considered by this Court in *Euclid* v. *Ambler Co.,* 272 U. S. 365. In its general scope it is conceded to be constitutional within that decision. The land of plaintiff in error was put in district R–3, in which are permitted only dwellings, hotels, clubs, churches, schools, philanthropic institutions, greenhouses and gardening, with customary incidental accessories. The attack upon the ordinance is that, as specifically applied to plaintiff in error, it deprived him of his property without due process of law in contravention of the Fourteenth Amendment.

The suit was for a mandatory injunction directing the city and its inspector of buildings to pass upon an application of the plaintiff in error for a permit to erect any lawful buildings upon a tract of land without regard to the provisions of the ordinance including such tract within a residential district. The case was referred to a master to make and report findings of fact. After a view of the premises and the surrounding territory, and a hearing, the master made and reported his findings. The case came on to be heard by a justice of the court, who, after confirming the master's report, reported the case for the determination of the full court. Upon consideration, that court sustained the ordinance as applied to plaintiff in error, and dismissed the bill. 260 Mass. 441.

A condensed statement of facts, taken from the master's report, is all that is necessary. When the zoning ordinance was enacted, plaintiff in error was and still is the owner of a tract of land containing 140,000 square feet, of which the locus here in question is a part. The locus contains about 29,000 square feet, with a frontage on Brookline street, lying west, of 304.75 feet, on Henry street, lying north, of 100 feet, on the other land of the plaintiff in error, lying east, of 264 feet, and on land of the Ford Motor Company, lying southerly, of 75 feet. The territory lying east and south is unrestricted. The lands beyond Henry street to the north and beyond Brookline street to the west are within a restricted residential district. The effect of the zoning is to separate from the west end of plaintiff in error's tract a strip 100 feet in width. The Ford Motor Company has a large auto assembling factory south of the locus; and a soap factory and the tracks of the Boston & Albany Railroad lie near. Opposite the locus, on Brookline street, and included in the same district, there are some residences; and opposite the locus, on Henry street, and in the same district, are other residences. The locus is now vacant,

although it was once occupied by a mansion house. Before the passage of the ordinance in question, plaintiff in error had outstanding a contract for the sale of the greater part of his entire tract of land for the sum of $63,000. Because of the zoning restrictions, the purchaser refused to comply with the contract. Under the ordinance, business and industry of all sorts are excluded from the locus, while the remainder of the tract is unrestricted. It further appears that provision has been made for widening Brookline street, the effect of which, if carried out, will be to reduce the depth of the locus to 65 feet. After a statement at length of further facts, the master finds "that no practical use can be made of the land in question for residential purposes, because among other reasons herein related, there would not be adequate return on the amount of any investment for the development of the property." The last finding of the master is:

"I am satisfied that the districting of the plaintiff's land in a residence district would not promote the health, safety, convenience and general welfare of the inhabitants of that part of the defendant City, taking into account the natural development thereof and the character of the district and the resulting benefit to accrue to the whole City and I so find."

It is made pretty clear that because of the industrial and railroad purposes to which the immediately adjoining lands to the south and east have been devoted and for which they are zoned, the locus is of comparatively little value for the limited uses permitted by the ordinance.

We quite agree with the opinion expressed below that a court should not set aside the determination of public officers in such a matter unless it is clear that their action "has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public

safety or the public welfare in its proper sense." *Euclid* v. *Ambler Co., supra,* p. 395.

An inspection of a plat of the city upon which the zoning districts are outlined, taken in connection with the master's findings, shows with reasonable certainty that the inclusion of the locus in question is not indispensable to the general plan. The boundary line of the residential district before reaching the locus runs for some distance along the streets, and to exclude the locus from the residential district requires only that such line shall be continued 100 feet further along Henry street and thence south along Brookline street. There does not appear to be any reason why this should not be done. Nevertheless, if that were all, we should not be warranted in substituting our judgment for that of the zoning authorities primarily charged with the duty and responsibility of determining the question. *Zahn* v. *Bd. of Public Works,* 274 U. S. 325, 328, and cases cited. But that is not all. The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare. *Euclid* v. *Ambler Co., supra,* p. 395. Here, the express finding of the master, already quoted, confirmed by the court below, is that the health, safety, convenience and general welfare of the inhabitants of the part of the city affected will not be promoted by the disposition made by the ordinance of the locus in question. This finding of the master, after a hearing and an inspection of the entire area affected, supported, as we think it is, by other findings of fact, is determinative of the case. That the invasion of the property of plaintiff in error was serious and highly injurious is clearly established; and, since a neces-

sary basis for the support of that invasion is wanting, the action of the zoning authorities comes within the ban of the Fourteenth Amendment and cannot be sustained.

Judgment reversed.

SPRINGER ET AL. *v.* GOVERNMENT OF THE PHILIPPINE ISLANDS.

AGONCILLO *v.* SAME.

CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

Nos. 564 and 573. Argued April 10, 1928.—Decided May 14, 1928.

1. Acts of the Philippine Legislature creating a coal company and a bank, the stock of which is largely owned by the Philippine government, provide that the power to vote the stock shall be vested in a "Committee," in the one case, and in a "Board of Control," in the other, each consisting of the Governor General, the President of the Senate, and the Speaker of the House of Representatives. *Held*, that the voting of the stock in the election of directors and managing agents of the corporations is an executive function, and that the attempt to repose it in the legislative officers named violates the Philippine Organic Act. P. 199.
2. In the Philippine Organic Act, which divides the government into three departments—legislative, executive, and judicial—the principle is implicit, as it is in state and federal constitutions, that these three powers shall be forever separate and distinct from each other. P. 201.
3. This separation and the consequent exclusive character of the powers conferred upon each of the three departments of the government, is basic and vital—not merely a matter of governmental mechanism. *Id.*
4. It may be stated as a general rule inherent in the American constitutional system, that, unless otherwise expressly provided or incidental to the powers conferred, the legislature cannot exercise either executive or judicial power; the executive cannot exercise either legislative or judicial power; and the judiciary cannot exercise either executive or legislative power. *Id.*

5. Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or to appoint the agents charged with the duty of enforcing them. The latter are executive functions. P. 202.
6. Not having the power of appointment, unless expressly granted or incidental to its powers, the legislature cannot engraft executive duties upon a legislative office, since that would be to usurp the power of appointment by indirection. *Id.*
7. The appointment of managers (in this instance corporate directors) of property or a business in which the government is interested, is essentially an executive act which the legislature is without capacity to perform, directly or through its members. P. 203.
8. Whether or not the members of the "board" or "committee" are public officers in the strict sense, they are at least public agents charged with executive functions and therefore beyond the appointing power of the legislature. *Id.*
9. The instances in which Congress has devolved on persons not executive officers the power to vote in non-stock corporations created for governmental purposes, lend no support to a construction of the Constitution which would justify Congressional legislation like that here involved, considering the limited number of such instances, the peculiar character of the institutions there dealt with, and the contrary attitude of Congress towards governmentally owned or controlled stock corporations. P. 204.
10. The powers here asserted by the Philippine Legislature are vested in the Governor General by the Organic Act; viz., by the provision vesting in him the supreme executive power, with general supervision and control over all the departments and bureaus of the government; the provision placing on him the responsibility for the faithful execution of the laws; and the provision that all executive functions of the government must be directly under him or within one of the executive departments under his supervision and control. P. 205.
11. Where a statute contains a grant of power enumerating certain things which may be done, and also a general grant of power which, standing alone, would include those things and more, the general grant may be given full effect if the context shows that the enumeration was not intended to be exclusive. P. 206.
12. In § 22 of the Organic Act, the clause in the form of a proviso placing all the executive functions directly under the Governor General or in one of the executive departments under his direc-

tion and control, and the proviso preceding it which grants certain powers to the legislature, are both to be construed as independent and substantive provisions. P. 207.

13. An inference that Congress has approved an Act of the Philippine Legislature reported to it under § 10 of the Organic Act cannot be drawn from the failure of Congress to exercise its power to annul, reserved in that section, where the Act reported contravenes the Organic Act and is therefore clearly void. P. 208.

Affirmed.

CERTIORARI, 275 U. S. 519, to two judgments of ouster rendered by the Supreme Court of the Philippine Islands in proceedings in the nature of *quo warranto*, which were brought in that court by the Philippine Government against the present petitioners, to test their right to be directors in certain corporations described in the opinion.

Mr. John W. Davis, with whom *Messrs. José A. Santos, James Ross, Quintin Paredes,* and *Claro M. Recto* were on the briefs, for petitioners.

The voting power of the government-owned stock in the National Coal Company is not an office, and all of respondent's contentions as to an alleged invasion of the Governor-General's asserted general power of appointing persons to public office are, for that reason, quite beside the point. *Sheboygan County* v. *Parker,* 3 Wall. 92; *United States* v. *Hatch,* 1 Pin. (Wis.) 182; *United States* v. *Hartwell,* 6 Wall. 385; *United States* v. *Germaine,* 99 U. S. 508; *State* v. *Kennon,* 7 Oh. St. 546; *In the Matter of Oaths,* 20 Johnson, 492; *Bank of the United States* v. *Planters Bank,* 9 Wheat. 904. This latter case has been followed in *Bank of Kentucky* v. *Wister,* 3 Pet. 431; *Briscoe* v. *Bank of Kentucky,* 11 Pet. 323; *Darrington* v. *Bank of Alabama,* 13 How. 12; *Curran* v. *Arkansas,* 15 How. 304; *Sloan Shipyards Corp'n* v. *U. S. Shipping Board,* 258 U. S. 549, and in other cases. *C. & D. Canal Co.* v. *United States,* 250 U. S. 123; *Shoemaker* v. *United States,* 147 U. S. 282.

The Philippine Legislature has all general legislative powers such as are exercised by States and Territories.

The voting of the government-owned stock is merely a part of the machinery for the management of the corporation, and, under the Legislature's power to create corporations for the attainment of objects within its powers and to provide for the organization of such corporations and for their management, the Legislature may confer the voting power of the corporate stock as it sees fit.

Congress has often created corporations to act for it in the attainment of those objects that are within its powers and has often given over the voting power in such corporations to persons other than executive officers of the Government, or—what is the same thing where the corporations have been without capital stock—it has given over the management of the corporations to such persons. Examples of the latter sort are the Smithsonian Institution and the National Home for Disabled Soldiers.

A more frequently used extra-governmental means for the attainment of Congressional objectives has been the privately owned stock company, such, for example, as those concerned in *California* v. *Pacific R. R. Co.*, 127 U. S. 1, and *Luxton* v. *North River Bridge Co.*, 153 U. S. 525.

Plainly, corporations such as those involved in the two foregoing cases exercise the functions that some executive departments would exercise if Congress chose to "use its sovereign powers directly." Yet, despite this fact and despite the fact that such corporations are instruments through which Congress exercises portions of its sovereign power, it has nevertheless been usual to confide to the private stockowners in such corporations the power of control through the stock-voting power.

Government ownership, this Court has repeatedly held, is insufficient to blur the corporate lines that separate such corporations as that herein concerned from the government that has created them. *Bank of the United States*

v. *Planters Bank,* 9 Wheat. 904; *Bank of Kentucky* v. *Wister,* 3 Pet. 431; *Briscoe* v. *Bank of Kentucky,* 11 Pet. 324; *Darrington* v. *Bank of Alabama,* 13 How. 12; *Curran* v. *Arkansas,* 15 How. 304; *Sloan Shipyards Corp'n* v. *U. S. Shipping Board,* 258 U. S. 549; *United States* v. *Strang,* 254 U. S. 491; *Skinner & Eddy* v. *McCarl,* 275 U. S. 1.

Where the extra-governmental entity is chosen, the cases indicate that insofar as the management of its corporate affairs is concerned, the corporation so created is in the fullest degree a separate entity. The only blurring of the corporate lines has been in the extension of governmental privileges and protection to such corporations. *Russel Motor Car Co.* v. *United States,* 261 U. S. 514; *United States* v. *Walter,* 263 U. S. 15; *Clallam County* v. *United States,* 263 U. S. 341; *U. S. Grain Corp'n* v. *Phillips,* 261 U. S. 106; *Emergency Fleet Corp'n* v. *Western Union,* 275 U. S. 415.

Conceding, *arguendo,* that the corporate entity of the National Coal Company may be disregarded and that the power of voting the government-owned stock may be regarded as a duty of caring for government property, that voting power, as such a duty, is nevertheless properly confided to legislative officers.

It is well settled that under § 3 of Art. IV of the Constitution, neither the President nor the heads of any of the executive departments have any powers in respect to the use or disposal of public property apart from those given them by Congress. *Pan American Petroleum Co.* v. *United States,* 273 U. S. 456; *Mammoth Oil Co.* v. *United States,* 274 U. S. 13; *United States* v. *Hare,* Fed. Cas. No. 15,303; *Knote* v. *United States,* 10 Ct. Cls. 397; *Flores* v. *United States,* 18 Ct. Cls. 352; *Lear* v. *United States,* 50 Fed. 65; *United States* v. *Nichol,* Fed. Cas. No. 15,879.

The authority of Congress may be given either generally in reference to a class of properties or specifically in reference to a particular property, and Congress can with-

draw a pending contest over the right of entry of public lands from the jurisdiction of the land department and itself determine the rights of the parties involved. *Emblen* v. *Lincoln Land Co.*, 102 Fed. 559, affirmed, 184 U. S. 660.

The powers of Congress in the care of government property are plenary. In that behalf the executive departments are no more than the agents or instrumentalities of Congress. It is plain that the duty of caring for government property, far from being "surely executive," is, in fact, legislative in character. The executive departments ordinarily perform the detail of such care; but to Congress belongs the power of direction and such direction may be as specific as Congress sees fit to make it.

While the constitutional provision is not of course directly applicable to the Philippine Legislature, it and the decisions under it are important as showing the scope of legislative power in respect of the care, management, use and disposal of government property under the American theory of government.

Officers of the National Coal Company are not officers of the Philippine Government, and the fact that the voting power of the government-owned stock is to be exercised for the purpose, *inter alia,* of selecting such officers, does not make that voting power a part of the Governor-General's asserted power of appointing persons to public office.

If voting the government-owned stock were an office, the President of the Senate and Speaker of the House of Representatives would be eligible to hold it.

The Governor-General of the Philippine Islands has no general power of appointing persons to public office and the alleged "offices" herein involved would not be within the powers of appointment specifically given to him under the Autonomy Act, even if they were prop-

erly regarded as "offices" within the meaning of that Act.

The Philippine statutes here in question have received the implied sanction of Congress and should not be disturbed. *Clinton* v. *Englebrecht,* 13 Wall. 434; *Gromer* v. *Std. Dredging Co.,* 224 U. S. 362; *Tiaco* v. *Forbes,* 228 U. S. 549; *Chanco* v. *Imperial,* 34 Phil. Rep. 329; *United States* v. *Bull,* 15 Phil. Rep. 31; *Baca* v. *Perez,* 8 N. M. 187; *Gallardo* v. *Porto Rico Rwy. Co.,* 18 F. (2d) 918; *Fajardo Sugar Co.* v. *Holcomb,* 16 F. (2d) 92; *Myers* v. *United States,* 272 U. S. 52; *Binns* v. *United States,* 194 U. S. 486.

Solicitor General Mitchell, with whom *Messrs. Frederick C. Fisher, Wm. Cattron Rigby, Hugh C. Smith, Robert P. Reeder,* Special Assistant to the Attorney General, *John A. Hull,* Judge Advocate General, U. S. A., and *Delfin Jaranilla,* Attorney General of the Philippine Islands, were on the brief, for respondent.

The Acts of the Philippine Legislature, read in connection with other statutes relating to the Philippine National Bank, the National Coal Company, and corporations in general, have the effect of stripping the Governor General of all direction or control over the Bank or Coal Company and of vesting the direction of the management and operation of those institutions in representatives of the two Houses of the Legislature selected by those Houses. The President of the Senate and the Speaker of the House of Representatives are selected by those bodies and hold office during their pleasure. They, in turn, acting together on the so-called Board of Control, elect and remove the managing directors and agents of these corporations, and in the case of the Bank, they also directly participate with those officers and agents in conducting the bank's affairs. The effect of these provisions

is that the majority in the Legislature, acting through representatives doing their bidding, from day to day direct and control the operations and management of these institutions.

The selection and removal of the managing directors and officers of corporations, a majority of the stock of which is owned by the Government, and the direction of the operations of those corporations through the exercise of that power, are not legislative functions. They do not constitute the making or repealing of laws or anything incidental to such legislative action. The voting of the Government's stock is itself not legislative, and the depriving the Governor General of all control of the operations of these corporations is in direct violation of that provision of the Organic Act contained in § 22, which provides that all executive functions must be under the Governor General or within one of the executive departments under his supervision and control. It is not material whether the relation of the Philippine Government to these corporations is proprietary or sovereign, or whether the corporations are engaged in performing sovereign governmental functions or conducting private business. The power of the Philippine Legislature over matters in which the Philippine Government acts in a proprietary capacity, is legislative. It has no more power to exercise administrative or executive functions over proprietary interests of the Government than it has over sovereign governmental functions, and the exclusion of the Legislature from participation in administrative or executive functions, and the granting of those functions to the Governor General and his subordinates, operate on all governmental matters whether proprietary or sovereign.

If membership on the "Board of Control" or "Committee" is a separate post or position from that of Governor General or of President of the Senate or of Speaker

of the House of Representatives, then the selection by the Legislature or by either House of the persons to occupy that position is beyond legislative power, because in itself an executive act. If the functions to be exercised by members of the Board of Control or Committee are executive or administrative in character, the selection of those members is not a legislative act.

The ultimate question here is again whether voting the stock and directing the affairs of these corporations are executive functions, and it is not important whether the position on the Board of Control or Committee is a separate office or post, or whether the Legislature has merely added certain duties to those of the President of the Senate and the Speaker of the House of Representatives. It may not make appointments to executive or administrative positions, and it may not confer executive or administrative functions on legislative officials.

That Congress has not taken any action to affirmatively annul these statutes is of no consequence. The power reserved in the Organic Act to annul Acts of the Philippine Legislature, relates to valid Acts passed under authority of the Organic Act and consistent with it. It was never contemplated that Acts of the Philippine Legislature, void because in conflict with the Organic Act, would become valid unless their invalidity be reiterated by Congress within a reasonable time.

Mr. Justice Sutherland delivered the opinion of the Court.

These cases, presenting substantially the same question, were argued and will be considered and disposed of together. In each case an action in the nature of *quo warranto* was brought in the court below challenging the right to hold office of directors of certain corporations organized under the legislative authority of the Philippine

Islands, No. 564 involving directors of the National Coal Company and No. 573 involving directors of the Philippine National Bank.

The National Coal Company was created by Act 2705, approved March 10, 1917, subsequently amended by Act 2822, approved March 5, 1919. The Governor-General, under the provisions of the amended act, subscribed on behalf of the Philippine Islands for substantially all of the capital stock. The act provides: " The voting power of all such stock owned by the Government of the Philippine Islands shall be vested exclusively in a committee, consisting of the Governor-General, the President of the Senate and the Speaker of the House of Representatives."

The National Bank was created by Act 2612, approved February 4, 1916, subsequently amended by Act 2747, approved February 20, 1918, and Act 2938, approved January 30, 1921. The authorized capital of the bank, as finally fixed, was 10,000,000 pesos, consisting of 100,000 shares, of which, in pursuance of the legislative provisions, the Philippine Government acquired and owns 97,332 shares, the remainder being held by private persons. By the original act the voting power of the government-owned stock was vested exclusively in the Governor-General, but by the amended acts now in force that power was " vested exclusively in a board, the short title of which shall be ' Board of Control,' composed of the Governor-General, the President of the Senate, and the Speaker of the House of Representatives." The Governor-General was also divested of the power of appointment of the President and Vice-President of the bank, originally vested in him, and their election was authorized to be made by the directors from among their own number. Provision was also made for a general manager, to be appointed or removed by the board of directors with the advice and consent of the Board of Control. The manager was to be chief executive of the bank, with an annual

salary to be fixed by the board of directors with the approval of the Board of Control. Further duties were conferred upon the Board of Control in connection with the management of the bank which it does not seem necessary to set forth.

It is worthy of note that this voting power has been similarly devolved by the legislature in the case of at least four other corporations: The National Petroleum Company, by Act 2814; The National Development Company, by Act 2849; The National Cement Company, by Act 2855; and The National Iron Company, by Act 2862; and the suggestion of the Solicitor General that this indicates a systematic plan on the part of the legislature to take over, through its presiding officers, the direct control generally of nationally organized or controlled stock corporations would seem to be warranted.

In pursuance of the first quoted provision, petitioners in No. 564 were elected directors of the National Coal Company by a vote of the government-owned shares cast by the President of the Senate and the Speaker of the House; and in pursuance of the second quoted provision, petitioners in No. 573 were elected directors of the National Bank in the same way. The Governor-General, challenging the validity of the legislation, did not participate in either election. While there are some differences between the two actions in respect of the facts, they are differences of detail which do not affect the substantial question to be determined.

On behalf of the Philippine Government, respondent in both cases, it is contended that the election of directors and managing agents by a vote of the government-owned stock was an executive function entrusted by the Organic Act of the Philippine Islands to the Governor-General, and that the acts of the Legislature divesting him of that power and vesting it, in the one case, in a "board," and, in the other, in a "committee," the majority of which in

each instance consisted of officers and members of the Legislature, were invalid as being in conflict with the Organic Act. The court below sustained the contention of the Government and entered judgments of ouster against the petitioners in each case.

The Congressional legislation referred to as the "Organic Act" is the enactment of August 29, 1916, c. 416, 39 Stat. 545, which constitutes the fundamental law of the Philippine Islands and bears a relation to their governmental affairs not unlike that borne by a state constitution to the state. The act contains a bill of rights, many of the provisions of which are taken from the federal Constitution. It lays down fundamental rules in respect of taxation, shipping, customs duties, etc. Section 8 of the act provides, "That general legislative power, except as otherwise herein provided, is hereby granted to the Philippine Legislature, authorized by this Act." And by § 12 this legislative power is vested in a legislature, to consist of two houses, one the senate and the other the house of representatives. Provision is made (§§ 13, 14 and 17) for memberships, terms and qualifications of the members of each house. By § 21 it is provided "that the supreme executive power shall be vested in an executive officer, whose official title shall be 'The Governor General of the Philippine Islands.'" He is given "general supervision and control of all of the departments and bureaus of the government in the Philippine Islands as far as is not inconsistent with the provisions of this Act." He is made "responsible for the faithful execution of the laws of the Philippine Islands and of the United States operative within the Philippine Islands." Other powers of an important and comprehensive character also are conferred upon him. By § 22 the executive departments of the Philippine government, as then authorized by law, are continued until otherwise provided by the legislature. The legislature is authorized by appropriate legislation to

"increase the number or abolish any of the executive departments, or make such changes in the names and duties thereof as it may see fit," and "provide for the appointment and removal of the heads of the executive departments by the Governor General." Then follows the proviso: "That all executive functions of the government must be directly under the Governor General or within one of the executive departments under the supervision and control of the Governor General." Section 26 recognizes the existing supreme court and courts of first instance of the Islands and continues their jurisdiction as theretofore provided, with such additional jurisdiction as shall thereafter be prescribed by law.

Thus the Organic Act, following the rule established by the American constitutions, both state and federal, divides the government into three separate departments—the legislative, executive and judicial. Some of our state constitutions expressly provide in one form or another that the legislative, executive and judicial powers of the government shall be forever separate and distinct from each other. Other constitutions, including that of the United States, do not contain such an express provision. But it is implicit in all, as a conclusion logically following from the separation of the several departments. See *Kilbourn* v. *Thompson,* 103 U. S. 168, 190–191. And this separation and the consequent exclusive character of the powers conferred upon each of the three departments is basic and vital—not merely a matter of governmental mechanism. That the principle is implicit in the Philippine Organic Act does not admit of doubt. See *Abueva* v. *Wood,* 45 Phil. Rep. 612, 622, 628 *et seq.*

It may be stated then, as a general rule inherent in the American constitutional system, that, unless otherwise expressly provided or incidental to the powers conferred, the legislature cannot exercise either executive or judicial power; the executive cannot exercise either legislative or

judicial power; the judiciary cannot exercise either executive or legislative power. The existence in the various constitutions of occasional provisions expressly giving to one of the departments powers which by their nature otherwise would fall within the general scope of the authority of another department emphasizes, rather than casts doubt upon, the generally inviolate character of this basic rule.

Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions. It is unnecessary to enlarge further upon the general subject, since it has so recently received the full consideration of this Court. *Myers* v. *United States,* 272 U. S. 52.

Not having the power of appointment, unless expressly granted or incidental to its powers, the legislature cannot engraft executive duties upon a legislative office, since that would be to usurp the power of appointment by indirection; though the case might be different if the additional duties were devolved upon an appointee of the executive. *Shoemaker* v. *United States,* 147 U. S. 282, 300–301. Here the members of the legislature who constitute a majority of the " board " and " committee," respectively, are not charged with the performance of any legislative functions or with the doing of anything which is in aid of the performance of any such functions by the legislature. Putting aside for the moment the question whether the duties devolved upon these members are vested by the Organic Act in the Governor-General, it is clear that they are not legislative in character, and still more clear that they are not judicial. The fact that they do not fall within the authority of either of these two constitutes logical ground for concluding that they do fall within that of the remaining one of the three among

which the powers of government are divided. Compare *Myers* v. *United States, supra,* pp. 117–118.

Assuming, for present purposes, that the duty of managing this property, namely, the government-owned shares of stock in these corporations, is not sovereign but proprietary in its nature, the conclusion must be the same. The property is owned by the government, and the government in dealing with it whether in its quasi-sovereign or its proprietary capacity nevertheless acts in its governmental capacity. There is nothing in the Organic Act, or in the nature of the legislative power conferred by it, to suggest that the legislature in acting in respect of the proprietary rights of the government may disregard the limitation that it must exercise legislative and not executive functions. It must deal with the property of the government by making rules, and not by executing them. The appointment of managers (in this instance corporate directors) of property or a business is essentially an executive act which the legislature is without capacity to perform directly or through any of its members.

Whether the members of the "board" or the "committee" are public officers in a strict sense we do not find it necessary to determine. They are public agents at least, charged with the exercise of executive functions and, therefore, beyond the appointing power of the legislature. *Stockman* v. *Leddy,* 55 Colo. 24, involved a case very much like that now under consideration. The state legislature had created a committee of its own members to investigate the rights of the state in the flowing waters therein. The committee was authorized to determine what steps were necessary to be taken to protect the rights of the state, to employ counsel, etc. There was no claim that the investigation was for the purpose of ascertaining facts to aid in future legislation or to assist the legislature in its legislative capacity, but it was for the pur-

pose of enabling the committee itself to reach a conclusion as to what should be proper to do in order to protect the rights of the state. The court, in holding the act unconstitutional, said (p. 31): "In other words, the general assembly not only passed an act—that is, made a law—but it made a joint committee of the senate and the house as its executive agent to carry out that law. This is a clear and conspicuous instance of an attempt by the general assembly to confer executive power upon a collection of its own members." And the court held that this was invalid under the provisions of the state constitution respecting the tripartite division of governmental powers. See also, *Clark* v. *Stanly*, 66 N. C. 59; *State ex rel. Howerton* v. *Tate*, 68 N. C. 546.

Petitioners seek to draw a parallel between the power of Congress to create corporations as appropriate means of executing governmental powers and the acts of the Philippine legislature here under consideration. To what extent the powers of the two bodies in this respect may be assimilated we need not stop now to determine, since the power of the legislature to create the two corporations here involved is not doubted. But it is argued further that Congress in creating corporations for governmental purposes has sometimes devolved the voting power in such corporations upon persons other than executive officers. In the case of the Smithsonian Institution, cited as an example, Congress provided for a governing Board of Regents composed in part of members of the Senate and of the House. There are two or three other instances in respect of non-stock organizations of like character. On the other hand, as pointed out by the Solicitor General, in the case of governmentally organized or controlled stock corporations, Congress has uniformly recognized the executive authority in their management, generally providing in express terms that the shares shall be voted

by an executive officer, and in no instance attempting to grant such power to one or more of its members. Many instances of this kind are cited by the Solicitor General, but it is not necessary to repeat his enumeration. It is enough to say that, when we consider the limited number of acts of Congress which fall within the first class spoken of above, as well as the peculiar character of the institutions dealt with, and the contrary attitude of Congress toward corporations of a different character, such acts cannot be regarded as lending support to a construction of the Constitution which would justify Congressional legislation like that here involved. As this Court said in *Myers* v. *United States, supra,* pp. 170–171.

"In the use of Congressional legislation to support or change a particular construction of the Constitution by acquiescence, its weight for the purpose must depend not only upon the nature of the question, but also upon the attitude of the executive and judicial branches of the Government, as well as upon the number of instances in the execution of the law in which opportunity for objection in the courts or elsewhere is afforded. When instances which actually involve the question are rare, or have not in fact occurred, the weight of the mere presence of acts on the statute book for a considerable time, as showing general acquiescence in the legislative assertion of a questioned power, is minimized."

And we are further of the opinion that the powers asserted by the Philippine Legislature are vested by the Organic Act in the Governor-General. The intent of Congress to that effect is disclosed by the provisions of that act already set forth. Stated concisely these provisions are: that the supreme executive power is vested in the Governor-General, who is given general supervision and control over all the departments and bureaus of the Philippine government; upon him is placed the responsi-

bility for the faithful execution of the laws of the Philippine Islands; and, by the general proviso, already quoted, all executive functions must be directly under the Governor-General or within one of the executive departments under his supervision and control. These are grants comprehensive enough to include the powers attempted to be exercised by the legislature by the provisions of law now under review. *Myers* v. *United States, supra.*

It is true that § 21 contains a specific provision that the Governor-General shall appoint such officers as may now be appointed by the Governor-General, or such as he is authorized by this act to appoint, or whom he may hereafter be authorized by law to appoint. And it is said that the effect of this is to confine the Governor-General's powers of appointment within the limits of this enumeration. The general rule that the expression of one thing is the exclusion of others is subject to exceptions. Like other canons of statutory construction it is only an aid in the ascertainment of the meaning of the law and must yield whenever a contrary intention on the part of the law-maker is apparent. Where a statute contains a grant of power enumerating certain things which may be done and also a general grant of power which standing alone would include these things and more, the general grant may be given full effect if the context shows that the enumeration was not intended to be exclusive. See for example, *Ford* v. *United States,* 273 U. S. 593, 611; *Portland* v. *N. E. T. & Co.,* 103 Me. 240, 249; *Grubbe* v. *Grubbe,* 26 Or. 363, 370; *Swick* v. *Coleman,* 218 Ill. 33, 40; *Lexington ex rel.* v. *Commercial Bank,* 130 Mo. App. 687, 692; *McFarland* v. *M. K. & T. Ry. Co.,* 94 Mo. App. 336, 342.

Applying these principles, we are unable to accept the contention that the enumeration here in question is exclusive in the face of the general provisions already quoted and particularly of that one which declares that

all executive functions are vested directly in the Governor-General or under his supervision and control. It is true that this provision is in the form of a proviso, and it is argued that it is, therefore, nothing more than a definition by negation of the power given to the legislature in the same section. But an analysis of the section, which is reproduced so far as pertinent in the margin,* shows, though not wholly beyond doubt, that the power given to the legislature is itself a proviso. In other words, both the grant of power to the legislature and the grant of power to the Governor-General are in form provisos to the general provisions of § 22 which precede them. It is difficult to assign to either proviso the general purpose of that form of legislation, which is merely to qualify the operation of the general language which preceeds it. We think rather that both provisos are to be construed as independent and substantive provisions. As this Court has more than once pointed out, it is not an uncommon practice in legislative proceedings to include independent pieces of legislation under the

* Sec. 22. That, except as provided otherwise in this Act, the executive departments of the Philippine government shall continue as now authorized by law until otherwise provided by the Philippine Legislature. When the Philippine Legislature herein provided shall convene and organize, the Philippine Commission, as such, shall cease and determine, and the members thereof shall vacate their offices as members of said commission: *Provided,* That the heads of executive departments shall continue to exercise their executive functions until the heads of departments provided by the Philippine Legislature pursuant to the provisions of this Act are appointed and qualified. The Philippine Legislature may thereafter by appropriate legislation increase the number or abolish any of the executive departments, or make such changes in the names and duties thereof as it may see fit, and shall provide for the appointment and removal of the heads of the executive departments by the Governor-General: *Provided,* That all executive functions of the government must be directly under the Governor General or within one of the executive departments under the supervision and control of the Governor General. . . .

head of provisos. See *Georgia Banking Co.* v. *Smith,* 128 U. S. 174, 181; *White* v. *United States,* 191 U. S. 545, 551; *Cox* v. *Hart,* 260 U. S. 427, 435.

Finally, it is urged that since no action has been taken by Congress under § 19 of the Organic Act, requiring all laws enacted by the Philippine Legislature to be reported to Congress, which reserves the power to annul them, the legislation now under review has received the implied sanction of Congress and should not be disturbed. *Clinton* v. *Englebrecht,* 13 Wall. 434, 446, is cited in support of this contention. In that case jurors were summoned into the legislative courts of the territory of Utah under the provisions of acts of Congress applicable only to the courts of the United States. This Court held that the jurors were wrongly summoned and a challenge to the array should have been sustained. The Court, however, proceeded also to examine the jury law enacted by the territorial legislature, and declared it to be valid. In the course of the opinion it was said that since the simple disapproval by Congress at any time would have anulled that law, it was not unreasonable to infer that it was approved by that body. In the later case of *Clayton* v. *Utah Territory,* 132 U. S. 632, an act of the same territory providing for the appointment of certain officers, was held to be void as in contravention of a provision of the territorial Organic Act vesting in the Governor the power to appoint such officers. Dealing with the same point here made, this Court said (p. 642):

"It is true that in a case of doubtful construction the long acquiescence of Congress and the general government may be resorted to as some evidence of the proper construction, or of the validity, of a law. This principle is more applicable to questions relating to the construction of a statute than to matters which go to the power of the legislature to enact it. At all events, it can hardly be admitted as a general proposition that under the power of

Congress reserved in the organic acts of the Territories to annul the acts of their legislatures the absence of any action by Congress is to be construed to be a recognition of the power of the legislature to pass laws in conflict with the act of Congress under which they were created."

The inference of an approval by Congress from its mere failure to act at best rests upon a weak foundation. And we think where the inference is sought to be applied, as here, to a case where the legislation is clearly void as in contravention of the Organic Act it cannot reasonably be indulged. To justify the conclusion that Congress has consented to the violation of one of its own acts of such fundamental character, will require something more than such inaction upon its part as really amounts to nothing more than a failure affirmatively to declare such violation by a formal act.

Whether the Philippine Legislature, in view of the alternative form of the provision vesting all executive functions directly under the Governor-General or within one of the executive departments under his supervision and control, might devolve the voting power upon the head of an executive department or an appointee of such head, we do not now decide. The legislature has not undertaken to do so; and in the absence of such an attempt it necessarily results that the power must be exercised directly by the Governor-General or by his appointee, since he is the only executive now definitely authorized by law to act.

The judgments in both cases are

Affirmed.

MR. JUSTICE HOLMES.

The great ordinances of the Constitution do not establish and divide fields of black and white. Even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to the other. Property must not be taken without compensation, but with

the help of a phrase, (the police power) some property may be taken or destroyed for public use without paying for it, if you do not take too much. When we come to the fundamental distinctions it is still more obvious that they must be received with a certain latitude or our government could not go on.

To make a rule of conduct applicable to an individual who but for such action would be free from it is to legislate—yet it is what the judges do whenever they determine which of two competing principles of policy shall prevail. At an early date it was held that Congress could delegate to the Courts the power to regulate process, which certainly is lawmaking so far as it goes. *Wayman* v. *Southard,* 10 Wheat. 1, 42. *Bank of the United States* v. *Halstead,* 10 Wheat. 51. With regard to the Executive, Congress has delegated to it or to some branch of it the power to impose penalties, *Oceanic Steam Navigation Co.* v. *Stranahan,* 214 U. S. 320; to make conclusive determination of dutiable values, *Passavant* v. *United States,* 148 U. S. 214; to establish standards for imports, *Buttfield* v. *Stranahan,* 192 U. S. 470; to make regulations as to forest reserves, *United States* v. *Grimaud,* 220 U. S. 506, and other powers not needing to be stated in further detail. *Houston* v. *St. Louis Independent Packing Co.,* 249 U. S. 479. *Union Bridge Co.* v. *United States,* 204 U. S. 364. *Ex parte Kollock,* 165 U. S. 526. Congress has authorized the President to suspend the operation of a statute, even one suspending commercial intercourse with another country, *Field* v. *Clark,* 143 U. S. 649, and very recently it has been decided that the President might be given power to change the tariff. *J. W. Hampton, Jr., & Co.* v. *United States,* 276 U. S. 394. It is said that the powers of Congress cannot be delegated, yet Congress has established the Interstate Commerce Commission, which does legislative, judicial and executive acts, only softened by a *quasi;* makes regulations, *Intermountain Rate Cases,*

234 U. S. 476, 486, issues reparation orders, and performs executive functions in connection with Safety Appliance Acts, Boiler Inspection Acts, &c. Congress also has made effective excursions in the other direction. It has withdrawn jurisdiction of a case after it has been argued. *Ex parte McCardle,* 7 Wall. 506. It has granted an amnesty, notwithstanding the grant to the President of the power to pardon. *Brown* v. *Walker,* 161 U. S. 591, 601. A territorial legislature has granted a divorce. *Maynard* v. *Hill,* 125 U. S. 190. Congress has declared lawful an obstruction to navigation that this Court has declared unlawful. *Pennsylvania* v. *Wheeling & Belmont Bridge Co.,* 18 How. 421. Parallel to the case before us, Congress long ago established the Smithsonian Institution, to question which would be to lay hands on the Ark of the Covenant; not to speak of later similar exercises of power hitherto unquestioned, so far as I know.

It does not seem to need argument to show that however we may disguise it by veiling words we do not and cannot carry out the distinction between legislative and executive action with mathematical precision and divide the branches into watertight compartments, were it ever so desirable to do so, which I am far from believing that it is, or that the Constitution requires.

The only qualification of such latitude as otherwise would be consistent with the threefold division of power, is the proviso in § 22 of the organic Act " that all executive functions of the Government must be directly under the Governor General or within one of the executive departments," &c. Act of August 29, 1916, c. 416, 39 Stat. 553, U. S. C., Title 48, § 1114. That does not appear to me to govern the case. The corporations concerned were private corporations which the legislature had power to incorporate. Whoever owned the stock, the corporation did not perform functions of the Government. This

would be plain if the stock were in private hands, and if the Government bought the stock from private owners the functions of the corporations would not be changed. If I am right in what I have said I think that ownership would not make voting upon the stock an executive function of the Government when the acts of the corporation were not. I cannot believe that the legislature might not have provided for the holding of the stock by a board of private persons with no duty to the Government other than to keep it informed and to pay over such dividends as might accrue. It is said that the functions of the Board of Control are not legislative or judicial and therefore they must be executive. I should say rather that they plainly are no part of the executive functions of the Government but rather fall into the indiscriminate residue of matters within legislative control. I think it would be lamentable even to hint a doubt as to the legitimacy of the action of Congress in establishing the Smithsonian as it did, and I see no sufficient reason for denying the Philippine legislature a similar power.

MR. JUSTICE BRANDEIS agrees with this opinion.

MR. JUSTICE McREYNOLDS.

I think the opinion of the majority goes much beyond the necessities of the case.

The "Organic Act" is careful to provide: "That all executive functions of the government must be directly under the Governor General or within one of the executive departments under the supervision and control of the Governor General."

A good reason lies behind this limitation which does not apply to our Federal or State governments. From the language employed, read in the light of all the circumstances, perhaps it is possible to spell out enough to overthrow the challenged legislation. Beyond that it is unnecessary to go.

Counsel for Parties.

FEDERAL INTERMEDIATE CREDIT BANK OF COLUMBIA, SOUTH CAROLINA, *v.* MITCHELL ET AL.

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

No. 456. Argued March 13, 1928.—Decided May 14, 1928.

1. A suit to collect promissory notes exceeding the jurisdictional amount, brought by a Federal Intermediate Credit Bank chartered under the Act of March 4, 1923, is, because of the plaintiff's federal incorporation, a suit arising under the laws of the United States and within the jurisdiction of the District Court under Jud. Code § 24 (1). P. 214.
2. Such jurisdiction is not affected by § 12, Act of February 13, 1925, since ownership by the United States of all of the plaintiff's capital stock brings the case within the proviso of that section. P. 217.
3. Section 201 (c) of the Act of March 4, 1923, *supra*, in the provision that each such bank "for purposes of jurisdiction shall be deemed a citizen of the State where it is located," governs the places where suit may be brought against such banks, but is in nowise inconsistent with the general rule that district courts have jurisdiction of suits brought by or against corporations organized under an Act of Congress on the ground that they are controversies arising under federal law. *Hermann* v. *Edwards*, 238 U. S. 107, distinguished. Pp. 315, 317.
4. In the absence of enactments plainly expressing that purpose, Congress will not be held to have intended to restrict that jurisdiction. P. 317.

21 F. (2d) 51, reversed.

CERTIORARI, 275 U. S. 516, to a judgment of the Circuit Court of Appeals, which affirmed a judgment of the District Court dismissing an action by the Bank for want of jurisdiction.

Mr. D. W. Robinson, with whom *Messrs. R. H. Welch* and *Randolph Murdaugh* were on the briefs, for petitioner.

Mr. George L. Buist, with whom *Mr. Wm. J. Thomas* was on the brief, for respondents.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Petitioner is a Federal Intermediate Credit Bank chartered under an Act of March 4, 1923, c. 252, 42 Stat. 1454. All its capital stock is owned by the United States. It sued in the federal court for the eastern district of South Carolina to recover more than $3,000.00 claimed on certain promissory notes. The bank is located at Columbia in that State. The defendants were citizens of the State and residents within the district. Jurisdiction was invoked on the ground that the suit is one where the matter in controversy arises under the laws of the United States. § 24(1), Judicial Code, U. S. C., Tit. 28, § 41. The district court held that it was without jurisdiction and dismissed the case. The Circuit Court of Appeals affirmed. 21 F. (2d) 51.

The judicial power of the United States extends to all cases arising under its Constitution and laws. Art. III. By § 2 of an Act of March 3, 1875, c. 137, 18 Stat. 470, which in substance was carried into the Judicial Code as § 24(1), the district courts were given jurisdiction of all suits where the matter in controversy exceeds a specified amount and arises under federal law. A suit by or against a corporation created under an Act of Congress is one arising under the laws of the United States. *Osborn* v. *United States Bank,* 9 Wheat. 738, 816. *American Bank & Trust Co.* v. *Federal Reserve Bank,* 256 U. S. 350. *Sowell* v. *Federal Reserve Bank,* 268 U. S. 449. State citizenship does not result from the mere creation of a corporation under federal law. *Bankers Trust Co.* v. *Texas & Pacific Ry.,* 241 U. S. 295, 309. Section 201(c) of the Act under which petitioner was organized provides that each such bank "for purposes of jurisdiction shall be deemed a citizen of the State where it is located." Sec-

tion 12 of the Act of February 13, 1925, c. 229, 43 Stat. 936, 941, declares that no district court shall have jurisdiction of any suit by or against any corporation upon the ground that it was incorporated by or under an Act of Congress: "*Provided,* That this section shall not apply to any suit . . . brought by or against a corporation incorporated by or under an Act of Congress wherein the Government of the United States is the owner of more than one-half of its capital stock." U. S. C., Tit. 28, § 42.

The lower courts, erroneously conceiving that § 201(c) is in respect of Federal Intermediate Credit Banks the equivalent of § 24(16) of the Judicial Code applying to national banking associations, held that the former operates to take suits by or against petitioner out of the general rule, and that the proviso in the Act of February 13, 1925, does not apply to it. That conclusion resulted from a misunderstanding of the decision in *Herrmann* v. *Edwards,* 238 U. S. 107. That was a suit brought in the United States court by a stockholder of a national bank against its directors to compel them to reimburse the bank for funds wrongfully diverted. It was a controversy arising under the laws of the United States within the meaning of § 24(1); and if that provision stood alone, the district court would have had jurisdiction. But § 4 of the Act of July 12, 1882, c. 290, 22 Stat. 162, 163, declared that jurisdiction of such suits, except those between a bank and the United States or its officers and agents, " shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such national banking associations may be doing business when such suits may be begun." Section 4 of the Act of March 3, 1887, c. 373, 24 Stat. 552, 554 (reënacted August 13, 1888, 25 Stat. 433, 436), provided that national banking associations should for the purposes of all actions by or against them " be deemed citizens of

the States in which they are respectively located; and in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State"; and it declared that the provisions of the section should not affect jurisdiction of federal courts in cases commenced by the United States or by direction of an officer thereof or in cases for winding up such banks. Section 24(16) of the Judicial Code gives district courts original jurisdiction of all cases commenced by the United States or by direction of any officer thereof against any national banking association and of cases for winding up any such bank, and of all suits brought by any banking association to enjoin the Comptroller of the Currency or any receiver acting under his direction. And it provides that all such banking associations " shall for the purposes of all other actions by or against them . . . be deemed citizens of the States in which they are respectively located." This court held that, as to suits not within the specified exceptions, national banks were by the Acts of 1882 and 1887 put on the same basis in respect of jurisdiction as if they had not been organized under an Act of Congress, and that as to such suits federal incorporation was not a ground for jurisdiction. That conclusion rests upon the direct and affirmative expression of these Acts. And the decision makes it plain that while § 24(16) adopted a different form of expression, it was in substance a reenactment of the earlier provisions in respect of such jurisdiction. The provisions of the Judicial Code are to be construed as continuations of existing statutes, and no change of intent is to be implied unless clearly made manifest. § 294, Judicial Code. The Judicial Code did not restore jurisdiction that the Acts of 1882 and 1887 had taken away.

The state citizenship granted by § 201(c) governs the places where suit may be brought against such banks. § 51, Judicial Code, U. S. C., Tit. 28, § 112. Cf. *Shaw* v. *Quincy Mining Company,* 145 U. S. 444. *In re Keasbey & Mattison Company,* 160 U. S. 221, 229. *Matter of Dunn,* 212 U. S. 374, 388. But it is in nowise inconsistent with the general rule that district courts have jurisdiction of suits brought by or against corporations organized under an Act of Congress on the ground that they are controversies arising under federal law. It is firmly established that, in the absence of enactments plainly expressing that purpose, Congress will not be held to have intended to restrict that jurisdiction. *Herrmann* v. *Edwards, supra,* 118. *Bankers Trust Co.* v. *Texas & Pacific Ry., supra,* 303. That Congress is accustomed to use direct and unmistakable language to effect such important changes in the law is well illustrated by the Acts of 1882 and 1887; by § 5 of the Act of January 28, 1915, c. 22, 38 Stat. 803, 804, providing that no court of the United States shall have jurisdiction of any suit by or against any railroad company upon the ground that such company was incorporated under an Act of Congress, and by § 12 of the Act of February 13, 1925. The Government owns all the capital stock of petitioner and suits by or against it are plainly within the reasons which prompted the enactment of the proviso in § 12. There is no warrant for an inference that by § 201(c) Congress intended to take suits by or against Federal Intermediate Credit Banks out of the general rule.

Judgment reversed.

PANHANDLE OIL COMPANY *v.* MISSISSIPPI EX REL. KNOX, ATTORNEY GENERAL.

ERROR TO THE SUPREME COURT OF MISSISSIPPI.

No. 288. Argued March 5, 1928.—Decided May 14, 1928.

1. A state tax imposed on dealers in gasoline for the privilege of selling, and measured at so many cents per gallon of gasoline sold, is void under the Federal Constitution as applied to sales to instrumentalities of the United States, such as the Coast Guard Fleet and a Veterans' Hospital. P. 222.
2. The substance and legal effect is to tax the sale, and thus burden and tax the United States, exacting tribute on its transactions for the support of the State. *Id.*
3. Such an exaction infringes the right of the dealer to have the constitutional independence of the United States in respect of such purchases remain untrammeled. *Id.*

147 Miss. 663, reversed.

ERROR to a judgment of the Supreme Court of Mississippi, sustaining a suit brought by the State of Mississippi to recover taxes assessed on sales of gasoline made by the defendant, plaintiff in error.

Mr. George Butler for plaintiff in error.

The Acts in question, as construed, are void in that they impose a direct burden and tax upon the activities and instrumentalities of the Federal Government. *McCulloch* v. *Maryland,* 4 Wheat. 316; *Dobbins* v. *Erie County,* 16 Pet. 435; *Osborn* v. *Bank,* 9 Wheat. 138; *Ohio* v. *Thomas,* 173 U. S. 276; *Johnson* v. *Maryland,* 254 U. S. 51; *Gillespie* v. *Oklahoma,* 257 U. S. 501; *Metcalf* v. *Mitchell,* 269 U. S. 514; *Crandall* v. *Nevada,* 6 Wall. 35; *Crutcher* v. *Kentucky,* 141 U. S. 47; *Western Union* v. *Kansas,* 216 U. S. 1; *Western Union* v. *Texas,* 105 U. S. 460; *Philadelphia, etc., Steamship Co.* v. *Pennsylvania,* 122 U. S. 326; *Galveston, etc., R. R. Co.* v. *Texas,* 210 U. S. 217; *Standard Oil Co.* v. *Graves,* 249

U. S. 389; *Askren* v. *Continental Oil Co.,* 252 U. S. 444; *Bowman* v. *Continental Oil Co.,* 256 U. S. 642; *Indian Territory Oil Co.* v. *Oklahoma,* 240 U. S. 522; *Wagner* v. *Covington,* 251 U. S. 95; *St. Louis R. R. Co.* v. *Arkansas,* 235 U. S. 230; *Fidelity & Deposit Co.* v. *Pennsylvania,* 240 U. S. 319.

Mr. J. L. Byrd, Assistant Attorney General of Mississippi, with whom *Mr. Rush H. Knox,* Attorney General, was on the brief, for defendant in error.

The mere fact that a private individual does business with an instrumentality of the Federal Government, does not clothe him with immunity from taxation which is given to the Federal Government and its instrumentalities; and the fact that such a person is required to pay the tax for engaging in business does not and cannot hamper or burden any instrumentality of the Federal Government. *Fidelity & Deposit Co.* v. *Pennsylvania,* 240 U. S. 319; *Baltimore Ship Bldg. Co.* v. *Mayor of Baltimore,* 195 U. S. 375; *Choctaw, O. & G. R. R. Co.* v. *Mackey,* 256 U. S. 531; *Gromer* v. *Standard Dredging Co.,* 224 U. S. 362; *Metcalf* v. *Mitchell,* 269 U. S. 514.

It is admitted by the demurrer, that the tax was not collected from the United States Government. Therefore, we say if the collection of the tax from the Government, or the collection of an amount for the gasoline sufficient to include the tax, would be void, we do not have that question here for the reason that the Government has not paid any tax and the State is not demanding a tax from the Government, but is demanding a tax from the distributor or dealer in gasoline for the right to engage in the business.

Plaintiff in error has no right to raise the question. No pretense is made that it is a part of the United States Government or an instrumentality of the Government. Therefore, the question as to whether or not the Govern-

ment will pay an amount sufficient to yield a reasonable profit plus the tax, is a matter of private contract, and it is not mandatory on the Government to purchase this gasoline at a stipulated price, but it can drive any bargain it desires, and neither is it mandatory on the plaintiff in error to sell to the Government with the tax added or without the tax added, it all being a matter of contract.

A person who would strike down a state statute as being violative of the Federal Constitution, must show that he is within the class of persons with respect to whom the Act is unconstitutional, and that the alleged unconstitutional feature injures him. *Heald, Executor,* v. *District of Columbia,* 254 U. S. 20.

Mr. Justice Butler delivered the opinion of the Court.

Chapter 116 of the Laws of Mississippi of 1922 provided that " any person engaged in the business of distributing gasoline, or retail dealer in gasoline, shall pay for the privilege of engaging in such business an excise tax of 1¢ [one cent] per gallon upon the sale of gasoline . . . ," except that sold in interstate commerce or purchased outside the State and brought in by the consumer for his own use. Chapter 115, Laws of 1924, increased the tax to three cents and c. 119, Laws of 1926, made it four cents per gallon. Since some time in 1925 petitioner has been engaged in that business. The State sued to recover taxes claimed on account of sales made by petitioner to the United States for the use of its Coast Guard Fleet in service in the Gulf of Mexico and its Veterans' Hospital at Gulfport. Some of the sales were made while the Act of 1924 was in force and some after the rate had been increased by the Act of 1926. Accordingly the demand was for three cents a gallon on some and four cents on the rest. Petitioner defended on the ground that these statutes, if construed to impose taxes on such sales, are

repugnant to the federal Constitution. The court of first instance sustained that contention and the State appealed. The Supreme Court held the exaction a valid privilege tax measured by the number of gallons sold; that it was not a tax upon instrumentalities of the federal government and that the United States was not entitled to buy such gasoline without payment of the taxes charged dealers. 147 Miss. 663.

The United States is empowered by the Constitution to maintain and operate the fleet and hospital. Art. I, § 8. That authorization and laws enacted pursuant thereto are supreme (Art. VI); and, in case of conflict, they control state enactments. The States may not burden or interfere with the exertion of national power or make it a source of revenue or take the funds raised or tax the means used for the performance of federal functions. *McCulloch* v. *Maryland,* 4 Wheat. 316, 425, *et seq. Dobbins* v. *The Commissioners of Erie County,* 16 Pet. 435, 448. *Ohio* v. *Thomas,* 173 U. S. 276. *Choctaw & Gulf R. R.* v. *Harrison,* 235 U. S. 292. *Indian Oil Co.* v. *Oklahoma,* 240 U. S. 522. *Johnson* v. *Maryland,* 254 U. S. 51. *Clallam County* v. *United States,* 263 U. S. 341, 344. *Northwestern Mutual Life Ins. Co.* v. *Wisconsin,* 275 U. S. 136. *New Brunswick* v. *United States,* 276 U. S. 547. The strictness of that rule was emphasized in *Gillespie* v. *Oklahoma,* 257 U. S. 501, 505. The right of the United States to make such purchases is derived from the Constitution. The petitioner's right to make sales to the United States was not given by the State and does not depend on state laws; it results from the authority of the national government under the Constitution to choose its own means and sources of supply. While Mississippi may impose charges upon petitioner for the privilege of carrying on trade that is subject to the power of the State, it may not lay any tax upon transactions by which the United States secures the things desired for its governmental purposes.

The validity of the taxes claimed is to be determined by the practical effect of enforcement in respect of sales to the government. *Wagner* v. *City of Covington,* 251 U. S. 95, 102. A charge at the prescribed rate is made on account of every gallon acquired by the United States. It is immaterial that the seller and not the purchaser is required to report and make payment to the State. Sale and purchase constitute a transaction by which the tax is measured and on which the burden rests. The amount of money claimed by the State rises and falls precisely as does the quantity of gasoline so secured by the Government. It depends immediately upon the number of gallons. The necessary operation of these enactments when so construed is directly to retard, impede and burden the exertion by the United States of its constitutional powers to operate the fleet and hospital. *McCulloch* v. *Maryland, supra,* 436. *Gillespie* v. *Oklahoma, supra,* 505. *Jaybird Mining Co.* v. *Weir,* 271 U. S. 609, 613. To use the number of gallons sold the United States as a measure of the privilege tax is in substance and legal effect to tax the sale. *Telegraph Co.* v. *Texas,* 105 U. S. 460. *Frick* v. *Pennsylvania,* 268 U. S. 473, 494. And that is to tax the United States—to exact tribute on its transactions and apply the same to the support of the State.

The exactions demanded from petitioner infringe its right to have the constitutional independence of the United States in respect of such purchases remain untrammeled. *Osborn* v. *United States Bank,* 9 Wheat. 738, 867. *Telegraph Co.* v. *Texas, supra.* Cf. *Terrace* v. *Thompson,* 263 U. S. 197, 216. Petitioner is not liable for the taxes claimed.

Judgment reversed.

MR. JUSTICE HOLMES.

The State of Mississippi in 1924 and 1926 imposed upon distributors and retail dealers of gasoline, for the

privilege of engaging in the business, an excise tax of three cents and four cents respectively per gallon sold in the State. The Supreme Court of the State declares it to be a privilege tax but points out that whether this tax is on the privilege or on the property it is imposed before the gasoline has left the dealer's hands. The plaintiff in error, a dealer, was sued by the State for certain sums that were due under the statutes. It pleaded that the sales in respect of which the tax was demanded were sales to the United States for the use of its Coast Guard and Veterans' Hospital, that these being instrumentalities of the government it did not include the amount of the tax in the price charged, and that the statute did not and could not tax the dealer for them consistently with the Constitution of the United States. The Supreme Court of the State upheld the tax and pointed out the extreme consequences to which a different decision might lead.

It seems to me that the State Court was right. I should say plainly right, but for the effect of certain dicta of Chief Justice Marshall which culminated in or rather were founded upon his often quoted proposition that the power to tax is the power to destroy. In those days it was not recognized as it is today that most of the distinctions of the law are distinctions of degree. If the States had any power it was assumed that they had all power, and that the necessary alternative was to deny it altogether. But this Court which so often has defeated the attempt to tax in certain ways can defeat an attempt to discriminate or otherwise go too far without wholly abolishing the power to tax. The power to tax is not the power to destroy while this Court sits. The power to fix rates is the power to destroy if unlimited, but this Court while it endeavors to prevent confiscation does not prevent the fixing of rates. A tax is not an unconstitutional regulation in every case where an absolute prohibition of sales would be one. *Hatch* v. *Reardon,* 204 U. S. 152, 162.

To come down more closely to the question before us, when the Government comes into a State to purchase I do not perceive why it should be entitled to stand differently from any other purchaser. It avails itself of the machinery furnished by the State and I do not see why it should not contribute in the same proportion that every other purchaser contributes for the privileges that it uses. It has no better or other right to use them than anyone else. The cost of maintaining the State that makes the business possible is just as necessary an element in the cost of production as labor or coal. If the plaintiff in error had paid the tax and had added it to the price, the Government would have had nothing to say. It could take the gasoline or leave it but it could not require the seller to abate his charge even if it had been arbitrarily increased in the hope of getting more from the Government than could be got from the public at large. But in fact the Government has not attempted to say anything in this case, which is simply that of a dealer trying to cut down a legitimate tax on his business because certain purchasers proposed to use the goods in a certain way, although so far as the sale was concerned they were free to turn the gasoline into the ocean, use it for private purposes or sell it again. It does not appear that the Government would have refused to pay a price that included the tax if demanded, but if the Government had refused, it would not have exonerated the seller. *Pierce Oil Corporation* v. *Hopkins,* 264 U. S. 137, 139.

An imperfect analogy with taxation that affects interstate commerce is relied upon. Even the law on that subject has been liberalized since the decision of most of the cases cited. *Sonneborn Brothers* v. *Cureton,* 262 U. S. 506. But obviously it does not follow from the invalidity of a tax directly burdening interstate commerce that a tax upon a domestic seller is bad because he may be able to shift the burden to a purchaser, even

though an agency of the Government, who is willing to pay the price with the tax and who has no rational ground for demanding favor. I am not aware that the President, the Members of Congress, the Judiciary or, to come nearer to the case in hand, the Coast Guard or the officials of the Veterans' Hospital, because they are instrumentalities of government and cannot function naked and unfed, hitherto have been held entitled to have their bills for food and clothing cut down so far as their butchers and tailors have been taxed on their sales; and I had not supposed that the butchers and tailors could omit from their tax returns all receipts from the large class of customers to which I have referred. The question of interference with Government, I repeat, is one of reasonableness and degree and it seems to me that the interference in this case is too remote. *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514.

MR. JUSTICE BRANDEIS and MR. JUSTICE STONE agree with this opinion.

MR. JUSTICE McREYNOLDS.

I am unable to think that every man who sells a gallon of gasoline to be used by the United States thereby becomes a federal instrumentality, with the privilege of claiming freedom from taxation by the State.

The doctrine of immunity is well established, but it ought not to be extended beyond the reasons which underlie it. Its limitations were well pointed out fifty years ago in *Railroad Company* v. *Peniston,* 18 Wall. 5, 30, 31—"It cannot be that a State tax which remotely affects the efficient exercise of a Federal power is for that reason alone inhibited by the Constitution. To hold that would be to deny to the States all power to tax persons or property. Every tax levied by a State withdraws from the reach of Federal taxation a portion of the property

from which it is taken, and to that extent diminishes the subject upon which Federal taxes may be laid. The States are, and they must ever be, coexistent with the National government. Neither may destroy the other. Hence the Federal Constitution must receive a practical construction. Its limitations and its implied prohibitions must not be extended so far as to destroy the necessary powers of the States, or prevent their efficient exercise."

MR. JUSTICE STONE concurs in these views.

BUZYNSKI *v.* LUCKENBACH STEAMSHIP COMPANY, INCORPORATED, ET AL.

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

No. 534. Argued March 19, 1928.—Decided May 14, 1928.

1. Section 33 of the Merchant Marine Act incorporated into the maritime law in favor of injured "seamen" the applicable provisions of the Employers' Liability Act and its amendments, and these may be enforced either in suits in admiralty or actions at law. P. 228.
2. A stevedore engaged in stowing cargo upon a vessel, is a "seaman" within the meaning of that section and, under applicable provisions of the Liability Act, may recover from the stevedoring company employing him for an injury caused by the negligence of a fellow-servant. *Id.*
3. Where the Circuit Court of Appeals erroneously reverses a judgment upon one question without deciding another upon which its correctness also depends, the case may be reversed for the error and remanded to that court for decision of the other question. *Id.*

19 F. (2d) 871, reversed.

CERTIORARI, 275 U. S. 518, to a judgment of the Circuit Court of Appeals, which reversed a judgment of the District Court on a libel in admiralty for personal injuries.

Mr. W. E. Price, with whom *Mr. James W. Wayman* was on the brief, for petitioner.

Mr. J. Newton Rayzor, with whom *Mr. Mart H. Royston* was on the brief, for respondents.

Mr. Justice Sanford delivered the opinion of the Court.

The petitioner, Karl Buzynski, brought a libel *in personam* in admiralty in the federal District Court for Southern Texas against the Luckenbach Steamship Co., the owner of the Steamship *Edgar F. Luckenbach,* and the Texas Contracting Co., to recover damages for personal injuries suffered by him while working as a stevedore for the Contracting Co., an independent contractor engaged in loading cargo on the steamship while at dock in the port of Galveston. He was awarded a judgment against the two Companies jointly, 12 F. (2d) 92. This was reversed by the Circuit Court of Appeals, 19 F. (2d) 871.

Shortly after Buzynski had started to work, and while he was removing a cover from one of the hatches on the ship, he was struck and severely injured, without fault on his part, by a chain which fell from the end of the boom of a derrick at this hatch, which was used in loading the cargo. The accident was caused by the starting in motion, in a manner not shown by direct evidence, of a winch belonging to the ship which connected with and controlled the movement of the boom. The winchman who operated the winch was an employee of the Contracting Co. and a fellow servant of Buzynski.

The District Court was of opinion that the accident resulted from a defect in the winch for which both Companies were responsible. The Circuit Court of Appeals was of opinion that the evidence showed no defect in the

winch for which either of the Companies was liable, and that, although there was evidence from which it might reasonably be inferred that the accident was caused by negligence of the winchman or of another stevedore, nevertheless the Contracting Co. would not be liable for the negligence of such fellow servant.

We granted this writ of certiorari on account of this ruling of the Circuit Court of Appeals as to the negligence of a fellow servant; and no other question need be considered here.

It is settled by this Court that § 33 of the Merchant Marine Act, 1920,[1] incorporated into the maritime law in favor of injured "seamen" the applicable provisions of the Employers Liability Act[2] and its amendments, and that these may be enforced either in suits in admiralty or actions at law. *Panama R. R. Co.* v. *Johnson,* 264 U. S. 375, 388; *Engel* v. *Davenport,* 271 U. S. 33, 35; *Panama R. R. Co.* v. *Vasquez,* 271 U. S. 557, 560; *Baltimore S. S. Co.* v. *Phillips,* 274 U. S. 316, 324; *Messel* v. *Foundation Co.,* 274 U. S. 427, 434. And in *Internat'l Stevedoring Co.* v. *Haverty,* 272 U. S. 50, 52, we held that the word "seamen" as used in § 33 included a stevedore engaged in the maritime work of stowing cargo upon a vessel, and that under the applicable provisions of the Employers Liability Act, he could recover from the stevedoring company for an injury caused by the negligence of a fellow servant.

The view of the Circuit Court of Appeals that the Contracting Co. would not be liable for the negligence of a fellow servant, was erroneous, and its judgment must be reversed. But since it did not determine whether the accident was in fact due to such negligence, or to some other cause, the case will be remanded to that court with

[1] 41 Stat. 988, c. 250.

[2] 35 Stat. 65, c. 149.

instructions to determine this question and take further proceedings in conformity with this opinion. See *Cole* v. *Ralph,* 252 U. S. 286, 290; *Gerdes* v. *Lustgarten,* 266 U. S. 321, 327.

Reversed and remanded.

UNITED STATES *v.* GOLDMAN ET AL.

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

No. 723. Argued April 10, 1928.—Decided May 14, 1928.

1. A criminal contempt, committed by violation of an injunction decreed by a federal court, is an offense against the United States; and an information brought by the United States for the punishment of such a contempt is a "criminal case" within the meaning of the Criminal Appeals Act. P. 236.
2. A motion to dismiss an information of criminal contempt raising the bar of the statute of limitations upon facts appearing upon the face of the information, is equivalent to a special plea in bar setting up those facts, and a judgment sustaining the motion is reviewable under the Criminal Appeals Act, as a judgment sustaining a special plea in bar. *Id.*
3. A person charged with criminal contempt is not put in jeopardy prior to the beginning of the trial by entry of a preliminary order to take testimony for use at the trial. P. 237.
4. Prosecution of a criminal contempt committed by violating an injunction decree entered in a suit brought by the United States under the Anti-Trust Act, is not barred in one year under § 25 of The Clayton Act, but in three years under § 1044 Rev. Stats. *Id.*

Reversed.

ERROR, under the Criminal Appeals Act, to a judgment of the District Court dismissing an information for contempt.

Assistant to the Attorney General Donovan, with whom *Solicitor General Mitchell,* and *Messrs. Porter R. Chandler, Ralstone R. Irvine,* and *W. Houston Kenyon,* Special

Assistants to the Attorney General, were on the brief, for the United States.

This Court has jurisdiction of this case under the Criminal Appeals Act of 1907. *United States* v. *Sanges,* 144 U. S. 310; *United States* v. *Kissel,* 218 U. S. 601; *United States* v. *Barber,* 219 U. S. 72; *United States* v. *Rabinowich,* 238 U. S. 78; *United States* v. *Oppenheimer,* 242 U. S. 85; *United States* v. *Noveck,* 271 U. S. 201; *United States* v. *Storrs,* 272 U. S. 652; *United States* v. *Celestine,* 215 U. S. 278; *United States* v. *Thompson,* 251 U. S. 407.

Contempts are criminal cases within the meaning of the Act. *Gompers* v. *United States,* 233 U. S. 604; *Ex parte Grossman,* 267 U. S. 87; *Michaelson* v. *United States,* 266 U. S. 42; *Myers* v. *United States,* 264 U. S. 95.

The third section of the Criminal Appeals Act, relating to pleas in bar, is applicable to criminal cases begun by information as well as to those begun by indictment. *United States* v. *Borger,* 7 Fed. 193; *Bailey* v. *Kalamazoo Publishing Co.,* 40 Mich. 251; cf. *The Queen* v. *Steel,* L. R. 2 Q. B. D. 37; *United States* v. *Celestine,* 215 U. S. 278; *United States* v. *Oppenheimer,* 242 U. S. 85; *United States* v. *Keitel,* 211 U. S. 370; *Gompers* v. *United States,* 233 U. S. 604.

The " motion to dismiss " filed on behalf of defendants below was a special plea in bar within the meaning of the Criminal Appeals Act. *United States* v. *Thompson,* 251 U. S. 407; *United States* v. *Oppenheimer, supra; United States* v. *Rabinowich,* 238 U. S. 78; *United States* v. *Barber,* 219 U. S. 72; *United States* v. *Cook,* 17 Wall. 168; *United States* v. *Noveck,* 271 U. S. 201.

The defendants in error have not been in jeopardy within the meaning of the Criminal Appeals Act. *Taylor* v. *United States,* 207 U. S. 120; *Kepner* v. *United States,* 195 U. S. 100; *United States* v. *United Shoe Machinery Co.,* 198 Fed. 870.

Section 25 of the Clayton Act, imposing a one-year period of limitation in certain classes of contempts, has no application to criminal contempts prosecuted by the United States. *Gompers* v. *United States,* 233 U. S. 604; *Michaelson* v. *United States,* 266 U. S. 42.

The legislative history of the Clayton Act supports the Government's contention. The contention of the Government is also supported by the language of the U. S. Code.

Mr. Robert R. Nevin, with whom *Messrs. Ezra M. Kuhns, Edward H. Green, E. H. Sykes,* and *Frank F. Dinsmore* were on the brief, for defendants in error.

At common law, the Government would unquestionably have had no right of appeal. This Court is a court of limited jurisdiction, and this statute grants it jurisdiction in a narrowly limited class of cases. The right of appeal therein given is unique, in that it provides for an absolute right of appeal from the District Court to this Court. Thus, the statute is in derogation of the common law in broadening the power of the Government against the right of the citizen; and it is a very limited statute giving an extraordinary right of appeal in very special and carefully-defined circumstances. The statute must, therefore, be strictly construed, and this Court has consistently so held. *United States* v. *Weissman,* 266 U. S. 377; *United States* v. *Keitel,* 211 U. S. 371.

This proceeding is not a criminal case, within the meaning of the Criminal Appeals Act. *Ex parte Fisk,* 113 U. S. 713; *Myers* v. *United States,* 264 U. S. 95. Distinguishing *Gompers* v. *United States,* 233 U. S. 604; *Ex parte Grossman,* 267 U. S. 87; and *Michaelson* v. *United States,* 266 U. S. 42.

There has been no decision or judgment sustaining a special plea in bar within the meaning of the Criminal

Appeals Act. *United States* v. *Barber,* 219 U. S. 72; *United States* v. *Storrs,* 272 U. S. 652.

The words "special plea in bar" have long since acquired a well-settled meaning in the law. Those pleas appeared first in the civil law and subsequently in the criminal law. The essential and fundamental characteristic of a special plea (whether it be in bar or in abatement) is that it denies the right of the Government to succeed by reason of facts extrinsic to the indictment. Starkie, 1 Cr. Pl., p. 349; 2 Bishop's New Crim. Pro., 2d ed. p. 583; *Farley* v. *Kittson,* 120 U. S. 303.

The distinction between demurrers or motions to dismiss, on the one hand, and pleas, on the other, is clear. The distinction has been clearly recognized by Congress in the Criminal Appeals Act.

It is true that the defense of the statute of limitations has usually been raised in pleadings that are properly called "special pleas in bar," rather than by demurrers or by motions to dismiss. That, however, is merely due to an accident rather than to anything inherent in their nature. The statute of limitations customarily pleaded is found in Rev. Stats., § 1044; and that is restricted by Rev. Stats., § 1045 so as not to apply to any person fleeing from justice. Therefore, whenever a defendant has desired the benefit of that statute of limitations, his pleading, of necessity, had to be a special plea in bar setting up the additional fact not appearing in the indictment, viz., that the defendant was not a fugitive from justice. *United States* v. *Cook,* 17 Wall. 168; *United States* v. *Barber,* 219 U. S. 72.

The function of a special plea in bar is to set up new matter. If this were not true, the careful distinction that Congress has drawn between the first and second subdivisions, on the one hand, and the third subdivision on the other, would be meaningless. This Court has but recently held that the words "a special plea in bar" are

used in their technical sense. *United States* v. *Storrs,* 272 U. S. 652; *United States* v. *Gompers,* 233 U. S. 604; *United States* v. *Novek,* 271 U. S. 201; *United States* v. *Rabinowich,* 238 U. S. 78.

The statute of limitations relied on is § 25 of the Clayton Act. It will be noted that this contains no such limitations as are found in Rev. Stats., §§ 1044 and 1045; it calls for no such pleading. Accordingly, all the facts necessary for the defense appeared upon the face of the information, and the defendants, therefore, did not have to plead a special plea in bar setting up any additional fact. In reality, if they had attempted to plead a special plea in bar, their pleading would not have been such.

The defendants have been put in jeopardy. *Jones* v. *Mould,* 151 Iowa 599; *Brown* v. *Farley,* 38 N. J. Eq. 186; *Kepner* v. *United States,* 195 U. S. 100; *Grafton* v. *United States,* 206 U. S. 333; *United States* v. *Oppenheimer,* 242 U. S. 85; *Merchants, etc. Co.* v. *Board of Trade,* 201 Fed. 20; *Myers* v. *United States,* 264 U. S. 95.

These proceedings are barred by § 25 of the Clayton Act. *Michaelson* v. *United States,* 266 U. S. 42; *I. C. C.* v. *Baird,* 194 U. S. 25.

Mr. Justice Sanford delivered the opinion of the Court.

An information presented by the United States to the District Court charged Jacob A. Goldman and others with criminal contempts committed by violating an injunction that had been granted by the court in a suit in equity brought by the United States against the National Cash Register Co. and others to enforce the Sherman Anti-Trust Act. On motion of the defendants in error the information was dismissed as to them on the ground that under § 25 of the Clayton Act [1] the prosecution was

[1] 38 Stat. 730, c. 323; U. S. C., Tit. 28, § 390.

barred by the statute of limitations of one year. The United States sued out this direct writ of error under the Criminal Appeals Act.[2]

The questions here are: 1st, whether this Court has jurisdiction under the writ of error; and 2nd, if so, whether the one year statute of limitations is applicable.

The information showed upon its face that the alleged contempts were committed by the defendants in error more than one year, but less than three years, prior to its presentment. They entered pleas of not guilty. In anticipation of and preparation for the trial a special examiner was appointed to take, transcribe and report to the court such testimony as the parties might offer, with the provision and understanding that at the trial the parties might rely on such portion of this testimony as might be desired and also introduce additional testimony, either oral or documentary. The testimony taken by the examiner was lodged with the District Judge, and, in accordance with a *nunc pro tunc* order, endorsed as " Filed with the court pending trial in open court." Before the trial the defendants in error [3] moved to dismiss the charges against them on the ground that it appeared on the face of the information that the proceeding for contempt was instituted more than one year after the date of the alleged acts complained of. The United States demurred to this motion on the ground that, treating it as a special plea in bar, the matters therein contained were not sufficient in law to bar the prosecution of the information. The court, likewise treating the motion to dismiss as a special plea in bar raising the question of the statute of limitations, overruled the demurrer and dismissed the information as to the defendants in error on the ground that the prosecution was barred by the statute of limitations.

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[2] 34 Stat. 1246, c. 2564; U. S. C., Tit. 18, § 682.

[3] The United States had previously agreed to dismiss the contempt proceeding against all the other defendants except one.

1. The Criminal Appeals Act provides that a writ of error may be taken by the United States from the district courts direct to this Court "in all criminal cases, in the following instances, to-wit: . . . From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy." The defendants in error challenge our jurisdiction under the present writ of error upon the grounds that this is not a criminal case, that the judgment was not one sustaining a special plea in bar, and that they had been put in jeopardy. We cannot sustain this contention.

While a proceeding instituted by the United States for the punishment of a criminal contempt committed by a violation of an injunction is not "a criminal prosecution" within the provisions of the Sixth Amendment relating to venue in a jury trial, *Myers* v. *United States,* 264 U. S. 95, 105, such a criminal contempt is "an offense against the United States" whose prosecution is subject to the statute of limitations applicable to such offenses, *Gompers* v. *United States,* 233 U. S. 604, 611, and which, as such an offense, may be pardoned by the President under Article II of the Constitution, *Ex parte Grossman,* 267 U. S. 87, 115. The only substantial difference between such a proceeding for criminal contempt and a criminal prosecution is that in the one the act complained of is the violation of a decree and in the other the violation of a law. *Michaelson* v. *United States,* 266 U. S. 42, 67. In *Gompers* v. *United States, supra,* 610, this Court said, in language which was quoted with approval in *Ex parte Grossman, supra,* 116: "It is urged . . . that contempts cannot be crimes, because, although punishable by imprisonment and therefore, if crimes, infamous, they are not within the protection of the Constitution and the amendments giving a right to trial by jury &c. to persons charged with such crimes. . . . It does not follow that contempts of the class under consideration are not

crimes, or rather, in the language of the statute, offenses, because trial by jury as it has been gradually worked out and fought out has been thought not to extend to them as a matter of constitutional right. These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech. So truly are they crimes that it seems to be proved that in the early law they were punished only by the usual criminal procedure . . . , and that at least in England it seems that they still may be and preferably are tried in that way." And we think it clear that informations brought by the United States for the punishment of criminal contempts constituting offenses against the United States are " criminal cases " within the meaning of the Criminal Appeals Act, in as real and substantial a sense as ordinary criminal prosecutions for the punishment of crimes. See *Bessette* v. *Conkey Company,* 194 U. S. 324, 335 *et seq.*

Whether the judgment sustaining the motion of the defendants in error and dismissing the information on the ground that the prosecution was barred by the statute of limitations, was a " judgment sustaining a special plea in bar " within the meaning of the Act, is to be determined not by form but by substance. *United States* v. *Thompson,* 251 U. S. 407, 412. The material question in such cases is the effect of the ruling sought to be reviewed. It is immaterial that the plea was erroneously designated as a plea in abatement instead of a plea in bar, *United States* v. *Barber,* 219 U. S. 72, 78, or that the ruling took the form of granting a motion to quash which was in substance a plea in bar, *United States* v. *Oppenheimer,* 242 U. S. 85, 86, *United States* v. *Thompson, supra,* 412. Here the motion to dismiss raised the bar of the statute of limitations upon the facts appearing on the face of the information, and was equivalent to a special plea in bar

setting up such facts. And the effect of sustaining the motion was the same as if such a special plea in bar had been interposed and sustained.

It is also clear that as the court had merely entered a preliminary order for the taking of testimony for use at the trial, and had not commenced its sitting for the trial, the defendants in error had not then been placed in jeopardy.

2. Finding, therefore, that we have jurisdiction under the writ of error, we proceed to consider the contention of the United States that the prosecution of the information was not barred by the limitation of one year prescribed in § 25 of the Clayton Act.

In *Gompers* v. *United States, supra,* 611, decided in May, 1914, it was settled that prosecutions for criminal contempts committed by violations of injunctions, were barred by the general three years' limitation applicable to non-capital crimes under R. S. § 1044.[4] And the sole question to be considered is whether this has been changed by § 25 of the Clayton Act, passed in October, 1914.

The provisions of the Clayton Act relating to the punishment of criminal contempt are in §§ 21 to 25, inclusive. Sec. 21 provides " That any person who shall willfully disobey any lawful writ, process, order, rule, decree, or command of any district court of the United States . . . by doing any act or thing therein, or thereby forbidden to be done by him, if the act or thing so done by him be of such character as to constitute also a criminal offense under any statute of the United States, or under the laws of any State in which the act was committed, shall be proceeded against for his said contempt as hereinafter provided." Sec. 22 relates to the procedure, trial, punishment, etc., in proceedings for the punishment of " such contempt; " Sec. 23 to the allowance of writs of error.

[4] The amendment made to that section by the Act of 1921, 42 Stat. 220, c. 124, U. S. C., Tit. 18, § 582, is not here material.

Sec. 24 provides " That nothing herein contained shall be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced within section twenty-one . . . may be punished in conformity to the usages at law and in equity now prevailing." And Sec. 25 provides " That no proceeding for contempt shall be instituted against any person unless begun within one year from the date of the act complained of; nor shall any such proceeding be a bar to any criminal prosecution for the same act or acts. . . ."

Although Sec. 25 is broad enough, upon its face, to provide a period of limitation of one year in all criminal contempts, we think that when construed in the light of the context and read in connection with the preceding sections, it does not relate to the prosecution for criminal contempts of the character here involved. The Act, as stated in *Michaelson* v. *United States, supra*, 66, is " of narrow scope," and " carefully limited to the cases of contempt specifically defined."

Sec. 21 relates only to the prosecution for the disobedience of orders, decrees, etc., by doing any forbidden act which is of such character as to constitute also a criminal offense under a federal statute or state law. And Sec. 24 specifically declares that " nothing herein contained,"—meaning evidently no provision in the Act relating to prosecutions for criminal contempts—shall be construed to relate to contempts committed in disobedience of any order, decree, etc., entered in any suit brought in the name or on behalf of the United States; but that these and all other cases of contempt not specifically embraced within

Sec. 21, may be punished in conformity to the prevailing usages at law and in equity.

It is plain, we think, that this specific exception in Sec. 24, applies to Sec. 25 relating to the period of limitations as well as to the other sections, and hence that the one year limitation prescribed by Sec. 25 has no application to the proceeding in the present case, which was brought for the disobedience of a decree entered in a suit brought and prosecuted in the name and on behalf of the United States.

We find nothing in the legislative history of the Act which indicates any different intention on the part of the Congress.

Judgment reversed.

MR. JUSTICE STONE did not sit in this case.

REINECKE, COLLECTOR, *v.* GARDNER, TRUSTEE.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 471. Argued April 17, 18, 1928.—Decided May 14, 1928.

1. A trustee in bankruptcy of a domestic corporation was not subject, under the Revenue Act of 1917, to an excess-profits tax on profits earned in his operation of the bankrupt's business which would have been so taxable if earned by the corporation. P. 242.
2. The classes subject to the excess-profits tax imposed by Title II, Revenue Act of 1917, were not enlarged by § 212 of that Title, which made administrative provisions of the Act of 1916 applicable in the collection of the tax. P. 244.
3. Under the Revenue Act of 1916, and Treasury Regulations, a taxpayer was obliged to make all deductions from gross income as of the year when the payments were made, unless he kept his books on an accrual basis which accurately reflected his income, and actually made his return on that basis. *Id.*
4. A question propounded under Jud. Code § 239, need not be answered if the facts pertinent to it have not been certified. P. 245.

RESPONSE to questions certified by the Circuit Court of Appeals relative to a claim for additional income and excess-profits taxes filed by the Commissioner of Internal Revenue in a bankruptcy proceeding and approved by the District Court.

Assistant Attorney General Mabel Walker Willebrandt, with whom *Solicitor General Mitchell* and *Messrs. Sewall Key* and *J. Louis Monarch,* Attorneys in the Department of Justice, were on the brief, for Reinecke, Collector.

Mr. Albert L. Hopkins, with whom *Messrs. Clarence J. Silber* and *Jay C. Halls* were on the brief, for Gardner, Trustee.

MR. JUSTICE STONE delivered the opinion of the Court.

In this case, pending in the Court of Appeals for the Seventh Circuit, that court has certified to this questions of law concerning which it asks instructions for the proper disposal of the cause. Jud. Code, § 239. The certificate states that the appellee, trustee in bankruptcy of a coal mining corporation, acting under order of the bankruptcy court, carried on the business of the bankrupt, using for that purpose its entire property. From October 3, 1913, the date of the adjudication, until about January 1, 1917, the business was conducted at a loss, but in 1917 and 1918 there were substantial profits. In 1917 the bankruptcy court, on the application of holders of bonds secured by trust deeds of all the bankrupt's property, ordered the payment of the bond interest maturing in 1916, the profits of the business for 1916 exceeding the interest maturing in that year. The trustee kept his books on the accrual basis and the interest coming due in 1916 was shown on the books as then kept. The trustee deducted from gross income of that year the bond interest which matured in 1916 and was paid in 1917. The Commis-

sioner of Internal Revenue disallowed the deduction and filed in the bankruptcy court a claim for the additional income and the excess profits tax due for 1917, on the ground the interest maturing on the bonds in 1916 had been improperly deducted from 1917 profits. The questions certified are as follows:

Question 1. Is a trustee in bankruptcy, operating under order of the bankruptcy court the business of a bankrupt domestic corporation in the year 1917, and realizing net profits from the operation, subject to the excess profits tax imposed by the revenue act of 1917, in a case where the corporation, if itself conducting the business, would, under the act, have been subject to such tax?

Question 2. Under the above stated facts is the trustee in bankruptcy, in computing income and excess profits taxes for the year 1917, entitled to deduct from the gross income of 1917 the bond interest maturing in 1916, and paid in 1917 out of profits of his operation in 1917 of the bankrupt's business?

As under the bankruptcy act the entire property of the bankrupt vested in the trustee, the income in question was not the income of the bankrupt corporation, but of the trustee and was subject to income and excess profits tax only if the statutes authorized the assessment of the tax against him. The Revenue Act of 1916, c. 463, 39 Stat. 756, and the War Revenue Act of 1917, c. 63, 40 Stat. 300, imposed income and excess profits taxes on individuals, partnerships and corporations, but neither in terms mentioned trustees in bankruptcy as taxable persons. But § 13(c) of the Act of 1916 required trustees in bankruptcy of corporations subject to the income tax to make returns of net income, and provided that "any income tax due on the basis of such returns . . . shall be assessed and collected in the same manner as if assessed directly against the" corporation. This section, as

appellee concedes, by its terms extends the tax imposed by § 10 of the Act of 1916 to income received by trustees in bankruptcy of corporations. See *United States* v. *Chicago & Eastern Ill. Ry.*, 298 Fed. 779.

In the next year § 4 of Title I of the Act of 1917 imposed an income tax of 4% "in addition to the tax imposed" by § 10 of the Act of 1916 as then amended on the same subjects taxed by § 10, and provided that "the tax imposed by this section shall be computed, levied, assessed, collected, and paid upon the same incomes and in the same manner as the tax" imposed by § 10. The respondent was thus subjected to the additional income tax of the later act.

The case is different with respect to the excess profits tax. That tax was imposed by Title II of the Act of 1917 on corporations, partnerships and individuals engaged in trade or business. The Title made no mention of executors, receivers, trustees or persons acting in a fiduciary capacity, and contained no language corresponding to the quoted provision of Title I, § 4, extending the additional income tax to "the same incomes" taxed by § 10 of the Act of 1916. A tax imposed on corporations alone does not extend to a trustee in bankruptcy of a corporation. See *United States* v. *Whitridge*, 231 U. S. 144; *Scott* v. *Western Pacific Ry.*, 246 Fed. 545; *compare Smietanka* v. *First Trust & Savings Bank*, 257 U. S. 602. In support of the assessment of an excess profits tax the collector relies on the general language of § 212 of Title II, printed in the margin [1], providing in substance that all

[1] Sec. 212. That all administrative, special, and general provisions of law, including the laws in relation to the assessment, remission, collection, and refund of internal-revenue taxes not heretofore specifically repealed, and not inconsistent with the provisions of this title are hereby extended and made applicable to all the provisions of this title and to the tax herein imposed, and all provisions of Title I of such

the administrative provisions of the Act of 1916 not inconsistent with Title II are made applicable to it, and argues that the provisions of § 13(c) of the Act of 1916, requiring the trustee in bankruptcy of a corporation to file a return and subjecting to tax the income thus disclosed are incorporated in the Act of 1917 by reference and extended to the excess profits taxes imposed by that act.

It is to be noted that § 212 purports to take over from the earlier acts administrative provisions only. Its last clause, adopting the provision of Title I of the 1916 Act "relating to returns and payment of the tax," refers to the administrative provisions of the earlier act fixing the time and manner of making returns and payment of the tax and not to the classes of income to be assessed. In this connection the omission from § 212 of any clause corresponding to the assessment provisions of Title I, by which the additional income tax was imposed on the "same incomes" taxed by the earlier act, is significant. If the requirement in § 13(c) that trustees shall make returns be considered an administrative provision, certainly the added clause "any . . . tax due on the basis of such returns shall be assessed and collected" is more than administrative and actually imposes a tax. As such it is not incorporated in the later act by the reference in § 212. Thus the later act is without any provision subjecting one in the position of appellee to the excess profits tax.

The apparent purpose of § 212 was to take over from the earlier act those applicable administrative provisions which would aid in the collection of the new tax imposed

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Act of September eighth, nineteen hundred and sixteen, as amended by this Act, relating to returns and payment of the tax therein imposed, including penalties, are hereby made applicable to the tax imposed by this title.

by Title II and not to extend it to classes of persons or subjects not mentioned in the Title. Various reasons may be urged why Congress may not have intended to extend the excess profits tax to trustees in bankruptcy. But whatever purpose Congress may have had, we think the language of § 212 falls short of indicating any intention to enlarge the classes of taxpayers mentioned in Title II. The extension of a tax by implication is not favored. *United States* v. *Whitridge, supra; Smietanka* v. *First Trust & Savings Bank, supra.*

The Treasury Department itself has held that testamentary trustees and trustees of estates in process of distribution, notwithstanding the administrative provisions of the 1916 Act requiring them to make returns for income tax purposes, are not taxable for excess profits. L. O. 1100, I–2 C. B. 230; S. M. 2384, III–2 C. B. 330.

The first question is answered "No."

As the trustee in bankruptcy was subject to an income tax under the Act of 1916 an answer to the second question is not made unnecessary by our answer to the first. The second was, we assume, intended to present the question whether the deduction of interest accrued and payable in 1916, but actually paid in 1917, was required to be made from 1916 income because the taxpayer kept his books on the accrual basis. We are unable to answer the question for the reason that the certificate omits to state facts essential to its determination. The applicable section, 13(d) of the Act of 1916, directs that if the taxpayer keeps his books on any basis other than that of actual receipts and disbursements, and the return is made on the basis adopted, the tax shall be computed on that basis unless the books clearly do not reflect the taxpayer's true income. In *United States* v. *Anderson,* 269 U. S. 422, it was pointed out that under the Act of 1916 and applicable treasury regulations, the taxpayer must make all deductions from gross income as of the year when the pay-

ments were made unless he keeps his books on an accrual basis which accurately reflects his income, and actually made his return on that basis. See *United States* v. *Mitchell,* 271 U. S. 9; *American National Co.* v. *United States,* 274 U. S. 99. The present certificate fails to state whether the books of the trustee as kept reflected his income or whether his return was made on the accrual basis or on the basis of actual receipts and disbursements. Under Jud. Code § 239 the facts pertinent to the question asked must be certified. When they are omitted from the certificate the question need not be answered. *Dillon* v. *Strathearn S. S. Co.,* 248 U. S. 182.

Question No. 1. Answered, No.
Question No. 2. Not answered.

HOLLAND FURNITURE COMPANY *v.* PERKINS GLUE COMPANY.

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

No. 285. Argued March 14, 15, 1928.—Decided May 14, 1928.

1. The narrowing by disclaimer of the process claims of a patent does not necessarily narrow the product claims. P. 254.
2. A patentable process is a method of treatment of certain materials to produce a particular result or product. The description of the process does not necessarily embrace the product. Either or both may be patentable. P. 255.
3. If the choice or designation of an essential ingredient of a composition of matter may be called a process, the process is one inseparable from the composition itself; the description of one necessarily limits the other; and the patent of the product cannot extend beyond a product having the designated ingredient. *Id.*
4. A patent for a composition of matter should contain some description of the ingredients entering into the composition which will both define the invention and carry it beyond the previous development of the art. P. 254.

5. A patentee of a composition of matter, the product of a process, cannot, by claiming the use or function of the product, extend his monopoly over like products made with ingredients not described in his patent. P. 257.
6. Respondent's patent (Perkins reissue, No. 13436, limited by disclaimers) includes claims, not here in dispute, for a process of making starch glue by treating with caustic alkali and water any starch in which the capacity to absorb water is limited by nature or by artificial "degeneration" to a degree specified in the patent, resulting in a glue as good as animal glue for wood veneering and similar uses. It also includes product claims of which three (Nos. 28, 30, and 31), forming the only subject matter of adjudication in the case, are construed as claiming, in substance, any starch glue which, combined with about three parts or less by weight of water, will have substantially the same properties as animal glue. The characteristic quality of animal glue is that when combined with three parts or less by weight of water it is suitable for use in wood veneering. *Held,* that the claims are void, as they do not describe the starch ingredient in terms of its own physical or chemical properties, or those of the product, but wholly in terms of the use or function of the product. P. 256.

18 F. (2d) 387, reversed.

CERTIORARI, 275 U. S. 512, to a decree of the Circuit Court of Appeals, reversing the District Court and holding the present petitioner liable as an infringer of certain claims of the respondent's patent.

Mr. Charles Evans Hughes, with whom *Messrs. Wm. H. Davis, James A. Watson,* and *R. Morton Adams* were on the brief, for petitioner.

Mr. Gorham Crosby, with whom *Mr. S. Mortimer Ward, Jr.,* was on the brief, for respondent.

MR. JUSTICE STONE delivered the opinion of the Court.

Respondent brought this suit in the district court for western Michigan, to enjoin infringement of the Perkins Reissued Patent No. 13436. So much of the judgment for the defendant, petitioner here, as held the product claims of the patent not infringed by respondent's product, was reversed by the court of appeals for the sixth circuit.

Perkins Glue Co. v. *Holland Furniture Co.,* 18 F. (2d) 387. The court of appeals for the seventh circuit, *Perkins Glue Co.* v. *Gould Manufacturing Co.,* 292 Fed. 596, and the court of appeals for the second circuit, *Perkins Glue Co.* v. *Standard Furniture Co.,* 287 Fed. 109, had previously held the patent not infringed by the same product.[1] This Court granted certiorari. 275 U. S. 512.

The patent is entitled "A Patent for Starch Glue and a Method of Making It." Perkins was the first to make successfully a starch glue suitable for wood veneering and similar uses. Glue made from animal substances, known as animal glue, has long been in common use as an adhesive and is especially adapted to use in wood veneering, in which thin sheets or layers of wood are fastened together by the use of an adhesive bonding material. The characteristic qualities of animal glue, making it peculiarly suitable for that use, are a low absorptiveness of water and a consequent high degree of fluidity, facilitating its application by mechanical means, high elasticity and great tensile strength. A high water content, characteristic of other adhesive preparations, delays drying, warps the wood and when dry leaves too little bonding material to secure the requisite strength. In practice animal glue is made suitably fluid for use in wood veneering by the addition of a critically small amount of water, three parts by weight to one of glue.

Long before Perkins' experiments, adhesive paste or mucilage made from starch was well known. The Gerard Patent (1874, Belgian, No. 34869) and the Dornemann

[1] Other cases involving the patent in suit are *Perkins Glue Co.* v. *Solva Waterproof Glue Co.,* 233 Fed. 792; *Solva Waterproof Glue Co.* v. *Perkins Glue Co.,* 251 Fed. 64; *Perkins Glue Co.* v. *Hood,* 279 Fed. 454; *Perkins Glue Co.* v. *Holland Furniture Co.,* 279 Fed 457; *Perkins Glue Co.* v. *Standard Furniture Co.,* 279 Fed. 458; *Perkins Glue Co.* v. *Gould Mfg. Co.,* 280 Fed. 728; *Perkins Glue Co.* v. *Crandall Panel Co.,* 294 Fed. 135.

Patent (1893, French, No. 232781) described a process of producing an adhesive or glue by dissolving starch in a solution of caustic alkali. The suitability of starch as a glue base in this and other processes depends upon its water absorptive quality which varies with the starch of different plants, and under varying conditions with the starch of the same plant. Because of their high water absorption, glues produced from starch, before Perkins, were too viscous and hence required too large an admixture of water for use successfully as a wood veneering glue. The controlling difficulty to be overcome in the development of a starch glue suitable for veneering was what may be called the normally large water absorptive quality of starch, corresponding to the viscosity of the resultant glue, a reduction of the one effecting a reduction in the other.

It has long been known that the viscosity or the water absorptive quality of starches may be reduced by chemical treatment known as degeneration in which changes in the arrangement of the atoms in the starch molecules are effected by use of a catalytic agent. In 1906 Gerson & Sachse (German, No. 167275) patented a process for the preparation of a starch base for glue manufacture by degenerating starch by the use of oxidizing agents in the presence of an alkali. But the resultant glue from this and other processes was not suitable for use in the woodworking trades. To make it sufficiently fluid for convenient use required too large an admixture of water, four parts or more to one of glue, so that the wood was warped and when dried the glue was not sufficiently tenacious to be used successfully as a substitute in that manufacture for animal glue.

The Perkins patent described a process for making glue from starch and a resultant product "as good as animal glue," "which will have the great practical advantage that it may be practically used for the same purposes as the best animal glue." The process consisted of two steps.

The basic material was a suitable raw starch, preferably starch made from the cassava root, and the first step was concerned with its conversion or degeneration so as to make a "glue base" with lower water absorptivity than ordinary untreated starch. This was to be accomplished by combining the basic raw material with oxidizing agents and subjecting them to heat. The method was that described in the Gerson & Sachse patent and was not new. The characteristic feature of this first step as described by Perkins was not the manner of degeneration but its degree. The degeneration of the raw cassava starch was to be carried to a point just short of its conversion into dextrine, a soluble starch, which, because of that property is of little value in glue manufacture. The patent in its re-issued form stated with precision the particular degree to which the water absorptive properties of the starch might be reduced in the preparation of a suitable glue base and described with particularity tests (the "9 to 1 boil up" test and the 170° test) for ascertaining when that stage of degeneration had been reached.

The second step in the process consisted in the treatment of the glue base, as prepared by the first step, by the addition of three parts or less of water by weight to one of the glue base and a specified percentage of cellulose solvent such as caustic potash. The process of preparing a starch glue by treating the glue base with a cellulose solvent was described by the Gerard and Dornemann patents and was not new, but more than three parts of water were used; hence the resultant glue was not suitable for veneering. The fundamental ideas of the Perkins process patent might be expressed in simple terms as follows: Glue made by dissolving ordinary starch in an alkaline solution of three parts of water (the quantity to which the woodworking industry is accustomed) is too thick. Glue made from over-degenerated starch is too weak. Between the extremes there is a range of degeneration within which the starch base, when dissolved in

caustic potash, will produce glue of ample fluidity without loss of tensile strength or other qualities characteristic of animal glue.

The product claims, of which more will be said presently, were for the resultant glue, in substance for a starch glue having substantially the properties of animal glue.

The patent has thirty-eight claims, divisible into groups. One group covers the process of producing the degenerated starch glue base, the first step process, already described. One group embraces the glue base product produced by the first step process. Another group includes the process of dissolving the starch base, by the use of alkaline solvents, the second process step; another, the combination of the two process steps and finally the group with which we are now concerned is based upon the ultimate product, the glue itself. Three of the claims embraced in this ultimate product group are the only ones now in suit, 28, 30 and 31. They are as follows:

28. A glue comprising cassava carbohydrate rendered semifluid by digestion and having substantially the properties of animal glue.

30. A wood and fiber glue formed of a starchy carbohydrate or its equivalent by union therewith of about 3 parts or less by weight of water and alkali metal hydroxid.

31. A wood and fiber glue containing amylaceous material as a base dissolved without acid in about three parts of water or less, and being viscous, semifluid and unjellified.

Of these the broadest in terms is No. 28, but it appears that a glue thus composed will not have "substantially the properties of animal glue" unless containing only the small amount of water specified in Claim 30. We may take it also that an article which is "wood and fiber glue" as described in the specifications will be "viscous, semifluid and unjellified" as described in Claim 31, and will also have substantially the properties of animal glue as specified in Claim 28, so that in point of substance the

product claims in suit are for a starch glue which, combined with about three parts or less by weight of water, will have substantially the same properties as animal glue.

With respect to the other or non-product groups of claims respondent, in consequence of earlier litigation, has filed a disclaimer. Brief reference must be made to both the litigation and the disclaimer. The respondent brought an infringement suit in the northern district of Illinois against the Solva Company, asserting an infringement of claims in each of the five groups by the product of that company, comprising in part at least a raw cassava starch glue base which, for present purposes, may be taken as identical with the product of the petitioner. Upon appeal to the seventh circuit court of appeals, *Solva Waterproof Glue Co.* v. *Perkins Glue Co.,* 251 Fed. 64, that court rendered an opinion, in some respects obscure, which has given rise to widely differing views as to its effect. In considering the present question we may assume that the court below was right in saying of that opinion:

"It held that the claims to the first step of the process, and to the product resultant therefrom—the glue base—were anticipated by Gerson & Sachse, and hence that the glue base, as a product and as the foundation of the second step in Perkins' process, was an old and unpatentable product. It found that Perkins' glue had the novelty and merit claimed for it. It sustained the claims to the compound two-step process, and to some extent at least, the claims to the ultimate product, and did not sustain the claims to the second-step process. No attention was paid to any distinctions in the different kinds of solva base that were involved. Its treatment of the process claims to the second-step process is open to the interpretation—and we think it the right one—that the Court considered those claims broad enough to cover the specified treatment as applied to any starch base however

high in viscosity, and employing water to any extent, and even though the product would not approximate Perkins glue; and hence thought them invalid. If that view is correct they were too broad. At the conclusion of its opinion the court said that the decree 'below sustaining the claims for the glue base and [first step] product, and for the so-called second step as such, is reversed, and that part of it which upholds the claims of the patent for the final process and the resultant product is affirmed.' "

We may assume also the correctness of the view of the court below that the effect of this decision was to sustain broadly the claim to the resultant product, the glue described in claims 28, 30 and 31, as distinguished from the intermediate product which was the resultant of the first step and was found to be old, and that the product claims thus upheld included a starch glue having substantially the properties of animal glue whether made by the employment of both steps of the compound process or not.

As a result of this decree the plaintiff filed a disclaimer of all the claims for the glue base itself and all those for the first process step. It also disclaimed from the second process step "any process of making glue, excepting where the starch or starchy product or carbohydrate subjected to the process, is degenerated to the extent described [in the patent], whereby the process results in the good as animal glue described" in the patent. Again we assume that the court below was right in saying that the effect of the disclaimer as to the second step claims was to limit them to a process where the material with which the second process step begins is any starch in fact degenerated to the point necessary to produce the result at which the second process step is aimed, whether the degeneration is effected by the first step or other artificial process, or the suitable starch is a natural agricultural product, sufficiently degenerated without chemical treatment and purchaseable in commercial quantities.

The second step process as narrowed by the disclaimer consists in the selection of a starch suitably degenerated, no matter how, and the treatment of it with an alkali as in the Gerard and Dornemann patents, but by the terms of the disclaimer only such starches are suitable, that is to say, fall within the range of selection, which, when treated by the second step process, will produce a glue as good as animal glue for veneering. The use or function of the resultant glue is made the measure or test of the choice of its ingredients.

Apparently no brand of raw starch which Perkins could procure in commercial quantities when conducting his experiments could be used as a glue base without the artificial degeneration of his first step. But it appears that the defendant has been able to purchase in such quantities a starch which is a natural agricultural product having a low water absorptiveness and other characteristics making it suitable for use as a glue base. Beginning with this starch the petitioner mixes the starch with three parts of water or less and approximately 4% of caustic soda. The mixture, when agitated and heated, produces a glue which the petitioner says is heavier than animal glue, but which is used commercially as a substitute for it and which, for present purposes, may be taken as having substantially the qualities of animal glue. Whether the result may be attributed wholly to reduced viscosity of the starch, due to changed methods of cultivation or manufacture, or in some measure to peculiarities of petitioner's dissolving operation does not appear.

Petitioner contends that the raw starch selected and used by it in the manufacture of its product has high water absorptive qualities above the range defined by the patent, not satisfying the tests laid down in the patent for ascertaining whether the appropriate stage of degeneration has been reached for the employment of the second step. As the process claims are not before us this

contention has bearing only upon the broad product claims which are the subject of the present suit. It is the contention of the respondent, and the court below held, that its product claims 28, 30 and 31, concededly broad enough, as stated, to cover the petitioner's product, are valid and, in effect, that all starch veneering glues, at least when mixed with three parts of water or less, having substantially the properties of animal glue, infringe the patent whether made by Perkins' process or otherwise.

We take it, as the respondent argues, that product patents or patents of compositions of matter are distinct from patents of the process by which the product may be produced. The former, if sufficiently described, may exist and be sustained independently of the latter. *Rubber Company* v. *Goodyear,* 9 Wall. 788; *Leeds & Catlin Co.* v. *Victor Talking Machine Co.,* 213 U. S. 301, 318. Hence any narrowing of process claims is not necessarily a narrowing of product claims. So much of the claim as is saved from the second step of Perkins' process after the disclaimer and referred to here as a process claim is, in fact, only the choice of an ingredient of the glue product, independently of the chemical process of producing it. It was necessary that the Perkins patent, so far as it is a patent of a composition of matter, should contain some description of the ingredients entering into the composition which would both define the invention, *Grant* v. *Raymond,* 6 Pet. 218, 247; *Wood* v. *Underhill,* 5 How. 1, 5; *Tyler* v. *Boston,* 7 Wall. 327, 330; *Béné* v. *Jeantet,* 129 U. S. 683; *Howard* v. *Detroit Stove Works,* 150 U. S. 164, 167, and carry it beyond the previous development of the art. Had Perkins claimed only a glue made of starch dissolved in three parts of water with an alkali, he would not have advanced beyond the Gerard and Dornemann patents and subsequent practice. As his patent discloses, it was well known that ordinary starch treated in this manner produced a thick glue unsuitable for wood veneer-

ing if made with three parts of water, and a thin glue not strong enough for wood veneering if made with four parts or more of water.

Perkins' real invention, apart from the combination of his first and second step processes, with which we are not now concerned, was that by the use of a particular kind of starch as an ingredient a new composition of matter was made for which he claimed his patent. Some description of this product was obviously essential to patentability and Perkins in the reissued patent sought to meet this necessity in two ways. One was to describe the product by describing its characteristic ingredient with particularity. If we look at the specifications, as we may, he did this by indicating the range of water absorptivity, or stated in another way the degeneration, of the starch ingredient in Perkins' glue. As described the starch ingredient fell short of dextrine or soluble starch, but was of lower water absorptivity than petitioner's glue base. The glue made of this ingredient within the specified range was a new product. This was invention of a new composition of matter and was the real contribution Perkins made to the art. As such it was entitled to the protection of a patent but as thus described and limited petitioner's product does not infringe.

To so describe the product is not, as the court below seemed to think, a limitation of product claims by reference to process claims. A patentable process is a method of treatment of certain materials to produce a particular result or product. *Cochrane* v. *Deener,* 94 U. S. 780. The description of one does not necessarily embrace the other. Either or both may be patentable. But here we are concerned only with the choice of one ingredient of the product. There can be no description of a composition of matter without some designation of its ingredients. If the selection or choice or designation of an essential ingredient of a composition of matter may be referred to,

inaccurately as we think, as a process, the "process" is one inseparable from the composition itself. The description of one necessarily limits the other. Hence the patent of the product cannot extend beyond a product having the designated ingredient. See *Powder Co.* v. *Powder Works,* 98 U. S. 126, 137; *Béné* v. *Jeantet, supra; Goodyear Dental Vulcanite Co.* v. *Davis,* 102 U. S. 222.

Perkins' second way of describing the starch ingredient of his product was in terms of the use or function of the product itself. The chosen starch ingredient was to possess such qualities that when combined with three parts of water and with alkali it would produce a product "as good as animal glue" for veneering, or having the properties of animal glue, these properties being described in terms of its functions. The ingredient was thus described, not in terms of its own physical characteristics or chemical properties or those of the product, but wholly in terms of the manner of use of the product. Any glue made of a starch base, whatever its composition, water absorptiveness or other properties, combined with three parts of water, as is animal glue used in veneering, and with alkali, which has substantially the properties of animal glue, or is as good as animal glue for use in the wood-working trades, is claimed as Perkins' glue. Thus the inventor who advances the art by discovery that a certain defined material may be combined in a product useful for certain purposes seeks to extend his monopoly to any product which may subsequently be made from materials not within any defined range described in the patent, but which is likewise useful for those purposes.

But an inventor may not describe a particular starch glue which will perform the function of animal glue and then claim all starch glues which have those functions, or even all starch glues made with three parts of water and alkali, since starch glues may be made with three parts of water and alkali that do not have those properties.

See *The Incandescent Lamp Patent,* 159 U. S. 465, 472.

Revised Stat., § 4888, requires that the patent shall contain a description of the invention "and of the manner and process of making, constructing, compounding, and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound, and use the same." One attempting to use or avoid the use of Perkins' discovery as so claimed and described functionally could do so only after elaborate experimentation. Respondents say that laboratory tests would be insufficient and that "the best and probably the only satisfactory test is to try it out on a large scale in a furniture or veneering gluing factory." A claim so broad, if allowed, would operate to enable the inventor who has discovered that a defined type of starch answers the required purpose to exclude others from all other types of starch and so foreclose efforts to discover other and better types. The patent monopoly would thus be extended beyond the discovery and would discourage rather than promote invention. *The Incandescent Lamp Patent, supra,* 476. That the patentee may not by claiming a patent on the result or function of a machine extend his patent to devices or mechanisms not described in the patent is well understood. *O'Reilly* v. *Morse,* 15 How. 62, 112, 113; *Knapp* v. *Morss,* 150 U. S. 221, 228; *Electric Signal Co.* v. *Hall Signal Co.,* 114 U. S. 87; *Westinghouse* v. *Boyden Power Brake Co.,* 170 U. S. 537; *Mitchell* v. *Tilghman,* 19 Wall. 287; *Fuller* v. *Yentzer,* 94 U. S. 288; *Risdon Iron & Locomotive Works* v. *Medart,* 158 U. S. 68. Respondent argues that this principle, applicable to machine patents, is inapplicable to a patent for the composition of matter which is always a result of a process and concededly is patentable as such, but the attempt to broaden product claims by describing the product exclusively in terms of its use or function is subject to the

same vice as is the attempt to describe a patentable device or machine in terms of its function. As a description of the invention it is insufficient and if allowed would extend the monopoly beyond the invention. See *Béné* v. *Jeantet, supra; Cochrane* v. *Badische Anilin & Soda Fabrik,* 111 U. S. 293; *The Incandescent Lamp Patent, supra; Matheson* v. *Campbell,* 78 Fed. 910; *American Adamite Co.* v. *Mesta Machine Co.,* 18 F. (2d) 538.

So far as respondent seeks to enlarge its product patent by subordinating the patent description of the starch ingredient which the patentee used, and which respondent does not use, to the vague and indefinite description in the three product claims now in suit, the patent is subject to the same vice.

Reversed.

JENKINS, RECEIVER, ET AL. *v.* NATIONAL SURETY COMPANY.

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

No. 424. Argued April 11, 12, 1928.—Decided May 14, 1928.

A surety company went on the bond furnished by a bank to secure repayment on demand of the deposits of a county treasurer up to a specified amount, and, as part consideration for executing the bond, took the bank's agreement to indemnify it for any liability it might thereby sustain or incur. The bank became insolvent while holding deposits of the treasurer exceeding the amount of the bond, and the surety, having paid that amount, sought to participate *pro rata* with him and his surety in the distribution of surplus assets of the bank, basing its claim on the indemnity agreement. *Held*—

1. That a former judgment denying the surety the right to be subrogated to the creditor's claim and remedies against the debtor until the creditor had been paid in full, did not bar the surety's claim under the indemnity agreement. P. 265.

2. That the indemnity claim should not be allowed. A surety for part of an indebtedness does not, through the expedient of taking a separate indemnity agreement from the debtor, equip himself to compete with the secured creditor in the distribution of the debtor's assets when the debtor becomes insolvent and the surety's obligation has been paid. P. 265.

18 F. (2d) 707, reversed.

CERTIORARI, 275 U. S. 515, to a decree of the Circuit Court of Appeals, which allowed the respondent Surety Company's claim to share, by way of indemnity, in assets of an insolvent national bank. The claim had been denied in the District Court.

Messrs. Paul H. Ray and *John Jensen,* with whom *Messrs. Emmett M. Bagley, Robert L. Judd, A. M. Cheney,* and *Harold M. Stephens* were on the brief, for petitioners.

To allow the National to recover anything on its indemnity agreement until Groesbeck has been made whole, is to violate the plain terms of the National's guaranty to him and to reduce its liability as guarantor of his entire deposit, a liability which continued "as well after as before" the payment of the penalty of its bond.

The bond stands not behind any particular part of Groesbeck's deposit, but behind all of it so as to be a guaranty against ultimate loss—a guaranty of the last $125,000.00, or any part of it.

The fact that the National paid Groesbeck the penalty of its bond before the receiver ceased to pay dividends, does not entitle the National to compete with Groesbeck in receiving dividends from the Bank. Groesbeck did not need protection against loss of that part of his deposit which the Bank could repay by way of dividends in the event of failure. By its bond the National agreed to stand between Groesbeck and ultimate loss on his deposit. As long as any part of his deposit remains unpaid,

Groesbeck holds the National's agreement to protect him to the extent of $125,000.00. *Maryland Casualty Co.* v. *Fouts,* 11 F. (2d) 71; *Knaffl* v. *Knoxville Banking & Trust Co.,* 133 Tenn. 655; *Buffalo, etc., Co.* v. *Title Guaranty & Trust Co.,* 99 N. Y. S. 883; *Merrill* v. *Nat'l Bank of Jacksonville,* 173 U. S. 131; *U. S. F. & G. Co.* v. *Carnegie Trust Co.,* 164 N. Y. S. 92; *Illinois Surety Co.* v. *United States,* 226 Fed. 665; *Columbia Finance & Trust Co.* v. *Kentucky Union Ry.,* 60 Fed. 794; *U. S. F. & G. Co.* v. *Union Bank & Trust Co.,* 228 Fed. 448; *Peoples* v. *Peoples Bros., Inc.,* 254 Fed. 489; *N. J. Midland Ry Co.* v. *Wortendyke,* 27 N. J. Eq. 658; *Featherstone* v. *Emerson,* 14 Utah 12; *American Surety Co.* v. *Nat'l Bank of Barnesville,* 17 F. (2d) 942; *In re Daily and Ivins,* 19 F. (2d) 95.

The lower court's decision will result in unfair distribution of the Bank's assets among its creditors in violation of the National Banking Act.

Mr. Bynum E. Hinton, with whom *Messrs. A. E. Moreton* and *Edwin G. Davis* were on the brief, for respondent.

The surety's right to subrogation as against the debtor does not arise until and " unless he pays the whole debt or it is otherwise satisfied," *United States* v. *Nat'l Surety Co.,* 254 U. S. 73; *Mellette Farmers Elevator Co.* v. *H. Poehler Co.,* 18 F. (2d) 430; whereas, under a contract of indemnity, the surety can proceed against the principal even though he has paid only a part of the debt. *In re Kimbrough-Veasy Co.,* 292 Fed. 757.

The claim sued upon in this case was not *res judicata* by reason of the decision in the first case, and must be determined on its merits.

If the principal be insolvent, this right of the surety to indemnity makes him, as a creditor of his insolvent principal, a general claimant against his estate, with the right to file a claim and to be paid dividends thereon in common

with other general creditors. *U. S. F. & G. Co.* v. *Centropolis Bank,* 17 F. (2d) 913, and cases there cited; Stearns, Suretyship, 3d ed., § 279; 1 Brandt, Suretyship, 3d ed., § 226; *Newman* v. *Goza,* 2 La. Ann. 643; *Ritenour* v. *Matthews,* 42 Ind. 7.

The respondent was the creditor of the Bank from the date of the indemnity agreement, by reason of having loaned the Bank its credit. *Schwartz* v. *Siegal,* 117 Fed. 13.

No new contract was made when it paid the penalty of its bond. The payment merely fixed the amount of damages for which the bank was liable under its indemnity agreement. Payment matured and fixed the amount of the debt and gave rise to a right of action at law for reimbursement. This debt owing by the Bank was entirely new and distinct. It was in no sense the debt, or any part of the debt, which the Bank originally owed Groesbeck and the County. Being a separate and distinct claim, and a valid and binding obligation of the bank, it should have been allowed by the Receiver and dividends paid thereon. *Townsend* v. *Sullivan,* 3 Cal. App. 115; *Yndo* v. *Rivas,* 107 Tex. 408; *Hill et al.* v. *Wright,* 23 Ark. 530; *Ryland* v. *Commercial, etc., Bank,* 127 Cal. 526.

The contract of indemnity was not in contravention of any provision of law or of the public policy of the State of Utah, nor was it in contravention of any Act of Congress relating to the conduct of national banks. It was therefore a legal and enforceable contract and no contention is made to the contrary. *Nat'l Surety Co.* v. *Blaumauer,* 247 Fed. 937; *Western Surety Co.* v. *Kelly,* 27 S. D. 465; *U. S. F. & G.* v. *Centropolis Bank,* 17 F. (2d) 913; 31 C. J. 424, § 16.

There is nothing in the bond which indicates any agreement as between the Bank, the respondent and Groesbeck that the claim of the County upon its con-

tract of deposit should be given any priority over the claim of the Surety Company upon its contract. This being true, there is no reason in law or in equity why the contract of indemnity upon which this action is based should not be enforced.

The decision of the Court of Appeals in the case at bar was based largely upon its own decision in the case of *U. S. F. & G. Co.* v. *Centropolis Bank,* 17 F. (2d) 913. Other cases supporting the view for which we contend are: *U. S. F. & G. Co.* v. *Carnegie Trust Co.,* 177 App. Div. (N. Y.) 176; *American Surety Co.* v. *Nat'l Bank of Barnesville,* 17 F. (2d) 942; *In re Dailey et al.,* 19 F. (2d) 95; *Mellette Farmers Elevator Co.* v. *H. Poehler Co.,* 18 F. (2d) 430; *Title Guaranty & Surety Co.* v. *Shattuck et al.,* 224 Fed. 401; *Tenant* v. *U. S. F. & G. Co.,* 17 F. (2d) 38.

The National's liability was limited to the penalty of its bond. When it paid this penalty, its bond was exonerated. It no longer continued liable as a guarantor of the entire deposit, nor did its liability continue "as well after as before" payment, except in the sense that until the deposit, which it guaranteed in part, was paid in full the surety could assert no claim to be subrogated to the rights of the Treasurer against the bank, or to any collateral which he may have held.

"Sureties are never held responsible beyond the clear and absolute terms and meaning of their undertakings." *Leggett* v. *Humphreys,* 21 How. 66.

Let us suppose that the National had required collateral security and that the Bank had given it sufficient to fully protect it against loss. This fact would not have made necessary any change whatever in the language of the depository bond. Under such circumstances there could be no doubt of the National's right to retain and to realize on its collateral, and it might very well have happened that the National, on the failure of the Bank, would have

been the only creditor who was in position to realize dollar for dollar on its claim and escape without loss.

The National may enforce a claim against the Bank springing from contract, notwithstanding the fact that it is not entitled to immediate subrogation to the rights of its obligee against the Bank. If the contract was in all respects legal and valid, and its enforcement not limited or restrained, why should it not be enforced? Can any good reason be found for destroying a right acquired by one surety through contract in order that the benefits expected by another surety from subrogation might be perhaps increased?

Mr. George P. Barse filed the brief of Mr. Joseph W. McIntosh, Comptroller of the Currency of the United States, as *amicus curiae,* by special leave of Court.

Mr. Justice Stone delivered the opinion of the Court.

The petitioner Jenkins was appointed receiver of the National City Bank of Salt Lake City, an insolvent national bank, by the Comptroller of the Currency, under the provisions of § 5234, R. S. The respondent National Surety Co. brought this action against the receiver to compel the allowance of and payment of dividends on its claim upon an indemnity agreement executed by the bank. The agreement was contained in the bank's application for a bond by which the bank as principal and the respondent company as surety undertook that the official deposits of the treasurer of Salt Lake County, Utah, up to a named sum, would be repaid on demand. The deposits at the time of the insolvency exceeded the amount of the bond. The district court directed that dividends on the claim for indemnity be postponed until the county treasurer should have been repaid the full balance of his deposit. The court of appeals for the eighth circuit reversed the decree with instructions that the respondent

be paid dividends on an equal basis with other creditors, including the treasurer. *National Surety Co.* v. *Jenkins,* 18 F. (2d) 707. This Court granted certiorari, 275 U. S. 515, to remove a conflict alleged to exist between the decision below and rulings by the courts of appeals in other circuits. *Maryland Casualty Co.* v. *Fouts,* 11 F. (2d) 71, *Springfield National Bank.* v. *American Surety Co.,* 7 F. (2d) 44.

In his answer the receiver prayed that Groesbeck, the county treasurer, and the American Surety Co. be required to interplead. An order issued and they filed a joint answer, from which it appeared that Groesbeck, as principal, and the American Surety Company, as surety, had given to Salt Lake County an official fidelity bond in the sum of $200,000. The treasurer deposited the county funds in his custody in the bank and took as security the respondent's bond in the sum of $125,000, bonds of other surety companies, executed to him as obligee, in the total sum of $100,000, and from the bank a certain amount of apparently doubtful collateral.

When the bank failed his official deposit amounted to $643,094.29. Salt Lake County was paid in full—$200,000 by the American Surety Co. as surety of the treasurer's fidelity bond; $125,000 by the respondent National Surety Co., the balance by the other surety companies and by dividends paid by the receiver. When the second dividend was paid it was sufficient to pay the final balance due from the treasurer to the county and leave a surplus of over $9,000; but there remained an unpaid balance of the deposit due from the bank to the treasurer.

The claim of the respondent company is for its pro rata share of this surplus and of all dividends paid or to be paid by the receiver as well as of the collateral given to the treasurer by the bank. The claim is resisted by the interpleaded petitioners, the treasurer and the American Surety Co., on two grounds, first, that the right of the

treasurer and his surety to full repayment of his deposits before any dividends are paid the respondent is in this case *res judicata;* second, that the respondent is not entitled to share in the estate of the insolvent debtor until the balance of the creditors' claims have been fully satisfied. On both grounds the circuit court of appeals ruled against the petitioners.

The plea of *res judicata* was based on the decree in an earlier suit brought in the district court by the county treasurer and the American Surety Co. against the receiver to determine their right to the excess of the second dividend over the county's claim, to all future dividends and to the collateral. The National Surety Co., the respondent here, was interpleaded and answered. A decree in favor of the American Surety Co. was affirmed by the court of appeals for the eighth circuit. *National Surety Co.* v. *Salt Lake County,* 5 F. (2d) 34. We think the court below was right in holding that the earlier litigation had determined only that the National Surety Co. was not entitled to be subrogated to the treasurer's claim and remedies against the insolvent bank until he had been paid in full, and in no way involved the National Surety Company's present separate claim on its contract of indemnity, and that the plea of *res judicata* was consequently ineffective. But as the certiorari was granted to review the other branch of the case, and as the view we take of it makes unnecessary an extensive consideration of the first question, we pass at once to the second.

The right now asserted by the respondent arises, not from subrogation to the rights of the treasurer but upon its independent agreement with the bank for indemnity. The bank's undertaking was to indemnify respondent for liability which it might "sustain or incur" by reason of its having given its surety bond, which was conditioned on the bank's keeping its deposits "subject at all times to the check and order of the treasurer." So long as the bank

remained solvent respondent would have been entitled to immediate indemnity from the bank even though that payment neither satisfied the treasurer's claim nor exhausted the surety's own liability. *Davies* v. *Humphreys,* 6 M. & W. 153; *Ex parte Snowden,* 17 Ch. D. 44. As between itself and its principal the surety should not have been required to make any payment at all, and to allow it prompt reimbursement would in no way impede the creditor so long as the principal remained solvent. But if, as here, the principal is insolvent, any dividends paid the surety on its claim for indemnty before the creditor's whole claim has been satisfied would decrease the creditor's dividends by his proportionate share of the payments to the surety. They would also result in a species of double proof, detrimental to the principal's other creditors, for the secured creditor would, under the applicable "chancery rule," still be entitled to dividends on his entire original claim. Compare *Merrill* v. *National Bank of Jacksonville,* 173 U. S. 131.

Respondent, in insisting on the letter of its agreement, takes a position in effect inconsistent with its obligation to secure to the treasurer the repayment of his deposits to the extent of $125,000. If after paying that amount to the treasurer it may then compete with him in the distribution of the insolvent's assets, the treasurer's recovery on the balance of his claim is reduced accordingly and the benefit of the surety bond to the treasurer is diminished *pro tanto.* By the expedient of taking a separate indemnity agreement from the debtor the surety would be enabled to deprive the creditor of the full benefit of the security he had demanded.

The established rule that the surety may not claim subrogation against an insolvent debtor until the creditor is paid in full is a recognition of the inconsistency of that position. *United States* v. *National Surety Co.,* 254 U. S. 73, 76; *Peoples* v. *Peoples Bros.,* 254 Fed. 489; *United*

States Fidelity & Guaranty Co. v. *Union Bank & Trust Co.*, 228 Fed. 448, 455. The rule would go for naught if, by claiming indemnity instead of subrogation, the surety could achieve the same result. The same policy against permitting a surety to compete with the creditor for the insolvent debtor's assets requires that the surety be denied subrogation to security given to a creditor for several debts for only one of which the surety is obligated. *National Bank of Commerce* v. *Rockefeller*, 174 Fed. 22. Similar reasoning underlies the requirement of equity that the surety who holds the security of an insolvent debtor must give the benefit of it to the creditor for whom he is surety, until the debt is fully paid. See *Keller* v. *Ashford*, 133 U. S. 610; *Hampton* v. *Phipps*, 108 U. S. 260; *Chamberlain* v. *St. Paul*, 92 U. S. 299, 306; 2 Pomeroy, Equitable Remedies (2d ed.) § 925.

Wherever equitable principles are called in play, as they preeminently are in determining the rights and liabilities of sureties and in the distribution of insolvents' estates, they likewise forbid the surety to secure by independent contract with the debtor indemnity at the expense of the creditor whose claim he has undertaken to secure.

Reversed.

Ex parte WILLIAMS, TAX COMMISSIONER.

PETITION FOR A WRIT OF MANDAMUS

No. 16, Original. Return to Rule submitted April 9, 1928.—Decided May 21, 1928.

1. A refusal of a district judge to call in two other judges for the final hearing of a case governed by Jud. Code § 266, as amended, is remediable in this Court by a writ of mandamus. P. 269.
2. A case does not fall within Jud. Code § 266 unless a statute, or an order of an administrative board or commission, is challenged as contrary to the Federal Constitution. P. 271.

3. An assessment of railroad property for taxation, made by a state board, is not an "order" within the meaning of Jud. Code § 266, and, therefore, in a suit to enjoin collection of taxes under it upon the ground of systematic and intentional discrimination against plaintiff by the board in making the assessment, the application for a preliminary injunction may be heard by a single judge. P. 271.
4. Under Jud. Code § 266, as amended February 13, 1925, the final hearing is not required to be before three judges, unless the application for an interlocutory injunction was required to be. P. 273.

Rule discharged.

UPON a return submitted by District Judge Woodrough in answer to a rule to show cause why a writ of mandamus should not issue requiring him to call in two other judges for the final hearing of an injunction suit. Williams, the Tax Commissioner of Nebraska, and seventy-one county treasurers were the petitioners for the writ.

Messrs. O. S. Spillman, Attorney General of Nebraska, *George L. Basye,* and *Hugh LaMaster,* Assistant Attorneys General, were on the brief for petitioners.

Hon. Joseph W. Woodrough, District Judge, made return and appeared for himself.

MR JUSTICE BRANDEIS delivered the opinion of the Court.

This is a petition by Williams, the tax commissioner of Nebraska, and 71 county treasurers asking for a writ of mandamus to be directed to District Judge Woodrough of the federal court for that State. A rule to show cause issued, 276 U. S. 597; and the return has been made. The petitioners are the defendants in a suit in equity commenced in that court by the Chicago, Burlington & Quincy Railroad Company. When the cause was ripe for final hearing, they moved the district judge to call to his assistance two other federal judges, as provided in § 266 of

the Judicial Code, as amended by the Act of March 4, 1913, c. 160, 37 Stat. 1013, and the Act of February 13, 1925, c. 229, 43 Stat. 936, 938. Judge Woodrough denied the motion and set the case for final hearing, stating that "the object and purpose of this action is to enjoin the collection of taxes against plaintiff's property by defendants county treasurers . . . and there is no injunction issued, allowed or prayed for to restrain the action of any officer of the state of Nebraska and that the defendants county treasurers are not officers of the state of Nebraska" within the meaning of § 266 as amended. The petitioners contend that they are entitled as of right to have the case heard before three judges. Mandamus is the appropriate remedy. *Ex parte Metropolitan Water Co.*, 220 U. S. 539, 546.

Nebraska has provided for the assessment of railroad property by a State Board of Equalization. Compiled Statutes, 1922, §§ 5839, 5840. After the board completes its valuation, it is required to return to the county clerk of every county in which the railroad has property, a statement showing the proportion of the railroad that lies within the county, its average valuation per mile, and the valuations that shall be placed to the credit of each of the governmental subdivisions of the county. The board is authorized to fix the rate of taxation for state purposes; and it transmits to the county clerk a statement of the rate so established. The county treasurers are ex officio collectors of all taxes levied within their respective counties whether for state or for local purposes. §§ 5847–5850, 5904, 5905, 5996.

The Railroad seeks in its suit to enjoin the collection of the taxes for 1923 on the ground that the equality clause of the Fourteenth Amendment was violated in making the assessment. It alleged that its property was assessed by the state board at 122% of its actual value, while the property of other taxpayers was assessed locally at not

more than 60% of its value; that this discrimination was systematic and intentional; that the valuation of its property fixed by the state board had been certified to the clerks of the various counties and entered on the tax lists; that the taxes were about to become delinquent; and that the Company was without adequate remedy at law. It prayed that the court fix the percentage of the tax levied which it should pay to the county treasurers in tentative settlement, for a temporary restraining order, and for interlocutory and final injunctions. Pursuant to an order of the district judge, the motion for an interlocutory injunction came on for hearing, in November, 1923, before a court of three judges constituted as provided in § 266 of the Judicial Code. Because certain of the legal questions presented were deemed similar to those involved in *Chicago, Burlington & Quincy R. R. Co.* v. *Osborne,* 265 U. S. 14, then pending in this Court, the interlocutory injunction was granted.

The *Osborne* case was decided on April 28, 1924. On June 23, 1925, the district court, again composed of three judges, appointed, on motion of the Railroad, a special master to take evidence. His report was filed on January 31, 1928. Soon thereafter, the defendants made the motion that the District Judge call two additional judges to his assistance on final hearing. He was not required to do this unless the suit was one in which, as provided in § 266, it is sought to restrain "the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such State . . . upon the ground of the unconstitutionality of such statute." We are of opinion that Judge Woodrough properly denied the motion.

A case does not fall within § 266 unless a statute or an order of an administrative board or commission is challenged as contrary to the Federal Constitution. *Oklahoma Gas Co.* v. *Russell,* 261 U. S. 290; *Ex parte Buder,* 271 U. S. 461, 465. Here, there was no question as to the validity of the taxing statute. It was the assessment which the Railroad challenged. And an assessment is not an order made by an administrative board or commission, within the meaning of that section. The function of an assessing board is not that of issuing orders. Its function is informational. Its duty is to make findings of fact, and thereby furnish the basis on which other officials are to act in individual instances in levying and collecting the taxes. An assessment does not command the taxpayer to do, or to refrain from doing any thing; does not grant or withhold any privilege, authority, or license; does not extend or abridge any power or facility; does not determine any right or obligation. Compare *Standard Scale Co.* v. *Farrell,* 249 U. S. 571, 577; *Pennsylvania R. R. Co.* v. *United States Railroad Labor Board,* 261 U. S. 72; *United States* v. *Los Angeles & Salt Lake R. R. Co.,* 273 U. S. 299, 310; *Southern Bell Telephone & Telegraph Co.* v. *Railroad Commission,* 280 Fed. 901. An assessment is directed by one officer of the State to another. Compare *Great Northern Ry. Co.* v. *United States,* ante, p. 172. Though in Nebraska the railroad property is, in the main, assessed by a state board and the value of the part within each county is then determined on a pro rata basis, the function of assessing property within a county remains the same as it would be if the valuation of all the property were made by a county board. Whatever the scope of the jurisdiction of the assessing body and whatever the method of valuation pursued, the function to be performed remains simply that of fact-finding.

For the purpose of jurisdiction in federal courts, the difference between the function of regulating, expressed

in orders of a railroad or like commission, and the function of fact-finding is vital. Determinations of an administrative board which are merely findings of fact are not reviewable, *Keller* v. *Potomac Electric Co.*, 261 U. S. 428. Assessments become reviewable judicially only when they are translated into action, as by levy of the tax based on the assessment. From this difference between regulatory orders of administrative boards or commissions, which constitute action, compare *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 226, and assessments by tax commissions or local assessors, which form merely a basis for action, flows the difference in the method of review in cases brought here under § 237 of the Judicial Code. A judgment of a state court sustaining the validity of a regulatory order of a public utilities board is reviewable by writ of error, like a judgment sustaining the validity of a statute. *Bluefield Waterworks & Improvement Co.* v. *Public Service Commission,* 262 U. S. 679, 683; *Northern Pacific Ry. Co.* v. *Department of Public Works,* 268 U. S 39, 42; *Live Oak Water Users' Association* v. *Railroad Commission,* 269 U. S. 354, 356; *Sultan Ry. & Timber Co.* v. *Department of Labor & Industries,* ante, p. 135. But a judgment of a state court sustaining a tax alleged to be illegal because there has been discrimination in assessing property, can be reviewed only on certiorari. *Jett Bros. Distilling Co.* v. *City of Carrollton,* 252 U. S. 1, 5. This is true whether it was the determination of a state or local assessing body, or, as in the case at bar, of both combined, which is alleged to have produced the discrimination. *Baker* v. *Druesedow,* 263 U. S. 137.

Obviously an assessment which is not "a statute of or an authority exercised under any State" within the meaning of § 237, before amended by the Act of 1925, cannot be a statute or an order of an administrative board or commission under § 266. The orders contemplated by § 266 are directed to railroads or others, of whom action, or non-action, is commanded, as it is by a statute.

Compare *Sultan Ry. & Timber Co.* v. *Department of Labor and Industries,* supra. Since an assessment by a state board of equalization has none of the qualities that would be associated with "orders," it cannot have been the sort of state administrative function which Congress had in mind when, by the amendment of 1913, it declared the scope of § 266 so as to include suits in which the injunction was sought on the ground of the unconstitutionality of an administrative order.[1]

Under the Act of February 13, 1925, the final hearing is not required to be before three judges unless the application for an interlocutory injunction was required to be. In a large majority of the cases of this character in which applications for an interlocutory injunction have been made, they have been heard before a single judge; and the propriety of the practice has not been questioned by this Court.[2] As we hold that the action of the state and

[1] The purpose of the amendment, as stated by Mr. Clayton, who had charge of the bill in the House, was "to put the order of a State railroad commission upon an equality with a statute of a State; in other words, to give the same force and effect to the order of a State railroad commission as is accorded under existing law to a State statute." 49 Cong. Rec. 4773.

[2] This appears to have been the uniform practice where the assessment was made by local officials. *Union Pacific R. R. Co.* v. *Board of Commissioners of Weld County,* 217 Fed. 540, 247 U. S. 282; *Keokuk Bridge Co.* v. *Salm,* 258 U. S. 122 (see original papers); *Wilson* v. *Illinois Southern Ry. Co.,* 263 U. S. 574 (see original papers); *Callaway* v. *Bohler,* 291 Fed. 243, 248; see 267 U. S. 479, 483; *Atchison, Topeka & Santa Fe Ry. Co.* v. *Board of Commissioners of Douglas County,* 225 Fed. 978; *Gammill Lumber Co.* v. *Board of Supervisors of Rankin County,* 274 Fed. 630. It has also been the practice in the great majority of cases where the object of the suit was to enjoin local officials from levying a tax based on an assessment made by a state board and claimed to be discriminatory. *Mudge* v. *McDougal,* 222 Fed. 562; *Nevada-California Power Co.* v. *Hamilton,* 235 Fed. 317; *City Ry. Co.* v. *Beard,* 283 Fed. 313; *Chicago & Northwestern Ry. Co.* v. *Eveland,* 285 Fed. 425, 437 (in this case the Tax Commission was joined as defendant, but no relief appears to have been sought against it); *Ohio Fuel Supply Co.* v. *Paxton,* 1 F. (2d)

county boards which is alleged to be discriminatory, is not an order within the meaning of § 266, we have no occasion to consider whether the lower court was right in holding that the " county treasurers are not officers of the State of Nebraska," or whether there are other reasons why the suit is not within the scope of that section.

Rule discharged.

WILLING ET AL. *v.* CHICAGO AUDITORIUM ASSOCIATION.

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

No. 561. Argued April 19, 20, 1928.—Decided May 21, 1928.

A corporation which had constructed and maintained a very expensive commercial building on ground leased to it for long terms, find-

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662, 663; *Fordson Coal Co.* v. *Maggard,* 2 F. (2d) 708; *Connecting Gas Co.* v. *Imes,* 11 F. (2d) 191, 195. On the other hand, in *Chicago, Burlington & Quincy R. R. Co.* v. *Osborne,* 265 U. S. 14, the hearing below was before three judges. In that case, as in this, the Tax Commissioner was joined as a defendant, but apparently no relief could have been given against him. Where relief by injunction has been sought against state tax commissions, boards of equalization, and their members, the practice has been less uniform. The application for a temporary injunction was entertained by a single judge in *Johnson* v. *Wells, Fargo & Co.,* 205 Fed. 60, 239 U. S. 234 (prior to the Act of 1913); *Louisville & Nashville R. R. Co.* v. *Greene,* 244 U. S. 522 (see original papers); *Illinois Central R. R. Co.* v. *Greene,* 244 U. S. 555 (see original papers); *Louisville & Nashville R. R. Co.* v. *Bosworth,* 209 Fed. 380; *Standard Oil Co.* v. *Howe,* 257 Fed. 481; *United Verde Extension Mining Co.* v. *Howe,* 8 F. (2d) 209. In *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Kendall,* 278 Fed. 298, 266 U. S. 94, the hearing was before three judges. See also *Illinois Central R. R. Co.* v. *Mississippi Railroad Commission,* 229 Fed. 248; *Chicago, Indianapolis & Louisville Ry. Co.* v. *Lewis,* 12 F. (2d) 802; *Cumberland Pipe Line Co.* v. *Lewis,* 17 F. (2d) 167; *Western Union Telegraph Co.* v. *Tax Commission of Ohio,* 21 F. (2d) 355.

ing the income inadequate to pay profits on the investment, and desiring to substitute on the same ground a larger building of modern type, but fearing that under the terms of the leases it could not remove the existing structure without the lessors' consent, brought suit against them and the trustees for its bondholders, for the purpose of establishing its right to do so, praying also that the defendants be restrained from taking any steps to prevent such removal. *Held* that the suit could not be maintained in a federal court, for:

1. The doubt of the plaintiff's right, arising only on the face of the leases by which it derived title, was not in legal contemplation a cloud; and a bill to remove it as such would not lie. P. 288.

2. Relief by declaratory judgment is beyond the jurisdiction of the federal judiciary. P. 289.

3. The proceeding was not a case or controversy within the meaning of Art. III of the Constitution, since no defendant had wronged or threatened to wrong the plaintiff, and no cause of action arose from the thwarting of the plaintiff's plans by its own doubts or by the fears of others. *Id.*

4. A removed proceeding which is not a suit within the meaning of Jud. Code § 28, must be remanded by the federal court, even though the remedy sought may be one conferred by state law or statute. P. 290.

20 F. (2d) 837, reversed.

CERTIORARI, 275 U. S. 519, to a decree of the Circuit Court of Appeals, which reversed a decree of the District Court, 8 F. (2d) 998, dismissing the bill of the Auditorium Association. The suit was said to be in the nature of a suit to remove a cloud from title, and was begun originally in the state court.

Mr. Charles Evans Hughes, with whom *Messrs. Samuel Topliff* and *Homer H. Cooper* were on the brief, for petitioners.

The law of the State must determine the respondent's title, or whether the title is clouded. *Guffey* v. *Smith,* 237 U. S. 101; *Holland* v. *Challen,* 110 U. S. 15; *Clark* v. *Smith,* 13 Peters, 195; *Pusey & Jones Co.* v. *Hanssen,* 261 U. S. 491.

Under the law of Illinois, doubtful provisions in an owner's muniment of title and oral hostile assertions by an adverse claimant, do not constitute a cloud upon that title. *McCarty* v. *McCarty,* 275 Ill. 573; *Greenough* v. *Greenough,* 284 Ill. 416; *Rigdon* v. *Shirk,* 127 Ill. 411; *Buckner* v. *Carr,* 302 Ill. 378; *Warren* v. *Warren,* 279 Ill. 217; *First Congregational Church* v. *Page,* 257 Ill. 472; *Glos* v. *People,* 259 Ill. 332. See *Devine* v. *Los Angeles,* 202 U. S. 313.

Bills to remove clouds presuppose the validity and existence of a plaintiff's own title, and are directed exclusively against the alleged invalid claim of a defendant, to be shown invalid by facts extrinsic to the plaintiff's own recorded evidence of title. *Wehrman* v. *Conklin,* 155 U. S. 314; *Lawson* v. *U. S. Mining Co.,* 207 U. S. 1; *Phelps* v. *Harris,* 101 U. S. 370.

The case set up by the respondent is not embraced within any principle or head of equity jurisprudence, and is an application for a declaratory decree not within the judicial function. The essential elements of a justiciable case or controversy, over which the jurisdiction of courts of the United States extends, have been stated in *Muskrat* v. *United States,* 219 U. S. 346; *United States* v. *Hamburg-Amerikanische Co.,* 239 U. S. 466; *United States* v. *Alaska Steamship Co.,* 253 U. S. 113; *New Jersey* v. *Sargent,* 269 U. S. 328.

Changing circumstances, or hardships, or lack of commensurate return, do not excuse nonperformance of the covenants in leases, and, since petitioners are not in the least responsible for the creation or development of these conditions, if existent, such conditions are not legal wrongs for which respondent has any remedy against petitioners. *Ingle* v. *Jones,* 2 Wall. 1; *Sheets* v. *Selden,* 7 Wall. 416; *Blake* v. *Pine Mt. Iron & Coal Co.,* 76 Fed. 624; *Postal Telegraph Co.* v. *Western Union,* 155 Ill. 335.

Illinois has no declaratory judgment or other statute under which jurisdiction can be sustained. This suit, upon the same considerations, would fail in the state courts. *Seely* v. *Baldwin,* 185 Ill. 211; *Paine* v. *Doughty,* 251 Ill. 396; *Prather* v. *Lewis,* 287 Ill. 304.

A declaratory judgment remedy can not be applied by the federal courts. *Liberty Warehouse Co.* v. *Grannis,* 273 U. S. 70.

There can be no substitution of equitable for legal remedies, whereby the constitutional right of trial by jury in actions at law is impaired. *L. & N. R. R. Co.* v. *Western Union,* 234 U. S. 369.

Where the plaintiff's own title is doubtful, a bill in equity to remove alleged clouds therefrom will not lie. *Phelps* v. *Harris,* 101 U. S. 370; *Frost* v. *Spitley,* 121 U. S. 552; *Wehrman* v. *Conklin,* 155 U. S. 314; *Seely* v. *Baldwin,* 185 Ill. 211; *Prather* v. *Lewis,* 287 Ill. 304.

The petitioners were wrongfully prevented from litigating in the courts of the State by the erroneous refusals of the federal courts to remand the case.

There is no separable, removable controversy unless there is a separate and distinct cause of action as to the defendants seeking removal, which can be decided as between them and the plaintiff in the absence of all other defendants. *Torrence* v. *Shedd,* 144 U. S. 527; *Fraser* v. *Jennison,* 106 U. S. 191; *Ayres* v. *Wiswall,* 112 U. S. 187; *Wilson* v. *Oswego Township,* 151 U. S. 56.

Where the right to remove is doubtful, the federal courts uniformly remand. *Thomas* v. *Delta Land & Water Co.,* 258 Fed. 758; *Boykin* v. *Morris Fertilizer Co.,* 257 Fed. 827; *Hansen* v. *Pacific Coast Asphalt Cement Co.,* 243 Fed. 283.

It becomes the duty of a federal court, at whatever stage of litigation it discerns that federal jurisdiction is lacking in a removed case, to remand it to the state

court. *Minnesota* v. *Northern Securities Co.,* 194 U. S. 48; *Graves* v. *Corbin,* 132 U. S. 571; *Torrence* v. *Shedd,* 144 U. S. 527.

Mr. Walter L. Fisher, with whom *Messrs. Wm. C. Boyden* and *Wm. W. Case* were on the brief, for respondent.

When there is a legal right to the beneficial use of property, when obstacles prevent the present enjoyment of that right, when the decree of a court of equity would in fact remove those obstacles without violation of rights of private individuals or of any principles of public policy, and when the courts of law afford no adequate remedy, the jurisdiction of equity is complete.

The doctrine that a right is not cognizable by courts of justice unless controverted, if possessed of general validity for any purpose, pertains to the canons of the common law rather than to equity. Trustees are constantly applying to the court for instructions, not because the defendants disagree with them about the performance of their duties, but to protect themselves against the possibility of any such claim at some future time. In suits to establish title, or to remove clouds on title, equity regularly intervenes to protect the rights of a plaintiff about which no controversy exists. The owner of a title acquired by adverse possession, the evidence of which is not a matter of record and might be lost, is entitled to a decree establishing his title as against the holder of the patent title, even though such holder may have entirely abandoned the property. The jurisdiction does not depend at all on any adverse claim by the defendant. See *Sharon* v. *Tucker,* 144 U. S. 533.

In an ordinary foreclosure suit, parties are joined as defendants on the mere allegation that they have or claim some junior interest in the property. Such a defendant may file a disclaimer, but he cannot sustain a demurrer

to the bill on the ground that it fails to show any assertion on his part of an adverse claim. The apprehension that he might make a claim, and the right of the plaintiff to the enjoyment of the property free and clear from any possibility of such claim, is all that is needed to enable the court to enter a decree against him.

While the present case does in fact disclose a wrong, consisting of unfounded assertions made before suit was begun and reiterated in pleading and by argument during its progress, we do not believe that equitable jurisdiction is conditioned by the assertion or existence of any such wrong. The ownership of property includes a right to its beneficial use; that right is coeval with the ownership and does not come into being for the first time when somebody disputes it; and it is one of the ordinary and most useful functions of equity to render such a right available by the removal of obstacles to its enjoyment. The utmost that can be required is that there must be in fact a real obstacle to the free enjoyment of the right. Cf. *Gavin* v. *Curtin,* 171 Ill. 640; *Fulwiler* v. *McClun,* 285 Ill. 174.

It is a grave error to picture equity as a congeries of stereotyped forms of action outside of which its remedial powers cannot operate. The issue thus raised goes to the very foundation of equitable jurisdiction.

If the bill must bear a label already in stock, the suit can best be described as one to remove cloud on title, or as a bill in the nature of a bill to remove cloud from title. *Holland* v. *Challen,* 110 U. S. 15; 32 Cyc. 1308; 18 Har. L. Rev., 528; *McArthur* v. *Hood Rubber Co.,* 221 Mass. 372.

As for the alleged effect of Illinois law, the authorities only go to the extent of holding that a state statute enlarging the jurisdiction to remove cloud on title creates a substantive right which may be enforced in a federal court; they lend no countenance to the claim that state

courts or even state legislatures can in any manner narrow the definition of a cloud on title so as to cut down the inherent jurisdiction of the federal courts with respect to the removal thereof. *McConihay* v. *Wright,* 121 U. S. 201; *Guffey* v. *Smith,* 237 U. S. 101; *Holland* v. *Challen,* 110 U. S. 15; *Clark* v. *Smith,* 13 Pet. 195; *Pusey & Jones Co.* v. *Hanssen,* 261 U. S. 491.

It is one thing to say that an impediment of some particular sort is not one which, standing alone, equity will assume jurisdiction to remove, and quite another to say that equity cannot remove it as a part of the relief to which a suitor is justly entitled. With this distinction kept in view, we think it easy to show that the remedy sought in the present suit would have been accorded by the Illinois courts. *Parker* v. *Shannon,* 121 Ill. 452; *Seely* v. *Baldwin,* 185 Ill. 211; *Greenough* v. *Greenough,* 248 Ill. 416; *Harrison* v. *Owsley,* 172 Ill. 629; *Buckner* v. *Carr,* 302 Ill. 378; *McCarty* v. *McCarty,* 275 Ill. 573; *Warren* v. *Warren,* 279 Ill. 217; *Fulwiler* v. *McClun,* 285 Ill. 174.

Equity is not prevented from assuming jurisdiction of a meritorious case merely because it involves features which, when isolated, have been pronounced insufficient in themselves to warrant the exercise of jurisdiction. *Truax* v. *Raich,* 239 U. S. 33; *Terrace* v. *Thompson,* 263 U. S. 197; *Packard* v. *Banton,* 264 U. S. 140; *Hygrade Provision Co.* v. *Sherman,* 266 U. S. 497; *Ohio Tax Cases,* 232 U. S. 576; *Shaffer* v. *Carter,* 252 U. S. 37; *Risty* v. *Railway Co.,* 270 U. S. 378.

As to oral assertion of adverse claims: That equity has no inherent jurisdiction merely to construe deeds or interpret contracts is a proposition which may be accepted as axiomatic. That mere verbal assertions of an adverse claim are not enough, without further incident, to create a removable cloud, is a proposition generally true. What gives equity jurisdiction to construe deeds or contracts in-

volving only legal titles is an actual emergency in which its aid is indispensable to assure to an owner the beneficial use of his property, and "mere verbal assertions" will not call equity into action unless they relate to a similar situation. *Thompson* v. *Emmett Irrigation District,* 227 Fed. 560; *Oman* v. *Bedford-Bowling Green Stone Co.,* 134 Fed. 64; *Lovell* v. *Marshall,* 162 Minn. 18; *Slegel* v. *Herbine,* 148 Pa. St. 236.

That there was affirmative assertion of adverse claim is shown by this record.

Illustrations of removal of clouds on title: *N. Y. & N. H. Ry Co.* v. *Schuyler,* 17 N. Y. 502; *Stebbins* v. *Perry County,* 167 Ill. 567; *Levy* v. *S. H. Kress & Co.,* 285 Fed. 836; *Blair* v. *Chicago,* 201 U. S. 400; *Holland* v. *Challen,* 110 U. S. 15; *Parker* v. *Shannon,* 121 Ill. 452; *Sharon* v. *Tucker,* 144 U. S. 533; *Contee* v. *Lyons,* 19 Sup. Ct. D. C. 207; *Walker* v. *Converse,* 148 Ill. 622; *Atchison Ry. Co.* v. *Stamp,* 290 Ill. 428; *McArthur* v. *Hood Rubber Co.,* 221 Mass. 372; *Rector* v. *Rector,* 201 N. Y. 1, 130 App. Div. 166.

Given a primary right to the beneficial use of property, and an obstacle to its present enjoyment which would in fact be removed by an appropriate decree, the lack of adequate remedy at law is the sole and sufficient criterion of equitable jurisdiction. 1 Pomeroy, Eq. Jur., § 111; *Toledo Ry. Co.* v. *Pennsylvania Co.,* 54 Fed. 746; *Dodge* v. *Cole,* 97 Ill. 338.

Waiting until somebody else chooses to start a lawsuit in this case is not an adequate remedy at law. Modern jurisprudence does not require parties to hazard their entire fortunes upon the correctness of their lawyers' opinions. *Nat'l Bank* v. *Carpenter,* 101 U. S. 567; *Ex parte Young,* 209 U. S. 123; *Wadley Southern Ry. Co.* v. *Georgia,* 235 U. S. 651; *Oklahoma Operating Co.* v. *Love,* 252 U. S. 331; *Terrace* v. *Thompson,* 263 U. S. 197; *Porterfield* v. *Webb,* 263 U. S. 225; *Webb* v. *O'Brien,* 263

U. S. 313; *Fick* v. *Webb,* 263 U. S. 326; *Pierce* v. *Society of Sisters,* 268 U. S. 510. Waiting to be sued is not an adequate remedy for a cloud on title. *Voss* v. *Murray,* 50 Oh. St. 19; *Holland* v. *Challen,* 110 U. S. 15; *Bank* v. *Stone,* 88 Fed. 383; *Fredenberg* v. *Whitney,* 240 Fed. 819; *Schwab* v. *St. Louis,* 310 Mo. 116; *Slegel* v. *Harbine,* 148 Pa. St. 236.

As for declaratory judgments, it is doubtless true that courts ordinarily refuse to enter judgments declaring rights with respect to which no present cause or controversy exists; but this doctrine does not affect the jurisdiction of equity to remove clouds from title.

The complicated problems incident to modern social, commercial, and industrial development often make it very important that the rights of parties be settled before they are directly involved in litigation. Generally the courts have not shirked the task when the necessity of an adjudication was sufficiently urgent, but they have been and are naturally reluctant to take jurisdiction of questions of a remote or speculative character, and they have not always been at one about the degree of vexatiousness that will warrant such intervention.

As to removability, separable controversy and indispensable parties: *Barney* v. *Latham,* 103 U. S. 205; *Fraser* v. *Jennison,* 106 U. S. 191; *Russel* v. *Clarke's Executors,* 7 Cranch 69; *Shields* v. *Barrow,* 17 How. 130; *Sioux City Co.* v. *Trust Co.,* 82 Fed. 124; *Williams* v. *Bankhead,* 19 Wall. 563; *Raphael* v. *Trask,* 194 U. S. 272; *Brown* v. *Trousdale,* 138 U. S. 389; *Kendig* v. *Brown,* 97 U. S. 423; *St. Louis Ry. Co.* v. *Wilson,* 114 U. S. 60; *Crump* v. *Thurber,* 115 U. S. 56; *Hagan* v. *Walker,* 14 How. 29; *Wood* v. *Dummer,* 3 Mason 308; *Greene* v. *Sisson,* 10 Fed. Cas. No. 5768; *Tobin* v. *Walkinshaw,* 23 Fed. Cas. No. 14068; *Martin* v. *Fort,* 83 Fed. 19; *Wilson* v. *Oswego Township,* 151 U. S. 56; *Construction Co.* v. *Cane Creek Township,* 155 U. S. 283; *Salem Trust Co.* v. *Mfrs.*

Finance Co., 264 U. S. 182; *Waterman* v. *Canal-Louisiana Bank Co.*, 215 U. S. 33; *Bitterman* v. *Louisville R. R. Co.*, 207 U. S. 205; *Elder* v. *Western Mining Co.*, 237 Fed. 966; *Graves* v. *Ashburn*, 215 U. S. 311; *Commodores Point Terminal Co.* v. *Hudnall*, 283 Fed. 150; *Schell* v. *Leander Clark College*, 2 F. (2d) 17; *Pirie* v. *Tvedt*, 115 U. S. 41; *L. & N. R. R. Co.* v. *Ide*, 114 U. S. 52; *Alabama Southern R. R. Co.* v. *Thompson*, 200 U. S. 206; *Illinois Central R. R. Co.* v. *Sheegog*, 215 U. S. 308; *Chicago, R. I. & P. Ry. Co.* v. *Dowell*, 229 U. S. 102; *Hay* v. *May Stores*, 271 U. S. 318; *Geer* v. *Mathiesen Alkali Works*, 190 U. S. 428; *Bacon* v. *Felt*, 38 Fed. 870; *Venner* v. *Southern Pacific Co.*, 279 Fed. 832; *Field* v. *Lownsdale*, 9 Fed. Cas. No. 4769; *Goodenough* v. *Warren*, 10 Fed. Cas. No. 5534; *Goldsmith* v. *Gilliland*, 24 Fed. 154; *Stanbrough* v. *Cook*, 38 Fed. 369; *Bates* v. *Carpentier*, 98 Fed. 452; *Carothers* v. *McKinley Mining Co.*, 116 Fed. 947; *N. C. Mining Co.* v. *Westfeldt*, 151 Fed. 290; *McMullen* v. *Halleck Cattle Co.*, 193 Fed. 282; *Winfield* v. *Wichita Natural Gas Co.*, 267 Fed. 47; *Old Dominion Oil Co.* v. *Superior Oil Corp'n*, 283 Fed. 636; *Davidson* v. *Montana-Dakota Power Co.*, 22 F. (2d) 688.

Mr. Justice Brandeis delivered the opinion of the Court.

This suit, which was begun in a state court of Illinois by the Chicago Auditorium Association, is said to be in the nature of a bill to remove a cloud upon title. All of the parties except a few of the defendants are citizens of Illinois. These claimed that as to them there was a separable controversy, and they secured a removal of the whole cause to the federal court for northern Illinois. There Willing and other defendants moved to dismiss on the ground that the bill was not within the jurisdiction of a court of equity and that the court "is without jurisdiction of the subject matter of the case, made or at-

tempted to be made by the bill." The court was of opinion that the case presented questions which should be determined only upon answers and proofs; denied the motions to dismiss, without prejudice to any question raised by either party touching the motions; and directed the defendants to answer. After hearing the case fully on the evidence, the District Court dismissed the bill "for want of equity jurisdiction in the court to grant any relief upon the pleadings and the evidence, but without prejudice to whatever rights the plaintiff may have . . . when asserted in any appropriate proceeding or otherwise." 8 F. (2d) 998.

The Circuit Court of Appeals held that the suit was cognizable in a court of equity as one to remove a cloud upon title; and it reversed the decree with direction to the District Court to hear the evidence and determine the issues involved, 20 F. (2d) 837. This Court granted a writ of certiorari, 275 U. S. 519. Motions by Willing and others to remand the case to the state court had been made in the District Court on the ground that the controversy involved was single and entire as to all the defendants. The motions, which that court denied, were renewed in the Circuit Court of Appeals and again denied. We have no occasion to consider whether the alleged controversy was separable. For we are of opinion that the proceeding does not present a case or controversy within the range of judicial decision as defined in Article III of the Federal Constitution.

The facts alleged and proved are these: The Association, an Illinois corporation, was organized in 1886 for the purpose of constructing and maintaining in Chicago a building containing a large auditorium, galleries for exhibition of works of art, offices and other rooms; to provide thereby and otherwise, for the cultivation of music, the drama and the fine arts, and for holding in Chicago political and other conventions; and to use the premises

for any and all purposes of profit. To this end, the Association became, in 1887, the ground lessee of five adjacent parcels of land for the term of 99 years, under five separate, substantially similar indentures. Three of the leases were later extended to the year 2085. On this land the Association built, before 1889, the single monumental structure now standing, known as the Auditorium Building, which contains, besides the auditorium, a recital hall, studios, a hotel, and many business offices. The cost of construction and maintenance was defrayed by stock issues aggregating $2,000,000, and by issues of bonds of which $1,375,000 are outstanding.

The building is now in fairly good condition, and continues to serve well the purposes for which it was constructed. The payments of rent and interest have been made regularly. Thus neither the public, the landlords, nor the bondholders have cause for dissatisfaction. But, for the stockholders, the investment has never been financially remunerative. In forty years only one dividend has been paid; and that was one and a half per cent. Considered as a financial investment, the building is now obsolete in design; and it is incapable of alteration without unjustifiable expense. The highest and best use of the property for the financial gain of the tenant would now be the replacement of this structure by a modern one adapted for business. The Association desires to erect a large modern commercial building of greatly increased height, the cost of which may be as much as $15,000,000. Appropriate changes in its charter powers have been made. Recently some of the stock has been acquired by the President of the corporation at a small fraction of its par value.

There is no provision in the leases which in terms gives the Association the right to tear down this building and erect another in its place. It may be that the building, as and when constructed, became, and now is, property

of the lessors. Compare *Kutter* v. *Smith,* 2 Wall. 491; *Bass* v. *Metropolitan West Side Elevated Railway Co.,* 82 Fed. 857. The leases contain certain provisions which may be construed as denying, by implication, any right to tear down the building even to replace it by a better one. They declare that the building is security for payment of rent and for the performance of all other covenants imposed upon the tenant; that the tenant shall "keep the building situated upon said demised premises . . . in good repair, and in a safe and secure condition, . . . and all rooms in said building in a good, safe, clean and tenantable condition and repair during the entire term of this lease"; that the tenant shall rebuild or repair the building, in event of damage or destruction by fire, upon the same plan as was followed in the original structure or upon such other plans as are approved by the lessors; and that the landlords shall pay the tenant the appraised value of the improvements at the end of the term.

Counsel for the Association are of opinion that it has the legal right to tear down the building and to construct the new one, without first obtaining the consent of the several lessors and of the trustee for the bondholders, provided adequate security is furnished for the payment of the ground rent pending the completion of the new building. But the Association deemed it advisable to obtain the consent of the lessors and of the trustee. To that end, negotiations were opened with Willing and one other of the lessors, and there was some talk of purchasing their interests. In the course of an informal, friendly, private conversation, Willing stated to the President of the Association that his counsel had advised that the lessee had no right to tear down the Auditorium Building without the consent of the lessors and of the trustee for the bondholders. Several of the lessors were never approached by anyone on behalf of the Association. Nor was the trustee for the bondholders. After this talk with Willing, a year

passed without further occurrence. Then, the suit at bar was begun against all the lessors and the trustee for the bondholders.

The bill alleged that "under the proper construction and interpretation of the terms, covenants and conditions of said several leases, your orator is fully empowered and has the right to tear down and remove the present improvement as a part of and incidental to the erection of a new improvement of equal or greater value not impairing in any way the security and property right of the said lessors or their successors and assigns, upon furnishing proper and adequate security during the removal of the present improvement and until the completion of the new improvement; but the defendants hereinafter named, or some of them, nevertheless claim and assert, and by reason of such claim and assertion certain persons with whom your orator is obliged to deal in the financing of its aforesaid plans are fearful, that the present building cannot be removed without a violation of the terms, covenants and conditions of said leases . . . The aforesaid claims, fears and uncertainties respecting the rights of the parties to said leases, based upon the terms, covenants and conditions of the leases of said property, have greatly impaired the value of the leasehold interests of your orator, and have made them unmarketable, and have prevented your orator from exercising its rights with respect to said leasehold interests so as to secure therefrom the highest and best use of its interest in the land; and the terms, covenants and conditions of the said leases, in so far as they give color to said claims, fears and uncertainties, are clouds upon the title of your orator, for the removal of and relief against which your orator has no adequate remedy in a court of law."

The bill prayed "that this court will remove from the several leasehold interests of your orator the above mentioned claims and clouds based upon the alleged force and

effect of the terms, covenants and conditions of the aforesaid leases, and will fully quiet and establish the title of your orator to the said leasehold properties with full right on the part of your orator to tear down and remove any and all buildings which for the time being may be upon said premises, upon giving proper security . . . ; and that said defendants may also be restrained and enjoined from taking any steps to prevent your orators from tearing down or removing the present building . . ."

There is not in the bill, or in the evidence, even a suggestion that any of the defendants had ever done anything which hampered the full enjoyment of the present use and occupancy of the demised premises authorized by the leases. There was neither hostile act nor a threat. There is no evidence of a claim of any kind made by any defendant, except the expression by Willing, in an amicable, private conversation, of an opinion on a question of law. Then, he merely declined orally to concur in the opinion of the Association that it has the right asserted. For that, or for some other reason, several of the defendants had refused to further the Association's project. Other defendants had neither done nor said anything about the matter to anyone, so far as appears. Indeed, several refrained, even in their answers, from expressing any opinion as to the legal rights of the parties.

Obviously, mere refusal by a landlord to agree with a tenant as to the meaning and effect of a lease, his mere failure to remove obstacles to the fulfillment of the tenant's desires, is not an actionable wrong, either at law or in equity. And the case lacks elements essential to the maintenance in a federal court of a bill to remove a cloud upon title. The alleged doubt as to plaintiff's right under the leases arises on the face of the instruments by which the plaintiff derives title. Because of that fact, the doubt is not in legal contemplation a cloud, and the bill to remove it as such does not lie. It is true that the plight of

which the Association complains cannot be remedied by an action at law. But it does not follow that the Association may have relief in equity in a federal court. What the plaintiff seeks is simply a declaratory judgment. To grant that relief is beyond the power conferred upon the federal judiciary. *Liberty Warehouse Co.* v. *Grannis,* 273 U. S. 70, 74. Compare *Liberty Warehouse Co.* v. *Burley Tobacco Growers Ass'n,* 276 U. S. 71. The statement, made at the bar, that *Blair* v. *Chicago,* 201 U. S. 400, 450, supports the jurisdiction, is unfounded.

It is true that this is not a moot case, like *Singer Manufacturing Co.* v. *Wright,* 141 U. S. 696, and *United States* v. *Alaska S. S. Co.,* 253 U. S. 113; that, unlike *Keller* v. *Potomac Electric Co.,* 261 U. S. 428, 444, and *Postum Cereal Co.* v. *California Fig Nut Co.,* 272 U. S. 693, the matter which it is here sought to have determined is not an administrative question; that the bill presents a case which, if it were the subject of judicial cognizance, would in form come under a familiar head of equity jurisdiction; that, unlike *Gordon* v. *United States,* 117 U. S. 697, a final judgment might be given; that, unlike *South Spring Hill Gold Mining Co.* v. *Amador Medean Gold Mining Co.,* 145 U. S. 300, the parties are adverse in interest; that, unlike *Fairchild* v. *Hughes,* 258 U. S. 126, and *Massachusetts* v. *Mellon,* 262 U. S. 447, there is here no lack of a substantial interest of the plaintiff in the question which it seeks to have adjudicated; that, unlike *New Jersey* v. *Sargent,* 269 U. S. 328, the alleged interest of the plaintiff is here definite and specific; and that there is here no attempt to secure an abstract determination by the court of the validity of a statute, as there was in *Muskrat* v. *United States,* 219 U. S. 346, 361, and *Texas* v. *Interstate Commerce Commission,* 258 U. S. 158, 162. But still the proceeding is not a case or controversy within the meaning of Article III of the Constitution. The fact that the plaintiff's desires are thwarted by its own doubts, or by the

fears of others, does not confer a cause of action. No defendant has wronged the plaintiff or has threatened to do so. Resort to equity to remove such doubts is a proceeding which was unknown to either English or American courts at the time of the adoption of the Constitution and for more than half a century thereafter, *Cross* v. *De Valle,* 1 Wall. 1, 14–16. Compare *Jackson* v. *Turnley,* 1 Drew. 617, 627; *Rooke* v. *Lord Kensington,* 2 K. & J. 753, 760; *Lady Langdale* v. *Briggs,* 8 DeG. M. & G. 391, 427.

As the proceeding is not a suit within the meaning of § 28 of the Judicial Code, the motions to remand the cause to the state court should have been granted. *Stewart* v. *Virginia,* 117 U. S. 612; *Upshur County* v. *Rich,* 135 U. S. 467; *Pacific Live Stock Co.* v. *Oregon Water Board,* 241 U. S. 440, 447. Whether, as the respondent contends, it has a remedy under the law of Illinois, we have no occasion to consider. *Fulwiler* v. *McClun,* 285 Ill. 174. Compare *McCarty* v. *McCarty,* 275 Ill. 573; *Greenough* v. *Greenough,* 284 Ill. 416; *Devine* v. *Los Angeles,* 202 U. S. 313, 334–335. Even a statute of the State could not confer a remedial right to proceed in equity in a federal court in a suit of this character. *Pusey & Jones Co.* v. *Hanssen,* 261 U. S. 491.

Reversed.

Concurring opinion of MR. JUSTICE STONE.

I concur in the result. It suffices to say that the suit is plainly not one within the equity jurisdiction conferred by §§ 24, 28, of the Judicial Code. But it is unnecessary, and I am therefore not prepared, to go further and say anything in support of the view that Congress may not constitutionally confer on the federal courts jurisdiction to render declaratory judgments in cases where that form of judgment would be an appropriate remedy, or that this

Court is without constitutional power to review such judgments of state courts when they involve a federal question. Compare *Fidelity National Bank & Trust Co.* v. *Swope,* 274 U. S. 123, 130–134. "It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case." *Burton* v. *United States,* 196 U. S. 283, 295. See *Blair* v. *United States,* 250 U. S. 273, 279; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 177; *Light* v. *United States,* 220 U. S. 523, 538. There is certainly no "case or controversy" before us requiring an opinion on the power of Congress to incorporate the declaratory judgment into our federal jurisprudence. And the determination now made seems to me very similar itself to a declaratory judgment to the effect that we could not constitutionally be authorized to give such judgments—but is, in addition, prospective, unasked, and unauthorized under any statute.

BALTIMORE & OHIO RAILROAD COMPANY *v.* UNITED STATES ET AL.

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

No. 404. Argued April 11, 1928.—Decided May 21, 1928.

1. Western railroads with termini at St. Louis (the "west-side" roads) exchanged traffic with railroads east of the Mississippi (the "east-side" roads) by means of a terminal company owned jointly or controlled by appellants and appellees. (See *Terminal R. R. Ass'n* v. *United States,* 266 U. S. 17.) In order to meet the competition on through freight of the Chicago and Alton and other western railroads which reached East St. Louis by means of independent crossings, the "west-side" roads had long made the same rates on that point as on St. Louis, absorbing the Terminal's transfer charges on west-bound as well as east-bound traffic. The "east-side" roads bore no part of such charges and where, as in most cases, their St. Louis and East St. Louis rates were the same, they were limited by appropriate tariff provisions

to East St. Louis as applied to through traffic moving on combination rates. On complaint of the "west-side" roads, the Interstate Commerce Commission ordered the "east-side" roads in the future to bear or absorb all the transfer charges on all west-bound traffic moving on combination rates, which were the same on St. Louis as on East St. Louis, holding the existing arrangement to be an unjust and unreasonable "practice," under § 1 (6) and (11) and § 15 (1) of the Act to Regulate Commerce, although there was no question concerning the furnishing of facilities or the handling of traffic, and no proof that the complainants justly should not bear the burden of transfer in both directions, like their competitors. *Held*, that the order could not be sustained. Pp. 294–302.

2. The term "practice" in the Act to Regulate Commerce, owing to its wide and variable connotations, should be confined to acts or things belonging to the same general class as those meant by the words associated with it in the statute. P. 299.
3. *Semble* that "practice," as used in § 1 (6), (11), and § 15 (1) of the Act, does not include or refer to the method or basis used by connecting carriers for the division of revenues, whether the revenues be derived from joint rates or from combination through rates. P. 300.
4. Even if the above-described arrangement by which the "west-side" roads bear the transfer charges on west-bound as well as east-bound through traffic moving on combination rates were a "practice," the Commission would not be authorized to set it aside without adequate evidence that it is unjust or unreasonable. *Id.*
5. Proof of a practice among carriers whereby the delivering carrier bears the cost of switching when interchange is effected by means of an intermediate carrier, did not tend to prove that the arrangement complained of in this case was unjust or unreasonable. P. 301.
6. In determining the reasonableness of the apportionment of revenues derived from combination rates, the same considerations apply as govern the divisions of joint rates under § 15 (6) of the Act. *Id.*

Reversed.

APPEAL from a decree of the District Court dismissing, for want of equity, a suit to set aside an order of the Interstate Commerce Commission.

Mr. Morison R. Waite, with whom *Messrs. D. P. Connell, Homer T. Dick, W. A. Northcutt, Guernsey Orcutt, Charles J. Rixey, Louis H. Strasser, W. J. Stevenson, Elmer A. Smith* and *Frank H. Towner* 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. J. Stanley Payne, with whom *Mr. P. J. Farrell* was on the brief, for the Interstate Commerce Commission.

Mr. M. G. Roberts, with whom *Messrs. Joseph M. Bryson, W. F. Dickinson, Edward J. White, E. T. Miller, C. S. Burg, Wallace T. Hughes* and *H. H. Larimore* were on the brief, for the Western Carriers, Appellees.

Mr. Justice Butler delivered the opinion of the Court.

The appellants,[1] for convenience called the east side lines, brought this suit to set aside an order of the Interstate Commerce Commission in respect of charges for transporting certain westbound through traffic from the lines east of the Mississippi at East St. Louis to the lines

[1] Appellants are: The Baltimore & Ohio Railroad Company; William W. Wheelock and William G. Bierd, Receivers of the Chicago & Alton Railroad Company; Chicago & Eastern Illinois Railway Company; The Cleveland, Cincinnati, Chicago & St. Louis Railway Company; Illinois Traction, Inc.; Illinois Central Railroad Company; Litchfield & Madison Railway Company; Louisville & Nashville Railroad Company; Mobile & Ohio Railroad Company; The New York, Chicago & St. Louis Railroad Company; The Pennsylvania Railroad Company; Southern Railroad Company, and Wabash Railway Company.

Appellees are: The Chicago, Rock Island & Pacific Railway Company; Missouri-Kansas-Texas Railroad Company; Missouri Pacific Railroad Company, and St. Louis-San Francisco Railway Company.

west of the river at St. Louis. The Commission and the carriers on whose complaint the order was made intervened. The district court, consisting of three judges (U. S. C., Tit. 28, § 47) dismissed the case for want of equity.

The order was made by the Commission after hearing on the complaint of four west side lines. They alleged that the practice of the east side lines requiring them to bear the expenses of transporting westbound through traffic across the river is unjust, unreasonable and illegal. They made no complaint as to the eastbound traffic, but they sought to be relieved from such charges on all the westbound through business and prayed reparation on account of such costs borne in the two years preceding the complaint. The Commission filed a report which was made a part of the order. 113 I. C. C. 681. It held—its Chairman and two other members dissenting—that the matter in controversy is a "practice" within the meaning of the Act. It found "that for the future the practice of the east side lines in requiring the west side lines to bear the transfer charges on westbound freight traffic moving through St. Louis and East St. Louis on combination rates which are the same on St. Louis as on East St. Louis will be unjust and unreasonable, and that the just and reasonable practice with respect to such traffic will be for the east side lines to bear or absorb all such transfer charges." The Commission was not convinced that the acceptance by the west side lines of divisions of joint rates did not constitute an acquiescence, tantamount to an agreement on their part to pay a transfer charge on through traffic moved on such rates. But it commended to the carriers a careful study of the divisions of joint rates on westbound traffic with a view to readjustment if necessary to conform to the just and reasonable practice in respect of interchange approved by the report. Reparation was denied.

The order[2] requires no change of divisions of revenues derived from traffic moving on joint rates. It covers only such of the westbound traffic as moves on combination through rates. It shifts from the west side lines to the carriers east of the river the burden of transferring that freight from east to west across the river. No change is ordered in the method of handling the traffic. No lack of facilities for the through routes, § 1 (3) (4), or for making the transfers, § 3 (3) was shown or found.

The appellants contend that the controversy involved rates and divisions and not a "practice" within the meaning of the Act, and that the evidence before the Commission was not sufficient to support a finding that it is or will be unjust or unreasonable to require the west side lines to bear such transfer charges or to warrant the order.

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[2] "It is ordered, That the above-named defendants, according as they participate in the transportation, be . . . required to cease and desist, on or before October 12, 1926, and thereafter to abstain from the practice of requiring the above-named complainants together with the Chicago, Burlington & Quincy Railroad Company and the Wabash Railway Company, to bear the charges for transfer services from East St. Louis, Ill., to St. Louis, Mo., on westbound freight traffic passing through both points on combination rates which are the same on St. Louis as on East St. Louis.

"It is further ordered, That said defendants, according as they participate in the transportation, be, . . . required to establish, on or before October 12, 1926, upon notice to this commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply to the transportation of westbound freight traffic passing through both East St. Louis, Ill., and St. Louis, Mo., on combination rates which are the same on St. Louis as on East St. Louis, and delivered to complainants, or the Chicago, Burlington & Quincy Railroad Company or the Wabash Railway Company, the practice of bearing or absorbing on such traffic the charges for transfer services from defendants' lines in East St. Louis, Ill., to the lines of complainants, or of the Chicago, Burlington & Quincy Railroad Company or the Wabash Railway Company in St. Louis, Mo."

The traffic at this crossing is very large. The railroad lines of the east side carriers terminate on the east bank, those of the appellee carriers on the west bank, and some carriers have lines on both sides. All, or practically all, of the traffic is handled for interchange between lines east and lines west by the Terminal Railroad Association and its subsidiaries. They are jointly owned or controlled by appellant and appellee lines. The arrangements for their use contemplate equal treatment of all carriers served by them. The proprietary companies have trackage rights over the lines of the Association between St. Louis and East St. Louis, but ordinarily they do not use them. The average haul for transfer across the river is about ten miles. The cost is higher than that attending transportation for like distances under ordinary circumstances.

The transfer charges complained of were assumed by appellee lines in order to enable them to compete with other railroads west of the Mississippi River. At first there was a separate rate or charge for the haul across the river. But in 1877, the Chicago & Alton Railroad Company built a line from the west across the Mississippi at Louisiana, Missouri, to a junction with its north and south line east of the river. That extension enabled it to open a route from the west to East St. Louis and there interchange with the east side lines. This competition for the haul between East St. Louis and the territory west of St. Louis compelled the four appellee lines to bear the cost of transferring across the river all through traffic in both directions. The Commission's report shows that now five of the eight lines on the west side that serve St. Louis also reach East St. Louis, and that three of them handle freight traffic to points west of the river without taking it through St. Louis. This is competition that must be met—if they would participate in the business—by the west side lines that reach East St. Louis only by means

of the facilities and services of the Association and its subsidiaries. Since the Alton opened its route to the west, the appellee lines have maintained the same rates from and to East St. Louis as from and to St. Louis. And, about 1908, upon the insistence of the business interests of St. Louis, the lines east of the river published and have since maintained, with some exceptions that need not be specified, the same rates from and to St. Louis as from and to East St. Louis. This was done by reducing the rates to and from St. Louis and by advancing most of the rates to and from East St. Louis. The decrease in revenue resulting from the reductions was much greater than the increase arising from the advances.

In 1905 the United States brought suit against the Terminal Railroad Association, carriers involved in this controversy and others in the district court for the eastern district of Missouri to prevent violations of the Sherman Anti-trust Act. A final decree in favor of the United States was entered in 1917 in accordance with the directions of this Court. 224 U. S. 383, 236 U. S. 194. On petition filed in that case by the appellee lines some years after the final decree, the district court, February 8, 1923, adjudged that in contempt of its decree the Association, its subsidiaries and proprietary companies, had continuously compelled the appellee lines to pay transfer charges for interchange between them and the east side lines on through traffic in both directions. It directed the east side lines to cease such violations and to pay for the use of the west side lines the total amount of the charges paid by the latter for the transfer of westbound through freight from March 2, 1914, to the date of the order. The east side lines and other companies so adjudged in contempt appealed; and, on October 13, 1924, this Court held that the original decree did not regulate rates, prescribe divisions of joint rates or fix liability for the transfer charges; that contempt proceedings did not lie to de-

termine the controversy between the east side lines and the west side lines or to require the former to make the payments ordered. *Terminal Railroad Ass'n* v. *United States,* 266 U. S. 17, 29, *et seq.*

The Commission's report states that the question before it was "whether the east side lines or the west side lines should bear the expense incident to the transfer across the Mississippi River from East St. Louis, Ill., to St. Louis, Mo., of practically all carload and less-than-carload through freight originating east of the St. Louis-East St. Louis district and destined west thereof." And the thing ordered by the Commission is the absorption by the east side lines of the transfer charges on westbound through traffic. It directed them to do exactly what the district court required them to do except that the latter's decree related to the past and the order of the Commission relates to the future. The matters in controversy in both proceedings were purely financial. There was no question concerning furnishing of facilities or the handling of traffic.

The larger part of the through traffic interchanged through the East St. Louis-St. Louis gateway moves on joint rates; and, for the purpose of divisions among participating carriers, these rates are deemed to "break" at East St. Louis. Each is made up of an amount to cover the part of the haul east of East St. Louis and an amount to cover the movement between that place and points west of St. Louis. The first amount goes to the lines east and the other, less the transfer charge, goes to carriers west of the river. Through traffic not covered by joint rates moves on through rates made up of combinations of local rates or local and proportional rates to and from East St. Louis. Where the combination on St. Louis is the same as on East St. Louis, the lines east of the river, by appropriate tariff provisions, § 6 (1), make their St. Louis-East St. Louis rates apply only to and from

East St. Louis. There are some exceptions, but they need not be set forth here. So all the revenues yielded by such rates, without deduction on account of charges for transfer, are retained by the carriers in the territory east of the river. But the Commission's order requires the rates, so by tariff provisions limited to East St. Louis, to be extended to St. Louis. This operates to deduct the cost of transfer from their revenue. In effect it is to require the cancelation of such tariff provisions, and to authorize a corresponding change in the tariffs of the appellee lines. It results that the controversy before the Commission involved divisions or apportionments of revenues derived from through traffic.

In holding that the matter in controversy is a "practice" within the meaning of the Act, the Commission relied on § 1 (6) and (11) and § 15 (1). Paragraph (6) makes it the duty of carriers to establish just and reasonable regulations and practices affecting classifications, rates or tariffs. Paragraph (11) requires them to furnish an adequate car service and to establish just and reasonable rules, regulations and practices, and declares to be unlawful every unjust and unreasonable rule, regulation and practice in respect of car service. The phrase "car service" is defined by paragraph (10) to include the exchange, interchange and return of locomotives, cars and other vehicles and also the supply of trains used by any carrier. Paragraph (1) of § 15 provides that whenever the Commission shall be of opinion that any individual or joint rate or classification, regulation or practice is or will be unjust or unreasonable, the Commission may prescribe just and reasonable rates, classifications, regulations or practices.

The word "practice," considered generally and without regard to context, is not capable of useful construction. If broadly used, it would cover everything carriers are accustomed to do. Its meaning varies so widely and de-

pends so much upon the connection in which it is used that Congress will be deemed to have intended to confine its application to acts or things belonging to the same general class as those meant by the words associated with it. *United States* v. *Pennsylvania Railroad Co.*, 242 U. S. 208, 229. When regard is had to that rule and the restrictions required to give the word a reasonable construction, it seems quite clear that "practice" as used in the provisions relied on by the Commission, does not include or refer to the method or basis used by the connecting carriers for their divisions of rates or revenues. And this is so whether the revenues are derived from joint rates or from combination though rates.

But even if the matter in controversy were a "practice" within the meaning of the Act, the Commission would not be authorized to set it aside without evidence that it is unjust or unreasonable. Paragraph (6) of § 15 empowers the Commission to prescribe divisions of joint rates, but there must be evidence adequate to justify action. *Brimstone Railroad & Canal Co.*, v. *United States*, 276 U. S. 104. *United States* v. *Abilene & Southern Ry. Co.*, 265 U. S. 274. *New England Divisions Case*, 261 U. S. 184. That rule may not be avoided by a broad construction of the word "practice." The record here contains all the evidence that was submitted to the Commission. Its report shows that "the propriety of divisions was not the subject of inquiry and investigation." The appellee lines adopted the policy of absorbing the transfer charges in order to meet competition of the Alton and have since continued to divide joint rates and apply their St. Louis-East St. Louis rates in combination on that basis. There is a strong presumption that the general level of their rates has been adjusted to include reasonable compensation for the services covered by them. The Commission found that appellee lines have long acquiesced

in the division of revenue derived from traffic moving on joint rates. They have not, by tariff provisions or otherwise, attempted to limit to St. Louis their St. Louis-East St. Louis rates when used in combination to move through traffic. The Alton and other like competitors of appellee lines bear the cost of the transfer across the river. The order makes no change as to them. But it takes the corresponding costs off appellee lines and puts that burden on the east side lines. The latter are required to absorb the transfer cost only when the traffic moves over the appellee lines.

The Commission appears to have relied on evidence tending to show that, usually, when interchange is effected by means of an intermediate carrier, the delivering carrier bears the cost of switching. But such a practice does not tend to prove that it is unjust or unreasonable for the appellee lines, in order to meet competition of other west side lines, to bear the cost of transfer in both directions, or that the east side lines may not justly and reasonably limit their rates to East St. Louis when used in combination on through traffic at that gateway and so put appellee lines on equal footing with their competitors. The same considerations apply in determining the reasonableness of the apportionment of revenues derived from combination rates as govern the divisions of joint rates. The merits of the changes made by the order cannot be determined without a consideration of facts substantially similar to those specified in paragraph (6) of § 15 relating to the division of joint rates. The case was not presented by complainants or considered by the Commission on that basis. There was no evidence to show the amount of revenue required to pay operating expenses, taxes and a fair return on the property of appellee lines or that their rates were not adjusted or were not sufficient to cover the transfer charges in question. There was nothing to sup-

port a finding that it is or will be unjust or unreasonable for the appellee lines to bear the cost of transfer of the westbound through traffic. The order cannot be sustained. *Florida East Coast Ry.* v. *United States,* 234 U. S. 167. *Louis. & Nash. R. R.* v. *United States,* 238 U. S. 1.

Decree reversed.

McCOY *v.* SHAW, STATE AUDITOR, ET AL.

CERTIORARI TO THE SUPREME COURT OF OKLAHOMA.

No. 403. Submitted April 9, 1928.—Decided May 21, 1928.

A suit to enjoin collection of a tax as violative of treaties between the United States and the Chickasaw Indians and of certain Acts of Congress, was dismissed by the state court upon the ground that there was a plain, adequate and exclusive remedy at law by paying the tax under protest and suing for its recovery. *Held* that this Court had no jurisdiction to review, as the judgment was put upon an independent, non-federal ground, adequate to sustain it. P. 303.
Certiorari to 124 Okla. 256, dismissed.

CERTIORARI, 275 U. S. 515, to a judgment of the Supreme Court of Oklahoma, dismissing a suit to enjoin collection of taxes.

Messrs. Robert M. Rainey, Streeter B. Flynn, Calvin Jones and *Jay W. Whitney* were on the brief for petitioner.

Messrs. Edwin Dabney, Attorney General of Oklahoma, and *V. P. Crowe,* Assistant Attorney General, were on the brief for respondents.

MR. JUSTICE SANFORD delivered the opinion of the Court.

McCoy, the petitioner, a Chickasaw Indian of one-fourth blood, brought this suit in equity in a state court

of Oklahoma to enjoin the collection of a gross production tax on his one-eighth royalty interest in the oil produced under a lease of lands patented to him as his homestead and surplus allotments from which all restrictions on alienation and incumbrance had been removed—claiming that this tax on his royalty share in the oil was in violation of the treaties between the United States and the Chickasaw Indians and the Acts of Congress relating thereto. The court dismissed the suit on motion, for want of equity; and this was affirmed by the Supreme Court of Oklahoma, without consideration of the federal question, on the ground that under §§ 9971 and 9973 of the Compiled Oklahoma Statutes, 1921, the petitioner had a plain, adequate and exclusive remedy at law by paying the tax under protest and suing for its recovery. 124 Okla. 256.

It is settled law that a judgment of a state court which is put upon a non-federal ground, independent of the federal question involved and broad enough to sustain the judgment, cannot be reviewed by this Court, unless the non-federal ground is so plainly unfounded that it may be regarded as essentially arbitrary or a mere device to prevent the review of a decision upon the federal question. *Leathe* v. *Thomas,* 207 U. S. 93, 99; *Vandalia Railroad* v. *South Bend,* 207 U. S. 359, 367; *Enterprise Irrig. Dist.* v. *Canal Co.,* 243 U. S. 157, 164; *Ward* v. *Love County,* 253 U. S. 17, 22; and cases therein cited.

Here the non-federal ground upon which the Oklahoma court based its decision—namely, that under the Oklahoma statutes the petitioner had a plain, adequate and exclusive remedy at law—was based on its earlier decision in *Black* v. *Geissler,* 58 Okla. 335. It is in harmony with the decisions of this Court relating to similar statutes of other States. *Tennessee* v. *Sneed,* 96 U. S. 69, 75; *Shelton* v. *Platt,* 139 U. S. 591, 595; *Indiana Mfg.*

Co. v. *Koehne,* 188 U. S. 681, 686; *Raymond* v. *Chicago Traction Co.,* 207 U. S. 20, 39; *Singer Sewing Mach. Co.* v. *Benedict,* 229 U. S. 481, 487; *Union Pac. R. R. Co.* v. *Weld County,* 247 U. S. 282, 285. And no intent to evade the federal question is indicated.

We are without authority to determine the federal right claimed by the petitioner. And the writ of certiorari is

Dismissed for want of jurisdiction.

SOUTHERN PACIFIC COMPANY *v.* HAGLUND, ADMINISTRATRIX, ET AL.

SAME *v.* MOORE SHIPBUILDING COMPANY ET AL.

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

Nos. 472, 473. Submitted April 13, 1928.—Decided May 21, 1928.

While a steamship, without power or lookout, was being held "dead" across a channel by a tug, leaving, however, ample space for navigation past her stern, a ferryboat, approaching the opening with its view of the channel beyond obstructed by the steamer, blew a single blast of her whistle, indicating her intention to pass in the rear of the steamer, and having received an acceptance by a like blast from the tug, continued at full speed until within the opening, when, perceiving another vessel approaching her, though not dangerously near, she began prematurely her movement to pass her and struck and injured the steamer. *Held:*

1. The collision was due solely to the negligence of the ferryboat. P. 309.

2. The signal of the tug was merely its assent to the proposed passing in the rear of the steamer. P. 310.

3. The tug was not at fault in accepting the passing signal and in not sounding a warning instead, though aware of the approach of the vessel on the other side, there being nothing in the situation to indicate that the ferryboat would be thereby prevented from passing the steamer safely, if navigated with due care. *Id.*

4. The steamer was not at fault in not having a lookout. *The Ariadne,* 13 Wall. 475, distinguished. P. 310.

19 F. (2d) 878, affirmed.

CERTIORARI, 275 U. S. 517, to decrees of the Circuit Court of Appeals, affirming two decrees in admiralty against the petitioner for damages caused in a collision by its ferryboat.

Mr. Wm. Denman submitted for petitioner.

The whistle acceptance of a tendered passing signal is a positive assertion that no danger exists which is known to the accepting vessel and concealed from the vessel signalling for the maneuver. If there is such a danger, the vessel knowing it owes a positive duty to the asking vessel to blow the danger signal. A vessel knowing of such concealed danger and accepting a passing signal and failing to blow the danger signal, is in fault and is responsible for a collision "caused" by the hidden danger.

The tendering vessel may rely on the assurances of the accepting vessel and is not at fault for damages arising from proceeding as if the hidden danger were not there.

The contrary rule, laid down by the Ninth Circuit in this case, is opposed to the rule as recognized in the Second, Fourth, Sixth, and Eighth Circuits and all other cases. It is not the law and is a menace to life and property at sea. *The American,* 92 U. S. 432; *The Genevieve,* 95 Fed. 859; *The F. W. Wheeler,* 78 Fed. 824; *The Edna V. Crew,* 202 Fed. 1021; *The Lowell M. Palmer,* 142 Fed. 937; *Atlas Trans. Co.* v. *Lee Line,* 235 Fed. 492, on rehearing, 238 Fed. 349; *The Richmond,* 275 Fed. 970; *The Alabama,* 114 Fed. 214; *Santa Maria,* 227 Fed. 149; *Werdenfels,* 150 Fed. 400; *The Luther C. Ward,* 149 Fed. 787.

The *Relief,* and tow, should be held in sole fault, for had the circumstances been as safe as they properly seemed to the *Thoroughfare,* and as the *Relief's* acceptance told her they were, there was nothing which could possibly have caused a collision. The *Thoroughfare* would have passed safely on through the deep, straight and unobstructed channel, without hurt to anyone.

The *Thoroughfare* was *in extremis* when at the stern of the *Enterprise.* Her sudden turn to avoid her danger was her only salvation, the only thing she could do. The turn was, therefore, the proximate result of the antecedent invitation by the *Relief* to enter the trap, from which the *Thoroughfare* struggled to escape.

The burden of proof is on each vessel to establish fault on the part of the other. *The Victory,* 168 U. S. 410.

Where fault on the part of one vessel is established by uncontradicted testimony, and such fault is, of itself, sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. *The City of New York,* 147 U. S. 72.

It is elemental that there should be a lookout on a tow which obscures the vision of a tug from approaching vessels. *Nevada* v. *Quick,* 106 U. S. 154; *Edward G. Murray,* 234 Fed. 61; *James A. Lawrence,* 117 Fed. 228; *Gladiator,* 132 Fed. 876; *Arthur M. Palmer,* 115 Fed. 420.

Every doubt as to the performance of the duty, and the effect of non-performance, should be resolved against the vessel sought to be inculpated until she vindicates herself by testimony conclusive to the contrary. *The Ariadne,* 13 Wall. 475; *The Anna,* 201 Fed. 58.

The mere finding that the *Thoroughfare's* act is the proximate cause does not make it the sole cause and does not absolve the court from considering whether the absence of a lookout was not a contributing cause. *The International,* 143 Fed. 468.

Mr. Ira S. Lillick, with whom *Mr. Hunt C. Hill* was on the briefs, submitted for the respondents, Moore Shipbuilding Company and Hildur Haglund, Administratrix.

Mr. J. F. Sullivan, with whom *Messrs. Edward I. Barry* and *Theodore J. Roche* were on the brief, submitted for the respondent, Rolph Navigation & Coal Company.

Mr. Justice Sanford delivered the opinion of the Court.

These two suits in admiralty, which were brought in the federal court for northern California, arose out of a collision between the ferryboat *Thoroughfare* and the steamship *Enterprise* in charge of the tug *Relief,* in the channel of San Antonio Creek, known as the Oakland Estuary, which resulted in damages to the *Thoroughfare* and the *Enterprise,* and the killing of Ernest Haglund, a workman on the *Enterprise.* In No. 472 the administratrix of Haglund's estate libelled the Southern Pacific Co., the owner of the *Thoroughfare,* and the Rolph Navigation & Coal Co., the owner of the *Relief,* for the damages arising from his death. In No. 473 the Moore Shipbuilding Co. libelled the *Thoroughfare* for the damages to the *Enterprise;* and the Southern Pacific Co., as claimant of the *Thoroughfare,* brought in as third party respondents the *Enterprise,* the *Relief* and the Rolph Navigation & Coal Co., to answer for the damages to the *Thoroughfare.*[1]

The suits were tried on the same evidence as to the responsibility for the collision, and were consolidated for hearing in the Circuit Court of Appeals. The District Court found that the collision was caused solely by the negligence of the *Thoroughfare,* without fault on the part of the *Relief* or the *Enterprise,* and entered decrees against

[1] Another tug, the *Hercules,* belonging to the Rolph Navigation & Coal Co., which was also impleaded, is not here involved.

the Southern Pacific Co. for the damages to the *Enterprise* and the death of Haglund. These decrees were affirmed by the Circuit Court of Appeals. 19 F. (2d) 878.

The channel of the Estuary, the great artery of commerce between San Francisco and Oakland, is 500 feet wide. The collision occurred about noon, on a clear day. The *Enterprise,* a steam freighter 320 feet long, which was undergoing repairs at the yard of the Moore Shipbuilding Co. on the north bank of the Estuary, was let down stern foremost on a marine railway into the waters of the Estuary, and lay at right angles across the channel. She was without power, had no lookout, and had been placed by the Shipbuilding Company in charge of the *Relief* to be berthed at a nearby wharf on the Company's plant.[2] The *Thoroughfare,* a steam ferryboat, was then approaching at her full speed of 13 miles an hour on an easterly course through the Estuary. When about 2,900 feet away she sounded a single blast of her whistle. This was not answered by the *Relief,* which was then engaged in stopping the sternway of the *Enterprise* towards the south side of the channel. When the *Thoroughfare* had approached within about 1,000 feet of the *Enterprise,* the *Relief* had arrested the movement of the *Enterprise* and was holding her dead in the water, with her stern about 100 feet from the south edge of the channel, leaving an ample opening for the passage of the *Thoroughfare.* At this distance the *Thoroughfare* again sounded a single blast of her whistle, indicating an intention to direct her course to starboard and pass in the rear of the *Enterprise.* This was accepted by the *Relief* by a like single blast. At this time the master of the *Relief* was aware of the presence at a considerable distance on the other side of

[2] The *Relief* was assisted by the tug *Hercules* referred to in note 1, supra.

the *Enterprise* of the tug *Union*[3] which, with a tow, was approaching on a westerly course near the south edge of the channel. The master of the *Thoroughfare,* whose view was then intercepted by the *Enterprise,* was not aware of the presence of the *Union.* After the *Relief* gave her answering signal the *Thoroughfare* continued to advance at full speed, for about 1,000 feet, heading for the 100 foot opening between the stern of the *Enterprise* and the edge of the channel, and not knowing what vessels might be encountered on the other side. Meanwhile the *Enterprise* remained at rest without any change in position. Just as the *Thoroughfare* was about to pass, she saw the *Union* approaching on the other side and blew two whistles to indicate her intention of passing on the starboard side of the *Union* after she got clear of the *Enterprise.* This was accepted by two blasts from the *Union.* But before clearing the *Enterprise* the *Thoroughfare* suddenly changed her course to port, and struck the *Enterprise.* There was no occasion for this change to port. The *Thoroughfare* was not then in peril; the *Union* was about 900 feet away and had already slowed down; and the *Thoroughfare* would have had ample time and space after clearing the *Enterprise* in which to go to port and pass on the starboard side of the *Union* in accordance with the previous exchange of signals. And the *Thoroughfare* could herself have stopped within 300 feet.

We agree with the view of both the lower courts that the collision was caused solely by the negligence of the *Thoroughfare,* which not only approached the passageway in the rear of the *Enterprise* at full speed, without knowing whether she would encounter any vessel on the other side, but needlessly commenced the execution of the passing movement with the *Union* before she had cleared the

[3] The *Union* is not brought into these suits.

Enterprise; and that there was no contributing fault on the part of the *Relief* or the *Enterprise.*

The *Relief* was not at fault in accepting the passing signal of the *Thoroughfare.* This was merely an assent to the proposed passage in the rear of the *Enterprise,* expressing an understanding of what the *Thoroughfare* proposed to do and an agreement not to endanger or thwart it by permitting an interfering change in the position of the *Enterprise.* See *Atlas Transp. Co.* v. *Lee Line Steamers* (C. C. A.), 235 Fed. 492, 495. And the *Relief,* being in a position to fully carry out its agreement, was under no obligation to decline the passing signal because of the approach of the *Union* on the other side and to sound instead a warning signal. There was nothing in the situation to indicate that the approach of the *Union* would prevent the *Thoroughfare* from passing safely, if, as the *Relief* had the right to assume, it were navigated with due care. See *Atlas Transp. Co.* v. *Lee Line Steamers* (C. C. A.), 238 Fed. 349, on petition for rehearing. The doctrine of *The F. W. Wheeler* (C. C. A.), 78 Fed. 824, that a moving tug is in fault in accepting, without warning, a passing signal when she knows that the passage is obstructed by her grounded tow whose movement she cannot control, has no application here.

Nor was the *Enterprise* at fault in not having a lookout. The rule stated in *The Ariadne,* 13 Wall. 475, 478, as to the responsibility of a moving vessel for the failure of her lookout to discover an approaching vessel in time to avoid a collision, does not apply to a vessel in the position of the *Enterprise,* which was at rest, without power; and the absence of a lookout upon her did not in any manner contribute to the collision.

Decrees affirmed.

Syllabus.

STIPCICH *v.* METROPOLITAN LIFE INSURANCE COMPANY.

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

No. 97. Argued November 30, 1927. Reargued March 6, 1928.—Decided May 21, 1928.

1. An applicant for life insurance who, after signing the application and before delivery of the policy, discovers a change in his physical condition seriously affecting his health and rendering statements in his application which are material to the risk no longer true, is under a duty to inform the insurer fully, and his failure to do so will constitute a defense to an action on the policy. So *held* where the ailment so discovered was the cause of the death of the insured. P. 316.
2. This duty does not rest upon the stipulations of the parties, but is one imposed by law as the result of their relationship and because of the peculiar character of the insurance contract as a contract *uberrimae fidei*. Pp. 316–318.
3. A state statute providing that "any person who shall solicit and procure an application for life insurance shall, in all matters relating to such application for insurance and the policy issued in consequence thereof, be regarded as the agent of the company issuing the policy and not the agent of the insured," and avoiding all provisions in the application or policy to the contrary, controls policies issued after its enactment and empowers the agent to receive from the applicant on behalf of the company, a disclosure of a change in the applicant's health occurring after the making of the application and affecting the validity of the insurance if not disclosed. P. 320.
4. Under such a statute, a clause printed in a life insurance application, embodied in the policy, denying the authority of the soliciting and forwarding agent to vary the terms of the contract, waive conditions or receive information sought by questions in the application other than that embodied in it—*held* inapplicable to receipt of information from the applicant as to a change in his health, after the making and forwarding of the application and before delivery of the policy. P. 321.

5. A provision in a life insurance application that any knowledge on the part of any agent as to any facts pertaining to the applicant shall not be considered as having been brought to the knowledge of the company unless stated in the application, should not be construed as applying to knowledge affecting the risk which insured acquired and communicated to the company's agent after the application was signed and delivered to the agent and sent to the company's home office in another State. P. 321.
6. Narrow and unreasonable interpretations of clauses in an insurance policy are not favored. When open, with equal reason, to two constructions, the one most favorable to the insured will be adopted. P. 322.
7. A defense set up in an answer, but not considered in the court below nor pressed in this one, and which depends on testimony ambiguous in character or excluded upon the trial, will not be passed upon by this Court. *Id.*

Reversed.

REVIEW of a judgment of the District Court for the insurance company in a suit on a life insurance policy. The case went to the Circuit Court of Appeals and was ordered up here in its entirety after that court had certified certain questions concerning it.

Mr. Chester I. Long, with whom *Messrs. George E. Chamberlain, Peter Q. Nyce,* and *G. C. Fulton* were on the brief, for Stipcich.

The condition of health of applicant between the date of application and delivery of the policy is not material under the provisions of the policy. The statutes of Oregon are a part of the policy, as though written therein. Where there is a conflict between a provision in the policy and a statute, the provision in the policy is void. *Nat'l Ins. Co.* v. *Wanberg,* 260 U. S. 71; *Continental Life Ins. Co.* v. *Chamberlain,* 132 U. S. 304.

The policy is the entire contract, and all conditions must be in it. *Northwestern Life Ins. Co.* v. *Riggs,* 203 U. S. 243; *Cable* v. *U. S. Life Ins. Co.,* 111 Fed. 19; *Thompson* v. *Travelers Ins. Co.,* 13 N. D. 444.

The agent must be licensed and he represents the company in all matters. The stipulation attempting to limit the agent's authority is void. The stipulation is not applicable to subsequent events here involved.

Between two constructions of an insurance policy, the one most favorable to the insured is to be taken. *Nat'l Bank* v. *Insurance Co.,* 95 U. S. 673; *Thompson* v. *Phoenix Ins. Co.,* 136 U. S. 297; *American Surety Co.* v. *Pauly,* 170 U. S. 144; *McMaster* v. *New York Life Ins. Co.,* 183 U. S. 25; *Williams* v. *Pacific States Fire Ins. Co.,* 120 Ore. 1.

Mutual Life Co. v. *Hilton-Green,* 241 U. S. 613, is not in point.

Other cases cited by defendant in error are inapplicable as no statutes were involved making limitation of agent's authority void.

Mr. F. Eldred Boland, with whom *Mr. Samuel Knight* was on the brief, for Metropolitan Life Insurance Company.

The representations made by an applicant for life insurance must be true as of the time of the consummation of the contract; and if there is any change in the physical condition of the applicant material to the risk, occurring between the making of the application and the consummation of the contract, it is imperative upon him to notify the company. *M'Lanahan* v. *Universal Ins. Co.,* 1 Pet. 170; *Piedmont & A. L. Ins. Co.* v. *Ewing,* 92 U. S. 377; *Equitable Life A. Society* v. *McElroy,* 83 Fed. 631; *Cable* v. *U. S. Life Ins. Co.,* 111 Fed. 19; *Watson* v. *Delafield,* 2 Caines 224, 1 Johns. 150, 2 Johns. 526; *Whitley* v. *Piedmont etc. Ins. Co.,* 71 N. C. 480; *Thompson* v. *Travelers Ins. Co.,* 13 N. D. 444; *Graham* v. *General Mut. Ins. Co.,* 6 La. Ann. 4832; *Hart* v. *British & F. M. Ins. Co.,* 80 Cal. 440; *Carleton* v. *Patrons Fire Ins. Co.,* 109 Me. 79; *Harris* v. *Security Ins. Co.,* 130 Tenn. 325; *Traill* v. *Baring,* 4 De

G. J. & S. 318; *British Equitable Ins. Co.* v. *Great Western R. R.,* 38 L. J. Ch. (N. S.) 314; *Canning* v. *Farquhar,* L. R. 16 Q. B. Div. 727.

The policy is the entire contract; including the representations in the application as to the condition of health at the time the policy was delivered. Both the law of Oregon and the policy provide that the policy and application shall state the entire contract.

The policy as issued and delivered does not in reality state the entire contract; it omits to mention the changed condition, a very important, even paramount, element of the contract.

If Stipcich had read the contract, as it was his duty to do, he would have known that he had not made known his changed condition at all, or that Coblentz, the agent, had omitted to mention it to the insurance company. In either case his continued silence would violate his obligation. *New York Life Ins. Co.* v. *Fletcher,* 117 U. S. 519; *Mutual Life Ins. Co.* v. *Hilton-Green,* 241 U. S. 613.

An insurer has the right to limit its agents' authority and to provide that the knowledge of the soliciting agent concerning matters material to the risk shall not be imputed to the principal. *Northern Assurance Co.* v. *Grand View Building Ass'n,* 183 U. S. 308; *New York Life Ins. Co.* v. *Fletcher,* 117 U. S. 519; *Aetna Life Ins. Co.* v. *Moore,* 231 U. S. 543; *Mutual Life Ins. Co.* v. *Hilton-Green, supra; Hartford Fire Ins. Co.* v. *Nance,* 12 F. (2d) 575; *Hartford Fire Ins. Co.* v. *Jones,* 15 F. (2d) 1.

Mr. Justice Stone delivered the opinion of the Court.

The plaintiff brought this action in the circuit court for Clatsop County, Oregon, as beneficiary of a policy by which the defendant had insured the life of her husband, Anton Stipcich. The case was removed for diversity of citizenship to the United States district court for Oregon. The company defended principally on the ground that

Stipcich, after applying for the insurance and before the delivery of the policy and payment of the first premium, had suffered a recurrence of a duodenal ulcer, which later caused his death, and that he failed to reveal this information to the company.

It was shown on the trial by uncontradicted evidence that after his application Stipcich consulted two physicians and that they told him that an operation for the removal of the ulcer was necessary. Plaintiff then made tender of evidence to the effect that Stipcich had communicated this information to Coblentz, the defendant's agent who had solicited the policy, and that the visit to the second doctor was made at Coblentz' request to confirm the diagnosis of the first.

The proffered evidence was excluded and, at the close of the whole case and over plaintiff's objection, the court directed a verdict for the defendant, stating that it did so because Stipcich was under a duty to inform the defendant of his knowledge of the serious ailment of which he had learned after making application for insurance; and that he had failed in that duty since his communication of the facts to Coblentz did not amount to notice of them to the insurance company. The case was taken on writ of error to the court of appeals for the ninth circuit. That court certified to this, certain questions of law presented by the case. Jud. Code, § 239. Without answering, we ordered the entire record to be sent up and the case is here as though on writ of error.

An insurer may of course assume the risk of such changes in the insured's health as may occur between the date of application and the date of the issuance of a policy. Where the parties contract exclusively on the basis of conditions as they existed at the date of the application, the failure of the insured to divulge any later known changes in health may well not affect the policy. *Insurance Co.* v. *Higginbotham,* 95 U. S. 380; see *New York*

Life Insurance Co. v. *Moats,* 207 Fed. 481; *Grier* v. *Insurance Co.,* 132 N. C. 542; compare *Gardner* v. *North State Mutual Life Insurance Co.,* 163 N. C. 367. But there is no contention here that the parties contracted exclusively on the basis of conditions at the time of the application. Here both by the terms of the application and familiar rules governing the formation of contracts no contract came into existence until the delivery of the policy, and at that time the insured had learned of conditions gravely affecting his health, unknown at the time of making his application.

Insurance policies are traditionally contracts *uberrimae fidei* and a failure by the insured to disclose conditions affecting the risk, of which he is aware, makes the contract voidable at the insurer's option. *Carter* v. *Boehm,* 3 Burrows, 1905; *Livingston* v. *Maryland Insurance Co.,* 6 Cranch, 274; *McLanahan* v. *Universal Insurance Co.,* 1 Pet. 170; *Phoenix Life Insurance Co.* v. *Raddin,* 120 U. S. 183, 189; *Hardman* v. *Firemen's Insurance Co.,* 20 Fed. 594.

Concededly, the modern practice of requiring the applicant for life insurance to answer questions prepared by the insurer has relaxed this rule to some extent, since information not asked for is presumably deemed immaterial. *Penn Mutual Life Insurance Co.* v. *Mechanics' Savings Bank & Trust Co.,* 72 Fed. 413, 435–441. See *Clark* v. *Manufacturer's Insurance Co.,* 8 How. 235, 248–249; compare *Phoenix Life Insurance Co.* v. *Raddin,* 120 U. S. 183, 190.

But the reason for the rule still obtains, and with added force, as to changes materially affecting the risk which come to the knowledge of the insured after the application and before delivery of the policy. For, even the most unsophisticated person must know that in answering the questionnaire and submitting it to the insurer he is furnishing the data on the basis of which the com-

pany will decide whether, by issuing a policy, it wishes to insure him. If, while the company deliberates, he discovers facts which make portions of his application no longer true, the most elementary spirit of fair dealing would seem to require him to make a full disclosure.[1] If he fails to do so the company may, despite its acceptance of the application, decline to issue a policy, *Canning* v. *Farquhar,* 16 Q. B. D. 727; *McKenzie* v. *Northwestern Mutual Life Insurance Co.,* 26 Ga. App. 225, or if a policy has been issued, it has a valid defense to a suit upon it. *Equitable Life Assurance Society* v. *McElroy,* 83 Fed. 631, 636, 637. Compare *Traill* v. *Baring,* 4 DeG. J. & S. 318; *Allis-Chalmers Co.* v. *Fidelity & Deposit Co. of*

[1] The rule that changes in conditions material to the risk which occur between the opening of negotiations for insurance and the issuance of a policy must be divulged became first established in early British marine insurance. *Grieve* v. *Young,* (Ct. of Session, 1782) Millar, Elements of the Law Relating to Insurances, p. 65; *Fitzherbert* v. *Mather,* 1 T. R. 12. Its adoption here followed as cases presenting the question arose. *McLanahan* v. *Universal Insurance Co.,* 1 Pet. 170; *Watson* v. *Delafield,* 2 Caines (N. Y.) 224; s. c., 1 Johns. (N. Y.) 149; s. c., 2 Johns. (N. Y.) 526; *Andrews* v. *Marine Insurance Co.,* 9 Johns. (N. Y.) 32; *Green* v. *Merchants' Insurance Co.,* 10 Pick. (Mass.) 402; *Neptune Insurance Co.* v. *Robinson,* 11 Gill & J. (Md.) 256; *Snow* v. *Mercantile Mutual Insurance Co.,* 61 N. Y. 160. When written applications began to be used by life insurance companies the rule was invoked as to occurrences after an application had been submitted. *Whitley* v. *Piedmont & Arlington Life Insurance Co.,* 71 N. C. 480; *Thompson* v. *Travelers Insurance Co.,* 13 N. Dak. 444, 453; *Cable* v. *United States Life Insurance Co.,* 111 Fed. 19; *Equitable Life Assurance Society* v. *McElroy,* 83 Fed. 631; but see *Merriman* v. *Grand Lodge Degree of Honor,* 77 Neb. 544; *Ames* v. *New York Life Insurance Co.,* 154 Minn. 111. The result is often explained by saying that a statement in the application is a "continuing representation," or "is made as of the time of the delivery of the policy." *Re Arbitration between Marshall & Scottish Employers' Liability and General Insurance Co., Ltd.,* 85 L. T. 757; *Canning* v. *Farquhar, supra; Blumer* v. *Phoenix Insurance Co.,* 45 Wis. 622; *Equitable Life Assurance Society* v. *McElroy, supra; Cable* v. *United States Life Insurance Society, supra.*

Maryland, 114 L. T. 433; compare *Piedmont and Arlington Life Insurance Co.* v. *Ewing,* 92 U. S. 377.

This generally recognized rule, in the absence of authoritative local decision, we take to be the law of Oregon. Its application here is not affected by Oregon Laws, § 6426(1) c, which provides that the policy shall set forth the entire contract between the parties. The defendant in insisting that Stipcich was under an obligation to disclose his discovery to it is not attempting to add another term to the contract. The obligation was not one stipulated for by the parties, but is one imposed by law as a result of the relationship assumed by them and because of the peculiar character of the insurance contract. The necessity for complying with it is not dispensed with by the failure of the insurer to stipulate in the policy for such disclosure.

The evidence proffered and rejected tended to show that the insured, in good faith, made the required disclosure to Coblentz who, for some purposes, admittedly represented the defendant. If he represented it for this purpose the evidence should have been received. Coblentz was the licensed agent of respondent under Oregon Laws § 6425 which provides that every life insurance company doing business in the state "shall give written notice to the insurance commissioner of the name and residence of, and obtain from him a license for every person appointed by it to act as its agent within this state, which license shall state, in substance, that the company is authorized to do business in this state and that the person named therein is constituted an agent of the company for the transaction of business in this state. . . ." The insured knew no other agent of defendant and dealt with Coblentz alone. So far as appears, no other person or agency was designated under the statute or held out by the defendant as representing it in connection with

Stipcich's application for insurance or the delivery of the policy or as the appropriate person or agency to receive information concerning either of them. The insured delivered the application to Coblentz and later paid to him the first premium, receiving in return the policy and a receipt executed by Coblentz in defendant's name. In communicating to him the information as to his changed condition of health Stipcich acted only in what must have appeared to him the most natural and obvious way to supplement the information already given in his written application.

Defendant relies on the established rule, here expressed in part at least in the printed clause of the application, incorporated in the policy and printed in the margin,[2] that the authority of a soliciting agent to receive the application and transmit it to the company and to deliver the policy when issued, does not include power to vary the terms of the contract, to waive conditions or to receive information sought by questions in the application other than that embodied in it. But Coblentz, when the insured communicated the information to him, did not purport to vary any term or waive any condition of the proposed insurance contract; he did not acquiesce in a variation of the application; nor in connection with the preparation of the written application did he receive any information not written into it. The insured merely communicated information, supplementing the application, to the designated agent of the company for the transaction of business in the state, as the most natural and appropriate channel of communication to the company.

[2] "2. That no agent, medical examiner, or any other person except the Officers at the Home Office of the Company, have power on behalf of the Company; (a) to make, modify or discharge any contract of insurance, (b) to bind the Company by making any promises respecting any benefits under any policy issued hereunder."

In insisting that it was entitled to information of the insured's change of health after the application, but that such information could not be effectively communicated to its agent to receive the application and transact business with insured preliminary to the acceptance of the risk, defendant is not aided by the stipulations of the policy and any doubts as to the agent's implied authority to receive it must be resolved in the light of the Oregon statutes. Oregon Laws § 6435 reads as follows:

"Any person who shall solicit and procure an application for life insurance shall, in all matters relating to such application for insurance and the policy issued in consequence thereof, be regarded as the agent of the company issuing the policy and not the agent of the insured, and all provisions in the application and policy to the contrary are void and of no effect whatever."

Provisions of this character are controlling when inconsistent with the terms of a policy issued after their enactment. *National Union Fire Insurance Co.* v. *Wanberg,* 260 U. S. 71; *Continental Life Insurance Co.* v. *Chamberlain,* 132 U. S. 304; *Whitfield* v. *Aetna Life Insurance Co.,* 205 U. S. 489. Here the statute does more than provide that the soliciting agent in matters relating to the application and policy does not represent the insured. In connection with those matters it makes him the agent of the company, a phrase which would be meaningless unless the statute when applied to the facts of the case indicated in what respects he represented the company. Here the statute in terms defines the scope of his agency to the extent that he is stated to represent the company "in all matters relating to the application and the policy issued in consequence" of it. We need not inquire what are the outer limits of that authority, but we think this language plainly makes him the representative of the company in connection with all those matters which, in the usual

course of effecting insurance, are incidental to the application and the delivery of the policy.

Within the requirements of the statute the company may provide by stipulations in the application or other appropriate notice for a suitable method of giving the information, by writing, in a supplemental application or otherwise, or may stipulate, as is not unusual, that the insurance shall not attach on delivery of the policy unless the insured is in good health. To say that under this statute the company's agent to solicit and receive the application and deliver the policy is not its agent also to receive disclosures which supplement the application and which vitally affect the validity of the insurance if not disclosed, is to disregard its language and ignore the obvious purpose of such legislation to require the company to provide some agency within the state with which the insured may safely deal in matters relating to his application. See *Continental Life Insurance Co.* v. *Chamberlain, supra.*

Much reliance is placed by respondent on *Mutual Life Insurance Co.* v. *Hilton-Green,* 241 U. S. 613, where a somewhat similar statute was involved. But there answers known by the insured and the agent to be false were written into the signed application by the agent. Such fraudulent representations known and participated in by the insured obviously could not have estopped the company, but there is nothing in the present case to suggest that the insured was a party to or intended any concealment from the company.

The defendant also argues that it is not affected by the disclosures to the agent because the application provided: " That any statement made to or by, or any knowledge on the part of, any agent, medical examiner or any other person as to any facts pertaining to the Applicant shall not be considered as having been made to or brought to the

knowledge of the Company unless stated in either part A or B of this application." But when Stipcich learned of his condition and told Coblentz about it, neither of them had possession of the application. That had been filled out and sent to the home office of respondent in New York, and disclosure " in either part A or B of this application " of a fact which did not occur until after the application was completed was obviously impossible. It is said that compliance with this provision, even though impossible, was a condition precedent to the securing of insurance. But narrow and unreasonable interpretations of clauses in an insurance policy are not favored. They are prepared by the insurer and if, with equal reason, open to two constructions, that most favorable to the insured will be adopted. *Mutual Insurance Co.* v. *Hurni Co.*, 263 U. S. 167, 174; *Thompson* v. *Phoenix Insurance Co.*, 136 U. S. 287; *American Surety Co.* v. *Pauly*, 170 U. S. 133, 144. The clause must therefore be taken to apply to information given or available when the application was prepared and as inapplicable to knowledge affecting the risk which insured acquired and communicated after the application was signed and delivered to the company's agent.

The only questions certified by the court of appeals, and the only questions pressed upon us here involve the correctness of the rulings of the trial court to which we have alluded. But the respondent's answer sets up that certain answers given in the written application as to the insured's recovery from his earlier illness, its recurrence, and with respect to consultation of physicians, were false and known by him to be false when he signed the application. It is now suggested that Stipcich in his application made a positive misrepresentation regarding a visit to a physician the day before he applied for insurance. If that were clearly established we would consider it neces-

sary to affirm the judgment below, although we think the rulings on which it was based erroneous. But the particular questions and portions of the record relied on, in the light of the medical testimony, are not free from ambiguity. The point is not elaborated in the briefs of either party and was not pressed upon us on the argument. At no time in the entire course of the litigation does the effect of the answers appear to have received any consideration independently of the supposed failure to make sufficient disclosure to the company of knowledge acquired by the insured after the application. Nor, in the absence of the testimony as to the disclosure made to Coblentz, are we able to say what its bearing may be on the alleged misstatements in the application. Under such circumstances we must decline to pass upon this defense. Compare *Southeastern Express Co.* v. *Robertson,* 264 U. S. 541; *Ewing* v. *Howard,* 7 Wall. 499, 503. The truthfulness of the answers and their effect will be open for consideration on the new trial.

Reversed.

THE MALCOLM BAXTER, JR.

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

No. 459. Argued April 16, 1928.—Decided May 21, 1928.

A schooner bound with cargo from New Orleans to Bordeaux developed leaks, because of unseaworthiness existing when she broke ground, and was forced to take refuge in Havana for repairs. Before the repairs were completed, an embargo was put into effect by the United States. Prevented by this from continuing to Bordeaux, she proceeded to New York and was there libeled by the cargo-owners. The unseaworthiness was unknown to her owner or master when the voyage began, but could have been discovered by due diligence. *Held:*

1. That recovery was rightly limited to actual damage to the cargo due to unseaworthiness, and to the difference between the value of the cargo at Bordeaux had it arrived there on the contract voyage and its value on arrival had the vessel proceeded there from Havana when she was repaired and ready for sea. Pp. 330, 333.

2. Clauses in the bill of lading entitling the ship-owner to retain the prepaid freight in case of forced interruption or abandonment of the voyage, and exempting the vessel from liability for "restraint of princes," etc., were not displaced by the departure; so that the freight and the damage due to the embargo were not recoverable by the cargo-owners. P. 333.

3. The rule that a voluntary deviation from the prescribed voyage displaces the contract of affreightment is not to be extended to deviation to avoid perils of the sea, even in a case where the deviation would not have been necessary if the owner had used reasonable diligence to start the voyage with a seaworthy vessel. P. 332.

4. In the absence of any showing that the embargo could reasonably have been foreseen by the ship-owner, or of special circumstances charging the ship-owner with the knowledge or expectation that the unseaworthiness, or consequent delay, would bring the vessel within its operation, the damage resulting from it to cargo-owners is not attributable to the negligence of the ship-owner, but to the embargo itself. P. 333.

5. The ship-owner having brought itself within the exception of the bill of lading, the burden was on the cargo-owners to show that the negligence was the cause of or contributed to the loss. P. 334.

20 F. (2d) 304, affirmed.

CERTIORARI, 275 U. S. 517, to a decree of the Circuit Court of Appeals, reversing a decree awarding damages in a suit begun by libel against the schooner above named. The present respondent petitioned for exoneration and limitation of liability.*

Messrs. John M. Woolsey and *Mark W. Maclay,* with whom *Messrs. Robert S. Erskine, Charles K. Carpenter,* and *John Tilney Carpenter* were on the brief, for petitioners.

* The docket title of the case in this Court was *Republic of France et al.* v. *French Overseas Corporation, as owner, etc.*

The law as to deviation is important in this case, because the schooner *Malcolm Baxter, Jr.*, and her owner, if guilty of a deviation would be unable to rely on any clauses in the bill of lading or on any defense based on impossibility or frustration, but would be responsible to the cargo as an insurer for all the damages flowing from her failure to arrive at destination. *The Willdomino,* 272 U. S. 718; *St. Johns N. F. Shipping Corp'n* v. *S. A. Companhia etc.,* 263 U. S. 119; *Mobile etc. R. R. Co.* v. *Jurey,* 111 U. S. 584; *Lawrence v. Minturn,* 17 How. 111; *The Sarnia,* 278 Fed. 459; *Gibaud* v. *Great Eastern Ry. Co.,* 2 K. B. 426; *Thorley* v. *Orchis S. S. Co.,* 1 K. B. 660.

The owner's warranty of seaworthiness and its obligation to furnish a vessel ready and able to perform the voyage are absolute and of the very essence of every contract of affreightment. *The Tornado,* 108 U. S. 342; *The Edwin I. Morrison,* 153 U. S. 199; *The Willdomino,* 272 U. S. 718.

Reckless indifference to the condition of the vessel is tantamount to actual knowledge. *Simmons Creek Coal Co.* v. *Doran,* 142 U. S. 417; *Fidelity & Deposit Co.* v. *Queens County Trust Co.,* 226 N. Y. 225.

The line of cleavage between justifiable and unjustifiable deviation of an unseaworthy ship depends on whether the deviation is caused by unseaworthiness within the privity and knowledge of her owner, or is due to unseaworthiness which was not within his privity or knowledge. *Kish* v. *Taylor,* [1912] A. C. 604; *The Turret Crown,* 284 Fed. 439, certiorari denied, 264 U. S. 591; *The Willdomino,* 272 U. S. 718; *St. Johns N. F. Shipping Corp'n* v. *Companhia etc.,* 263 U. S. 119; *The Henry W. Cramp,* 20 F. (2d) 321, certiorari denied, *sub nomine McDonald* v. *Rosasco,* 275 U. S. 561; *The Maine,* 8 F. (2d) 291; Cf. *The St. Paul,* 277 Fed. 99; *U. S. S. B.* v. *Bunge y Born, Ltd.,* [1925] H. L., 31 Com. Cas. 118.

A " deviation " is an unjustifiable failure of a shipowner to perform the contracted voyage, and may arise not only from a physical departure from the course of a voyage, but also from other causes, such as unreasonable delay, *Kemsley, Millbourn & Co.* v. *United States* 19 F. (2d) 441, *The Cittá di Messina,* 169 Fed. 472; or from the failure of a shipowner to furnish a vessel capable of performing. *The St. Paul,* 277 Fed. 99; *St. Johns N. F. Shipping Corp'n* v. *Companhia etc., supra; The Willdomino,* 272 U. S. 718; *Columbian Ins. Co.* v. *Catlett,* 12 Wheat, 383; *Hostetter* v. *Park,* 137 U. S. 30; *Audenreid* v. *Mercantile Mut. Ins. Co.,* 60 N. Y. 482; *Mount* v. *Larkins,* 8 Bing. 108; *The Indrapura,* 171 Fed. 929.

In *The Henry W. Cramp,* 20 F. (2d) 320, the court reached an exactly opposite conclusion from the decision below in the case at bar.

The " Restraint of Princes " clause in the bill of lading does not constitute a defense, because the shipowner's negligence in knowingly sending the ship to sea in an unseaworthy condition brought her within the operation of the restraint invoked as a defense.

Exceptions in a bill of lading of a common carrier do not exempt it from liability, if it appears that the damage, although *prima facie* due to an excepted cause, was occasioned by the culpable negligence of the carrier. *Clark* v. *Barnwell,* 12 How. 272; *Transportation Co.* v. *Downer,* 11 Wall. 129; *Herman* v. *Compagnie Generale Transatlantique,* 242 Fed. 859; *The Glenfruin,* 10 P. D. 108; *The Caledonia,* 157 U. S. 124; *Atlantic Shipping Co.* v. *Dreyfus & Co.,* [1922] 2 A. C. 250; *Tattersall* v. *The Nat'l Steamship Co.,* 12 Q. B. D. 297.

The breach of warranty of seaworthiness was the effective and continuing cause of frustration, to which the embargo was only incidental. *United States* v. *Hall,* 6 Cranch 171; *Bailiffs* v. *Trinity House,* L. R. 5 Exch. 204;

Davis v. *Garrett,* 6 Bing. 716; *Williams* v. *Vanderbilt,* 28 N. Y. 217; *Green-Wheeler Shoe Co.* v. *Chicago, R. I. & P. R. R. Co.,* 130 Ia. 123; *Michaels* v. *N. Y. Central R. R. Co.,* 30 N. Y. 564; *Condict* v. *Grand Trunk R. R. Co.,* 54 N. Y. 500; *Railway Co.* v. *Kelly,* 91 Tenn. 699; *Stevens* v. *B. & M. R. R. Co.,* 1 Gray 277; *Central Trust Co.* v. *E. Tenn. R. R. Co.,* 70 Fed. 764; *Constable* v. *Nat'l S. S. Co.,* 154 U. S. 51; *The Caledonia,* 157 U. S. 124; *Allanwilde Transport Corp'n* v. *Vacuum Oil Co.,* 248 U. S. 377.

The rule that a shipowner may not defend under a bill of lading exception of " restraint of princes " if the shipowner's own fault or negligence has in fact brought the " restraint " into operation, is well illustrated by the case of *Dunn* v. *Donald Currie & Co.,* 8 Com. Cas. 33 (1902). See *The Henry W. Cramp,* 20 F. (2d) 320; *Varagnolo* v. *Partola Mfg. Co.,* 209 App. Div. 347, affirmed 239 N. Y. 621.

The defense of impossibility of performance involves historically and, indeed, necessarily an equitable doctrine, and it can properly be invoked only when it would be unjust for the plaintiff to recover damages for the defendant's failure to perform his contract. The failure of plaintiff to perform an essential covenant or condition of his contract, precludes him from securing equitable relief, to which otherwise he might have been entitled. *Kelsey* v. *Crowther,* 162 U. S. 404; *Marble Co.* v. *Ripley,* 10 Wall. 339; *Willard* v. *Tayloe,* 8 Wall. 557; *Hansbrough* v. *Peck,* 5 Wall. 497; *Montana Water Co.* v. *City of Billings,* 214 Fed. 121; *Shubert* v. *Woodward,* 167 Fed. 47; *Taussig* v. *Corbin,* 142 Fed. 660; *Ohio Steel Fence Co.* v. *Washburn Mfg. Co.,* 26 Fed. 702; *Smith* v. *Spencer,* 81 N. J. Eq. 389; III Williston, Contracts, §§ 1959, 3329; *Allanwilde Transport Corp'n* v. *Vacuum Oil Co.,* 248 U. S. 377; *Texas Co.* v. *Hogarth Shipping Co.,* 256 U. S. 619; *Chicago, M. & St. P. Ry.* v. *Hoyt,* 149 U. S. 1;

Varagnolo v. *Partola Mfg. Co.,* 209 App. Div. 347, affirmed, 239 N. Y. 621; *The Henry W. Cramp,* 20 F. (2d) 320; *The Harriman,* 9 Wall. 161.

Mr. T. Catesby Jones, with whom *Messrs. D. Roger Englar* and *James W. Ryan* were on the brief, for respondent.

The breach of a warranty of seaworthiness does not preclude putting into a port of refuge for repairs if in the judgment of the master the safety or best interest of crew, ship or cargo requires it. *Kish* v. *Taylor,* [1912] A. C. 604; *The Turret Crown,* 297 Fed. 766; *Thessaloniki,* 267 Fed. 67; *Atlantic Shipping Co.* v. *Dreyfus & Co.,* [1922] A. C. 250.

The waiting at Havana after September 28, 1917, when further performance became illegal, did not constitute a deviation, because it was proper to wait a reasonable time for the sailing vessel prohibition order to be lifted, and because, even if the repairs had been completed earlier, it was illegal after September 28, 1917, for the vessel to continue the voyage. Illegality ended the contract on September 28, 1917. *Church* v. *Proctor,* 66 Fed. 240; Maclachlan, Law of Merchant Shipping, 6th ed., p. 445; *Ralli* v. *Compania Naviera Sota,* [1920] 2 K. B. 287; Carver, Carriage of Goods by Sea, 7th ed., § 237, pp. 343, 344; Clark, Contracts, p. 346; III Williston, Contracts, § 1759, p. 3066; *Id.,* § 1938, p. 3292; *Baily* v. *De Crespigny,* L. R. 4 Q. B. 180; *Heslop* v. *Jones,* 2 Chit. 550; *The Claveresk,* 264 Fed. 276; *Allanwilde Corp'n* v. *Vacuum Oil Co.,* 248 U. S. 377.

The petitioners' second point with reference to a contract clause of restraint of princes conditioned on the exercise of due diligence and their third point with reference to a defense of impossibility of performance or equitable frustration, also conditioned on due diligence, are both irrelevant because the defense here is illegality.

The leaks constituting unseaworthiness did not cause the illegality. The contention is untenable that because unseaworthiness may have caused the 9% sea-water damage which was found on arrival at New York after the schooner had carried the cargo 2,000 miles, it was therefore the cause of the almost 100% loss of market and steamer transshipment damages resulting from the ending of the contract at Havana because of illegality. *St. Louis Ry. Co.* v. *Commercial Ins. Co.,* 139 U. S. 223; 22 R. C. L; *Atchison Ry. Co.* v. *Calhoun,* 213 U. S. 1; *The Santa Rita,* 173 Fed. 413; II Williston, Contracts, § 1906, pp. 2040–2043; Burdick, Law of Torts, 4th ed., pp. 38, 39; *Milwaukee etc., R. R. Co.* v. *Kellogg,* 94 U. S. 469; 33 Yale Law Jour. 690; *Parry* v. *University Co.,* 219 N. Y. 60; *Engle* v. *Director General,* 78 Ind. App. 537.

Mr. Justice Stone delivered the opinion of the Court.

Petitioners, in July, 1917, shipped a cargo on the Schooner *Malcolm Baxter, Jr.,* owned by respondent, from New Orleans to Bordeaux, and prepaid the freight. The bill of lading stipulated "prepaid freight is to be considered as earned on shipment of goods and is to be retained by vessel's owner . . . if there be forced interruption or abandonment of the voyage, at a port of distress or elsewhere." In addition there was the usual clause exempting the vessel from "restraints of princes, rulers and peoples."

After departure from New Orleans the *Baxter* developed leaks due to unseaworthiness which caused her to put in at Key West, where she was surveyed. In order to effect the necessary repairs she was towed to Havana where she was unladen and repaired, remaining there for that purpose until January 14, 1918. Before the completion of the repairs the United States Export Administrative Board put into effect its ruling of Septem-

ber 28, 1917, that sailing vessels would not be permitted to clear for points beyond the war zone. This ruling remained in force when the repairs were completed, and the *Baxter,* being unable to secure a clearance for Bordeaux, took her cargo on board and proceeded to New York, where the petitioners libelled the vessel in the district court for southern New York to recover freight money, damages to cargo and damages for failure to perform the contract voyage from New Orleans to Bordeaux.

Respondent as owner filed a petition for exoneration and limitation of liability and enjoined further proceedings on the libels. Petitioners filed claims in the limitation proceedings, claiming damages as in the original libels, setting up the deviation and the abandonment of the voyage, by reason of the ship's unseaworthiness on sailing.

The district court denied the petition to limit liability, allowed the claim for freight money and for damages sustained by petitioners, including damage to cargo. A special master, appointed to take proof of damage, found that the measure of damages was the excess cost of the substituted carriage and incidental expenses, and in the case of goods which could not be sent forward the damage was measured by the difference between the value of the goods at the time when and in the condition in which they should have arrived at destination, and their value at the place where and in the condition in which they actually were received, less charges saved plus incidental expenses. Final decree was given to the petitioners for the damage as found.

The court of appeals for the second circuit upheld the ruling of the district court denying exoneration and limitation of liability but reversed the judgment, holding there could be no recovery of the prepaid freight or excess cost of transportation over prepaid freight; that the recovery of damages must be limited to actual damages to

cargo resulting from unseaworthiness, and the difference between the value of the cargo had it arrived in Bordeaux on a straight voyage on August 16, 1917, the date when the *Baxter* sailed, and on a voyage leaving Havana January 14, 1918, the date when the repairs were completed and the *Baxter* was ready for sea. The *Malcolm Baxter, Jr.*, 20 F. (2d) 304.

Both courts below agreed that the *Baxter* was unseaworthy on sailing and that respondent failed to exercise due diligence to ascertain her condition before sailing. This was sufficient ground for denying the petition for exoneration and limitation of liability under the Harter Act, Act of February 13, 1893, c. 105, 27 Stat. 445, and acts permitting limitation of liability to the vessel and pending freight. R. S. §§ 4282–4289. The correctness of this determination is not raised on the petition here, *Federal Trade Commission* v. *Pacific Paper Ass'n*, 273 U. S. 52, 66, but petitioners urge that the *Baxter's* putting in first at Key West and later at Havana must be deemed a voluntary deviation because due to the negligence of the owner in failing to discover the unseaworthiness and to make the vessel seaworthy before sailing.

Unseaworthiness alone or deviation caused by it displaces the contract of affreightment only in so far as damage is caused by the unseaworthiness. *The Caledonia*, 157 U. S. 124; *The Europa*, [1908], P. 84. *Thorley* v. *Orchis S. S. Co., Ltd.*, [1907], 1 K. B. 660; *Kish* v. *Taylor*, [1912], A. C. 604, 618. But if the deviation here is to be classed with voluntary deviations, respondent may not claim the benefit of the clauses of the bill of lading and is responsible for the cargo as insurer. *The Willdomino*, 272 U. S. 718; *St. Johns Corp.* v. *Companhia Geral. etc.*, 263 U. S. 119; *Mobile & Montgomery Ry.* v. *Jurey*, 111 U. S. 584; *Lawrence* v. *Minturn*, 17 How. 100; and see *The Indrapura*, 171 Fed. 929. In any case it is contended that respondent's negligent failure to discover the unsea-

worthiness of the vessel resulted in the delay which brought her within the operation of the embargo, and that the shipowners are for that reason liable for damages for all the delay, including that immediately resulting from the embargo.

Respondents had purchased the vessel about one month before she sailed. At that time she was unseaworthy, due to a 'hog' or camber in her keel, a structural weakness dangerous to the ship in heavy weather, which later caused the leak and made necessary the repairs at Havana. Following the purchase and before sailing from New Orleans a survey was made by the owner, which appears not to have disclosed her condition, but both courts below agree that the fact of her unseaworthiness could have been discovered by due diligence.

The evidence supports the finding of the court of appeals that the master of the *Baxter* "did not leave New Orleans with knowledge that he would have to make port for repairs, and honestly thought he could make the trip in safety and tried unsuccessfully to do so." The case is therefore not one where the master set sail with the knowledge that the deviation from the voyage, as described in the bill of lading, would ensue, and with the purpose and intent to deviate as in *The Willdomino, supra.* There the officers of the vessel, under direction of the owner, sailed from Ponta Delgada, bound for New York, all knowing that the supply of fuel was insufficient for the voyage and intending to take the vessel to North Sidney, and we held that the deviation under the circumstances was voluntary and inexcusable.

But here the deviation was not voluntary and the point to be determined is whether a like effect is to be given to a deviation to avoid perils of the sea, where the deviation would not have been necessary if the owner had used reasonable diligence to start the voyage with a seaworthy vessel.

No sufficient reason is suggested to us for thus extending the rule, nor do we perceive any. Petitioners, without

resort to it, are entitled to recover all damages caused by the unseaworthiness. The basis of the privilege of deviation to avoid perils of the sea, is humanitarian. See Carver, Carriage by Sea, (7th ed.) §§ 291, 292. To hold that the master whose ship is in a perilous position must choose between the hazard of continuing the voyage and gaining safety only by forfeiting the contract of affreightment would be a departure from that principle for no purpose except to give the shipper an added and unnecessary protection. "It is the presence of the peril and not its cause" which justifies the deviation. See *Strang* v. *Scott,* 14 App. Cas. 801. This is the conclusion reached in other circuits. *The Turret Crown,* 297 Fed. 766; *The Turret Crown,* 284 Fed. 439, 445; *The Turret Crown,* 282 Fed. 354, 360; see *The Thessaloniki,* 267 Fed. 67; and by the House of Lords in *Kish* v. *Taylor, supra,* holding that a deviation caused by unseaworthiness due to improper and negligent loading of the ship by the master did not displace the bill of lading. This rule we adopt as most consonant with the reason and consequences of the rule that a voluntary deviation displaces the contract of affreightment. It follows that the clauses of the bill of lading remain effective and that petitioners may not recover the freight money. *Allanwilde Corp.* v. *Vacuum Oil Co.,* 248 U. S. 377.

But for all damages legally attributable to the breach of warranty of seaworthiness petitioners may recover. *The Caledonia, supra.* For the delay caused by the embargo alone petitioners may not recover, both because it was within the exception of the bill of lading and because, while it continued, performance of the contract of affreightment would have been illegal. See *Allanwilde Corp.* v. *Vacuum Oil Co., supra,* 385; Carver, Carriage by Sea, (7th ed.), §§ 237, 238, 343, 344.

It was the embargo and not the unseaworthiness of the vessel which delayed the voyage after the *Baxter* was repaired and ready for sea on January 14, 1918, and the unseaworthiness of the vessel did not cause the embargo.

But it is urged that it is enough to sustain the recovery for the failure to complete the voyage that it was the unseaworthiness, for which respondent was responsible, that brought the vessel within the excepted peril. This view, although not without support, *Green-Wheeler Shoe Co.* v. *Chicago, Rock Island, & Pac. R. R.*, 130 Iowa 123; *Michaels* v. *New York Central R. R.*, 30 N. Y. 564; *Condict* v. *Grand Trunk Ry.*, 54 N. Y. 500, does not generally prevail. See 2 Williston, Contracts, § 1906, and cases cited.

It was rejected by this Court in *Railroad Co.* v. *Reeves*, 10 Wall. 176. There negligent delay in the transportation of goods by the carrier brought them within the path of a flood, which caused their destruction. The court held that the flood and not the negligent delay was the proximate cause of the damage and that the rule *causa proxima non remota spectatur* applied to contracts of common carriers as to others. There has been no departure from this rule and we see no reason for departing from it now. See *Milwaukee & St. Paul Ry.* v. *Kellogg*, 94 U. S. 469; *Atchison, Topeka & Santa Fe Ry.* v. *Calhoun*, 213 U. S. 1; *The Indrapura, supra; The Lusitania*, 251 Fed. 715, 732; *The Turret Crown*, 282 Fed. 354, 360. There is no finding, nor is it suggested, that at the time when the contract of affreightment was entered into, or when the vessel broke ground, the embargo could reasonably have been foreseen, or that there were any special circumstances charging petitioners with the knowledge or expectation that the unseaworthiness or consequent delay would bring the vessel within its operation. The respondent having brought itself within the exception under its bill of lading, the burden is on petitioners to show that respondent's negligence was the cause of or contributed to the loss. *Railroad Company* v. *Reeves, supra*, 190; *Transportation Co.* v. *Downer*, 11 Wall. 129; see *Southern Ry.* v. *Prescott*, 240 U. S. 632, 641; *Kohlsaat* v. *Parkersburg & Marietta Sand Co.*, 266 Fed. 283, 285.

Affirmed.

MELLON, DIRECTOR GENERAL, *v.* GOODYEAR, ADMINISTRATOR.

CERTIORARI TO THE SUPREME COURT OF KANSAS.

No. 131. Argued December 8, 1927.—Decided May 28, 1928.

1. Under the Federal Employers' Liability Act, a full settlement and release, executed advisedly and in good faith between a railroad carrier and an injured employee, discharges not only the claim of the employee for personal loss and suffering resulting from the injury while he lived, but also the claim of his dependants for pecuniary damages resulting from his ensuing death. P. 339.
2. Insofar as it gives an action for the benefit of dependants the statute is essentially identical with Lord Campbell's Act. Under both the remedy of the dependants is conditioned on the existence in the decedent at the time of his death of a right to recover for the injury. P. 344.

121 Kan. 392, reversed.

CERTIORARI, 273 U. S. 684, to a judgment of the Supreme Court of Kansas, affirming a judgment recovered by the administrator of a deceased employee in an action under the Federal Employers' Liability Act. See also 114 Kan. 557; 115 Id. 20.

Mr. Luther Burns, with whom *Messrs. M. L. Bell, W. F. Dickinson, T. P. Littlepage, J. E. DuMars, W. D. Vance,* and *Sidney F. Andrews* were on the brief, for petitioner.

Under the Federal Employers' Liability Act, settlement and release of all claims for personal injuries made in good faith by an injured employee, who subsequently dies as a result of the injury, constitute a bar to an action by a personal representative for the benefit of dependants for the death. *Michigan Central R. R. Co.* v. *Vreeland,* 227 U. S. 59; *Hecht* v. *O. & M. Ry.,* 132 Ind. 507; *Littlewood* v. *Mayor,* 89 N. Y. 24; *Southern Bell Tel. Co.* v. *Cassin,* 111 Ga. 575; *Edwards* v. *Chemical Co.,* 170 N. C.

551; *Louisville R. R. Co.* v. *Raymond's Admr.,* 135 Ky. 738; *Perry's Admr.* v. *L. & N. R. R. Co.,* 199 Ky. 396; *State* v. *United Rys.,* 121 Md. 457; *Bruns* v. *Welte,* 126 Ill. App. 541; *Strode* v. *Transit Co.,* 197 Mo. 616; *Sewell* v. *Ry. Co.,* 78 Kan. 1; *Hill* v. *Penn. Ry. Co.,* 178 Pa. 223; *Read* v. *Gt. Eastern R. Co.,* L. R. 3 Q. B. 555; *Goodyear* v. *Ry. Co.,* 114 Kan. 557; *Berner* v. *Merc. Co.,* 93 Kan. 769; *Giersch* v. *A. T. & S. F. R. Co.,* 98 Kan. 452; *Fuller* v. *A. T. & S. F. R. Co.,* 124 Kan. 66; *Frese* v. *C. B. & Q. R. Co.,* 263 U. S. 1; *American R. R. Co.* v. *Didricksen,* 227 U. S. 145; *Western Union* v. *Preston,* 254 Fed. 229; *St. Louis, etc., R. R. Co.* v. *Craft,* 237 U. S. 648; 17 C. J., 1250.

Messrs. Edwin C. Brandenburg and *John F. McClure,* with whom *Mr. Nelson J. Ward* was on the brief, submitted for respondent.

Mr. Justice McReynolds delivered the opinion of the Court.

While employed in interstate commerce by the Director General of Railroads at Belleville, Kansas, July 31, 1919, Lewis Goodyear sustained serious personal injuries for which he claimed the right to recover damages under the Federal Employers' Liability Act (35 Stat. 65, c. 149; 36 Stat. 291). On March 16, 1920, he settled with the employer, accepted the agreed sum, and executed a general release, which, among other things, recites—

"I do hereby compromise said claim and do respectively release and forever discharge said Director General of Railroads, operating Chicago, Rock Island & Pacific Railroad, and his successor or successors as such, the United States of America, The Chicago, Rock Island & Pacific Railway Company, the owner of said Railroad, and all railway companies whose lines are leased to said Railway Company or have been operated by it but are now oper-

ated by said Director General, and their respective agents and employes, from any and all liability for all claims and demands for all damages resulting from the injuries received by me at the time and place above stated, including such injuries as may hereafter develop as well as those now apparent, and also do release and discharge them, and each of them, of all suits, actions, causes of action and claims for damages on account of injuries to my person, as well as damages to my property, if any, which I have or might have arising from, growing out of, or in anywise connected with the accident above referred to, and do hereby acknowledge full satisfaction of all such liability and causes of action. . . .

"It is further expressly understood and agreed that this release shall be deemed to be and shall be a complete bar to any action which might otherwise be brought, either by law, or under any state or federal workmen's compensation act, employers' liability act, labor law, or any other statute, for the recovery of compensation or damages on account of said injuries (or of resulting death, if this be executed by an administrator or administratrix of the estate of said person), for the benefit of any person whomsoever or estate whatsoever."

May 4, 1920, Goodyear died. April 19, 1921, relying upon the Federal Employers' Liability Act, his widow, as administratrix and in behalf of herself and her children, brought this action for damages against the Director General in the District Court, Republic County, Kansas. She alleged that her husband's death resulted from the injuries suffered July 31, 1919. As a bar to the action the answer set up the settlement and release above referred to; and the administratrix replied that the beneficiaries had a separate cause of action for their pecuniary damage which the decedent could not release.

The cause was twice tried and twice considered by the Supreme Court of Kansas. At the first trial, the jury was

told—"You are instructed that the law favors a compromise and settlement of disputes, and, when parties in good faith enter into an agreement based on good consideration, neither is afterwards permitted to deny it." Judgment for the Director General was reversed by the Supreme Court. It held the quoted instruction erroneous. The opinion shows care and research, and forcefully sets out the argument against the power of an injured employee to destroy the right of dependants to recover in event of his death. 114 Kan. 557; 115 Kan. 20.

At the second trial the court instructed the jury—

"The Federal Employers' Liability Act, under which plaintiff's action was brought, creates two separate and distinct rights of action resulting from an injury such as complained of by the plaintiff in this case; one right of action to the injured employee for his suffering and loss resulting from the injury, and one to his personal representative for the benefit of his surviving widow and children, in the event death results from the injury.

"And you are instructed that the latter cause of action could not be released by the deceased Lewis Goodyear by any action taken by him. It accrues solely to his personal representative for the benefit of the persons named and Lewis Goodyear in his lifetime would have no control over same.

"In other words, it did not accrue until his death and hence he could not release it by any act on his part."

Answering special questions, the jury found that no fraud attended the settlement; Goodyear was mentally capable of transacting business at the time; there was no mutual mistake as to his physical condition; the release was not given under the mistaken belief that the material results of his injuries had disappeared; and nothing was allowed for funeral expenses.

Upon a verdict in her favor for $5,000.00 judgment went for the administratrix, which the Supreme Court af-

firmed, definitely approving the instruction last quoted. 121 Kan. 392. She died July 10, 1926, and Edward Goodyear was duly substituted by order of Supreme Court of Kansas.

The question for our decision is whether the settlement between Goodyear and the employer made advisedly and in good faith barred an action by dependants for their pecuniary damages through his death.

The Liability Act, approved April 22, 1908, 35 Stat. 65, c. 149, provided—

"Sec. 1. That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

The amending Act, of April 5, 1910, 36 Stat. 291, c. 143, added the following—

"Sec. 9. That any right of action given by this Act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then

of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury."

In *Michigan Central Railroad Company* v. *Vreeland*, 227 U. S. 59, 65, 67, 68, 69, 70—an action by the administrator to recover for loss suffered by the wife by reason of her husband's wrongful death—this Court considered the original statute (1908) and held that the employee's right of action to recover such damages as would compensate for expenses, loss of time, suffering, and diminished earning power did not survive his death. Also that the mere existence of such a right in the employee's lifetime did not destroy the dependant's right under the statute to recover for pecuniary damages consequent upon the death. By Mr. Justice Lurton, the Court said—

"We think the act declares two distinct and independent liabilities, resting, of course, upon the common foundation of a wrongful injury, but based upon altogether different principles. . . .

"The Act of 1908 does not provide for any survival of the right action created in behalf of an injured employé. That right of action was therefore extinguished. . . .

"The obvious purpose of Congress was to save a right of action to certain relatives dependent upon an employé wrongfully injured, for the loss and damage resulting to them financially by reason of the wrongful death. . . .

"This cause of action is independent of any cause of action which the decedent had, and includes no damages which he might have recovered for his injury if he had survived. It is one beyond that which the decedent had,—one proceeding upon altogether different principles. It is a liability for the loss and damage . . . resulting to them and for that only.

"The statute in giving an action for the benefit of certain members of the family of the decedent is essentially identical with the first act which ever provided for a cause

of action arising out of the death of a human being, that of 9 and 10 Victoria, known as Lord Campbell's Act. . . .

"But as the foundation of the right of action is the original wrongful injury to the decedent, it has been generally held that the new action is a right dependent upon the existence of a right in the decedent immediately before his death to have maintained an action for his wrongful injury. Tiffany, Death by Wrongful Act, § 124; *Louisville, E. & St. L. R. R. Co.* v. *Clark,* 152 U. S. 236; *Read* v. *G. E. Ry.,* L. R. 3 Q. B. 555; *Hecht* v. *O. & M. Ry.,* 132 Ind. 507; *Fowlkes* v. *Nashville & Decatur R. R. Co.,* 9 Heisk. 829; *Littlewood* v. *Mayor,* 89 N. Y. 24; *Southern Bell Tel. Co.* v. *Cassin,* 111 Ga. 575.

"The distinguishing features of that act [Lord Campbell's Act] are identical with the act of Congress of 1908 before its amendment; First, it is grounded upon the original wrongful injury of the person; second, it is for the exclusive benefit of certain specified relatives; third, the damages are such as flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received if the deceased had not died from his injuries.

"The word 'pecuniary' did not appear in Lord Campbell's Act, nor does it appear in our act of 1908. But the former act and all those which follow it have been continuously interpreted as providing only for compensation for pecuniary loss or damage."

St. Louis & Iron Mountain Ry. Co. v. *Craft,* 237 U. S. 648, 657, 658—

An administrator sought to recover for the father's benefit under the Federal Employers' Liability Act as amended in 1910. Damages were claimed on account of (a) pecuniary loss to the father, and (b) conscious pain and suffering by the decedent. The Railway Company insisted that the recovery should be restricted either to the pecuniary loss to the father, or to the damages sus-

tained by the injured person while alive; that the statute does not permit recovery for both. This Court held otherwise, and said—

"If the matter turned upon the original act alone it is plain that the recovery here could not include damages for the decedent's pain and suffering, for only through a provision for a survival of his right could such damages be recovered after his death. But the original act is not alone to be considered. On April 5, 1910, prior to the decedent's injuries the act was amended. . . . No change was made in § 1. . . . It continues, as before, to provide for two distinct rights of action; one in the injured person for his personal loss and suffering where the injuries are not immediately fatal, and the other in his personal representative for the pecuniary loss sustained by designated relatives where the injuries immediately or ultimately result in death. Without abrogating or curtailing either right, the new section provides in exact words that the right given to the injured person 'shall survive' to his personal representative 'for the benefit of' the same relatives in whose behalf the other right is given. Brought into the act by way of amendment, this provision expresses the deliberate will of Congress. . . . Although originating in the same wrongful act or neglect, the two claims are quite distinct, no part of either being embraced in the other. One is for the wrong to the injured person and is confined to his personal loss and suffering before he died, while the other is for the wrong to the beneficiaries and is confined to their pecuniary loss through his death. One begins where the other ends, and a recovery upon both in the same action is not a double recovery for a single wrong but a single recovery for a double wrong. . . ."

In *Frese, Admx.*, v. *Chicago, Burlington & Quincy R. R. Co.*, 263 U. S. 1, 4, an action under the Liability Act for

damages consequent upon death of the plaintiff's intestate, it was said: "If the engineer could not have recovered for an injury his administratrix can not recover for his death. *Michigan Central R. R. Co.* v. *Vreeland,* 227 U. S. 59, 70." The injuries were due primarily to the default of the engineer and the employer never became liable to him.

In *Reading Company* v. *Koons, Admr.,* 271 U. S. 58, 64, the administrator sought recovery by suit commenced seven years after the employee's death, but within two years after the granting of administration. This Court declared the action was barred.

In *Oliver* v. *Seaboard Air Line Ry.* (1919), 261 Fed. 1, 2, 3, 4, the employee received injuries March 31, 1912, and died August 11, 1915. The administrator sued and the Railway Company resisted on the ground that, during his lifetime, the decedent had recovered a judgment for the damages sustained which had been satisfied. The trial court overruled the defense and allowed recovery. The Circuit Court of Appeals reversed the judgment and said—

"The defendant in error's lack of right to maintain his suit in such a situation as the one under consideration is due, not to the decedent's lack, immediately prior to his death, of an enforceable right of action for the injury he sustained, but to the fact that the cause of action counted on has been extinguished by payment of the judgment recovered by the decedent for the wrong he suffered."

Obviously, the settlement and release of March 16, 1920, satisfied and discharged any claim against the Director General for the personal loss and suffering of Goodyear. Immediately before his death he had no right of action and nothing passed to the administratrix because of such loss and suffering. Hence, it is that the administratrix must recover, if at all, under § 1, Act of 1908, which imposes liability for pecuniary loss sustained by dependants through death.

Concerning that section, *Vreeland's* case, *supra,* declares: "But as the foundation of the right of action is the original wrongful injury to the decedent, it has been generally held that the new action is a right dependent upon existence of a right in the decedent immediately before his death to have maintained an action for his wrongful injury." And no later opinion here has given expression to any other view.

By the overwhelming weight of judicial authority, where a statute of the nature of Lord Campbell's Act in effect gives a right to recover damages for the benefit of dependants, the remedy depends upon the existence in the decedent at the time of his death of a right of action to recover for such injury. A settlement by the wrongdoer with the injured person, in the absence of fraud or mistake, precludes any remedy by the personal representative based upon the same wrongful act. Construing the statute of Kansas, the Supreme Court of that State seems to have accepted this generally approved doctrine. *Fuller, Admx.* v. *Atchison, T. & S. F. R. Co.,* 124 Kan. 66.

The cases supporting this view, from courts of last resort in twenty-one States, Canada and England, are collected in a note following the first opinion of the Supreme Court of Kansas in the present cause, reported in 39 A. L. R., 579. And in *Tiffany on Wrongful Death,* 2d ed., § 124, the rule (with supporting authorities) is thus broadly stated—

"If the deceased, in his lifetime, has done anything that would operate as a bar to a recovery by him of damages for the personal injury, this will operate equally as a bar in an action by his personal representatives for his death. Thus, a release by the party injured of his right of action, or a recovery of damages by him for the injury, is a complete defense in the statutory action. But, while the courts have agreed in their decisions, they have had difficulty in reconciling them with the express declaration of

the statute that the action may be maintained whenever the act, neglect, or default is such that the party injured, if death had not ensued, might have maintained an action. . . .

"It is hardly possible to place the general holding upon any very logical ground. The position taken by the courts is fairly enough summed up as follows: 'Whether the right of action is a transmitted right or an original right, whether it be created by a survival statute or by a statute creating an independent right, the general consensus of opinion seems to be that the gist and foundation of the right in all cases is the wrongful act, and that for such wrongful act but one recovery should be had, and that if the deceased had received satisfaction in his lifetime, either by settlement and adjustment or by adjudication in the courts, no further right of action existed.'" *Strode* v. *Transit Co.,* 197 Mo. 616.

See also—*Edwards* v. *Chemical Co.,* 170 N. C. 551; *Louisville R. Co.* v. *Raymond's Admr.,* 135 Ky. 738; *Perry's Admr.* v. *L. & N. R. Co.,* 199 Ky. 396; *State* v. *United Rys.,* 121 Md. 457; *Hill* v. *Penn. Ry. Co.,* 178 Pa. 223.

Considering the repeated holdings of many courts of last resort, the declarations by this Court, and the probable ill consequences to both employees and employers which would follow the adoption of the contrary view, we must conclude that the settlement and release relieved the Director General from all liability for damages consequent upon the injuries received by Goodyear and his death.

The Statute of 1908 is entitled "An Act Relating to the liability of common carriers by railroad to their employees in certain cases." Fifteen years ago this Court affirmed that insofar as it gives an action for the benefit of dependants, the statute is essentially identical with Lord Campbell's Act. Continued adherence to this view

is emphasized by repeated holdings that dependants can recover only pecuniary damages. *American Railroad Co. of Porto Rico* v. *Didricksen,* 227 U. S. 145, 149; *Gulf, Colorado & Santa Fe Ry. Co.* v. *McGinnis,* 228 U. S. 173; *C. & O. Ry. Co.* v. *Kelly, Admx.,* 241 U. S. 485; *C. & O. Ry. Co.* v. *Gainey, Admr.,* 241 U. S. 494; *Gulf, Colorado & Santa Fe Ry. Co.* v. *Moser,* 275 U. S. 133. Neither statute defines the nature of the damages to be recovered; this was left for interpretation. We followed the construction given the earlier one when it became necessary to interpret and apply the later and similar act.

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

Reversed.

MIDLAND NATIONAL BANK OF MINNEAPOLIS *v.* DAKOTA LIFE INSURANCE COMPANY.

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

No. 425. Argued April 12, 13, 1928.—Decided May 28, 1928.

1. A judgment of the District Court cannot be reversed by the Circuit Court of Appeals upon a proposition outside of the issues raised by the pleadings and which no fact admitted, nor evidence received, offered or excluded, tends to sustain. So *held* when a judgment on an assigned life insurance policy, though in all other respects sustained, was reversed upon the ground that the policy was in part a wagering contract—a matter not litigated in the District Court. P. 349.
2. A valid life insurance policy is not rendered void by assignment to one not having an insurable interest. P. 350.

18 F. (2d) 903, reversed.

CERTIORARI, 275 U. S. 515, to a judgment of the Circuit Court of Appeals, which reversed a judgment on a

life insurance policy recovered by the Bank against the Insurance Company.

Mr. Sigurd Ueland, with whom *Mr. Andreas Ueland* was on the brief, for petitioner.

Mr. John B. Hanten for respondent.

Mr. Justice Brandeis delivered the opinion of the Court.

The Midland National Bank of Minneapolis brought this action, in 1923, in a state court of Minnesota. It sought to recover on a policy of life insurance for $10,000 issued by the Dakota Life Insurance Company in the year 1920. The defendant, a South Dakota corporation, removed the cause to the federal court. There the case was tried before a jury. It was alleged and proved that the policy had been issued in North Dakota on the life of Oscar Mosher, payable to his estate; that it was assigned to the plaintiff in 1923 in North Dakota by Mosher and one Jacobson, a prior assignee; that the assignment recited that it was given to secure payment to the Bank of the sum of $10,000 according to the tenor and conditions of two promissory notes; that two demand notes for $5,000 each, signed by Mosher, had been given to the Bank by Jacobson as collateral for the latter's indebtedness to it in a larger amount; that the assignment bearing the approval of the Company was delivered to the Bank about the same time that it received the collateral notes; that of these notes the Bank became the absolute owner by foreclosure; that no part of them had been paid; that Mosher died soon after giving the notes, while the policy was in force; and that proofs of death had been duly furnished before this action was begun.

The answer to the amended complaint alleged, among other things, that the policy had been obtained from the

Company through a fraudulent conspiracy entered into by Mosher, Jacobson and the Dazey State Bank, of which the latter was president; that the two collateral notes were obtained from Mosher by fraud and without consideration; and that the Company when it approved the assignment to the plaintiff was unaware of these facts. On the plaintiff's motion the court struck out the paragraphs of the answer alleging that the policy had been procured by fraud, on the ground that under the statutes of North Dakota the policy had become incontestable; and it struck out also certain other paragraphs making "allegations in reference to equities of third parties in connection with the assignments of the policy in suit." The Company then filed an amended answer. This answer again set up the alleged invalidity of the assignments, the fraud on Mosher in obtaining the notes, and the want of consideration for the latter. It also alleged that in proceedings instituted by the Company in North Dakota the policy had been cancelled. Evidence in support of the latter allegation was excluded at the trial, on the ground that the Bank had not been brought within the jurisdiction of the North Dakota court. The Company then made an offer of proof in support of its allegation that the notes and the assignment had been obtained by Jacobson from Mosher by trickery and without consideration. On the Bank's objection all this evidence was excluded.

At the close of the evidence each party asked for a directed verdict. On admissions contained in the pleadings and on the evidence, the trial court found that the notes were taken by the Bank as security for a pre-existing debt, and held that, since under the law of North Dakota and of Minnesota a pre-existing debt constitutes value, the plaintiff was a holder for value of the notes and was entitled to recover on the policy assigned to secure their payment; and it assessed the damages for the full amount

claimed, that is, $10,000 (less an unpaid instalment of premium) and interest. The Circuit Court of Appeals held that the several offers of proof were properly rejected; and that the Bank was entitled to recover on the policy. But it reversed the judgment and remanded the case on the ground that, when issued, the policy was a wagering contract except to the extent that it was reasonably required as security for a debt which it assumed that Mosher owed, in the amount of $5,686.08, at the time of the issue of the policy, to the local bank of which Jacobson was president. It said: "So we conclude on the facts stated that the policy was a good and valid contract to the extent of Mosher's indebtedness to the Dazey State Bank on May 14, 1920, and that the court erred in excluding the tendered proof. If the tender should be made good and the case does not present a materially different aspect from the record before us, plaintiff should have judgment for that amount with interest from the service of summons." 18 F. (2d) 903, 905. This Court granted a writ of certiorari. 275 U. S. 515.

The action of the Court of Appeals was unjustified on the record before it. While the original answer had alleged that the policy was taken out with a view to its assignment to the Dazey State Bank and was so assigned some two months after its issue, these allegations were struck out by order of the court, to which the defendant took no exception. We may assume, though we do not so decide, that the defense of a want of insurable interest and the consequent illegality of the insurance contract, is one that may be raised by the court though not properly pleaded. See *Coppell* v. *Hall,* 7 Wall. 542, 558; *Oscanyan* v. *Arms Co.,* 103 U. S. 261, 267; *Higgins* v. *McCrea,* 116 U. S. 671, 685. But here there is nothing, either in the admitted facts, or in the evidence received, or in that offered and excluded, which tends to show such illegality.

The policy was taken out by the insured and was payable to his estate. It is true that the amended answer alleged that all the premiums were paid by the Dazey State Bank, but this was denied on information and belief in the reply, and no evidence was produced in its support. None of the evidence received or excluded had any bearing upon the circumstances under which the policy was issued. Whether if such evidence had been offered, it should have been excluded because of the provisions of the North Dakota statutes making policies incontestable after two years, or for other reasons, compare *Finnie* v. *Walker,* 257 Fed. 698, we have no occasion to consider. Plainly the assignment of the policy later would not render it void, whatever the lack of insurable interest on the part of the assignee. *Grigsby* v. *Russell,* 222 U. S. 149. The judgment of the Circuit Court of Appeals is reversed with direction that the judgment of the District Court be affirmed.

Reversed.

RIBNIK *v.* McBRIDE, COMMISSIONER OF LABOR OF THE STATE OF NEW JERSEY.

ERROR TO THE COURT OF ERRORS AND APPEALS OF NEW JERSEY.

No. 569. Argued April 26, 27, 1928.—Decided May 28, 1928.

1. The business of an employment agent is not one "affected with a public interest"; and, under the due process clause of the Fourteenth Amendment, a State cannot fix the fees which such an agent may charge for his services. P. 355.
2. The power to require a license for, and to regulate the conduct of, a business, is distinct from the power to fix prices. P. 358.
3. The fact that a business lends itself peculiarly to the practice of fraud, extortion and discrimination may be ground for regulation, but not for price-fixing. P. 358.

4. In determining the constitutionality of a state price-fixing statute, the mere fact that like statutes exist in other States—*held* not of persuasive force. P. 359.

103 N. J. L. 708, reversed.

ERROR to a judgment of the Court of Errors and Appeals of New Jersey, which affirmed a judgment, 4 N. J. Misc. Rep. 623, sustaining an order of the State Commissioner of Labor refusing Ribnik a license to conduct an employment agency upon the ground that some of his proposed fees were too high.

Messrs. John W. Simpson, 2d, and *Walter G. Merritt* for plaintiff in error.

The plaintiff in error is deprived of rights of liberty and property secured by § 1 of the Fourteenth Amendment. *Brazee* v. *Michigan,* 241 U. S. 341; *Adams* v. *Tanner,* 244 U. S. 594; *Murphy* v. *California,* 225 U. S. 623; *Tyson* v. *Banton,* 273 U. S. 418; *Weller* v. *New York,* 268 U. S. 319; *German Alliance Ins. Co.* v. *Kansas,* 233 U. S. 389; *Wilson* v. *New,* 243 U. S. 332; *Wolff Packing Co.* v. *Industrial Court,* 262 U. S. 522; *Adkins* v. *Children's Hospital,* 261 U. S. 525; *Block* v. *Hirsh,* 256 U. S. 135; *Marcus Brown Co.* v. *Feldman,* 256 U. S. 170; *Ex parte Dickey,* 144 Cal. 234.

There is no monopoly, or danger of monopoly, in the operation of employment agencies. They are numerous, and it requires no great amount of capital to start new ones. Nineteen States have established competitive free state employment agencies, and in at least seven others there are municipal agencies. An organization has been established called the "American Association of Public Employment Offices," which is seeking to put the private agencies out of business. These facts appear in the publications utilized by Mr. Justice Brandeis in his dissenting opinion in *Adams* v. *Tanner, supra.* Business schools, trade schools, Y. M. C. A's, Y. W. C. A's, college bureaus,

typewriter companies, and bar associations, maintain agencies, while the "want" columns of newspapers contribute an entirely different kind of competition. It is also a well-known fact that the labor unions of the country frequently conduct employment offices, and that many large employers of labor secure their recruits through established employment departments. Under these conditions, it appears that the business of an employment agency is distinctly a private business of a highly competitive nature, with no known tendencies toward monopoly.

From the very nature of the business, there cannot be any uniformity in respect of the conditions under which it is carried on. An attempt to establish a uniform fee for the more valuable service and the less valuable service, without regard to the expenses of overhead—which make possible the more valuable service—would seem to be hopelessly impracticable within the limits of constitutional rights.

In a business like insurance, each single insurance contract is not a single and separate transaction, but is so involved that it affects the whole or a large part of the entire mass of insurance transactions. That is not true of employment agencies.

Employment agencies—and emphatically those dealing with clerical, engineering and executive positions—are certainly not as much affected with a public interest as wages and rentals; and this Court has held that price-fixing is not a valid exercise of the legislative power in those businesses, except temporarily in case of emergencies.

Mr. Harry R. Coulomb, Assistant Attorney General of New Jersey, with whom *Mr. Edward L. Katzenbach,* Attorney General, was on the brief, for defendant in error.

The business is one so involved with public interest and concern as to warrant its regulation by the State. *Brazee* v. *Michigan,* 241 U. S. 340; *Adams* v. *Tanner,* 242 U. S. 590.

A State may regulate fees to be charged by employment agencies. *Munn* v. *Illinois,* 94 U. S. 113; *Budd* v. *New York,* 143 U. S. 517; *Brass* v. *North Dakota,* 153 U. S. 391; *German Alliance Ins. Co.* v. *Lewis,* 233 U. S. 389.

In the above cases, this Court, in effect, held that the right to regulate rates or fees depended upon the necessity of so doing in order properly to regulate the business itself. In at least twenty-one States the amount of fee which may be charged is controlled either by fixing a specified fee for the service or limiting the charge to a percentage of the wages. It would thus appear that the regulation of the fee has been found essential to regulating the business. All of these States have, in effect, declared not only that the business has superimposed upon it a public interest requiring its regulation, but also that that public interest necessitates that the fees charged should be reasonable.

It can scarcely be argued that the action of the New Jersey legislature in limiting these fees was either unwise or arbitrary, in view of the nature of the business and the abuses which might result from unlimited charges. Cf. *Euclid* v. *Ambler Realty Co.,* 272 U. S. 365.

The increase in urban population resulting in great bodies of unemployed in congested districts, and the consequent competition for employment, leading to compliance with any fee demanded by employment agencies, is ample reason for concluding that the public good required the regulation and justified the Act complained of.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Chapter 227, Laws of New Jersey, 1918, p. 822, being an act to regulate the keeping of employment agencies, requires that every person operating an employment agency as defined by the statute must procure a license from the Commissioner of Labor. A penalty is imposed for failure to do so. The application for such license must be made in writing to the Commissioner of Labor and, among other requirements, the applicant must "file with the Commissioner of Labor, for his approval, a schedule of fees proposed to be charged for any services rendered to employers seeking employees, and persons seeking employment, and all charges must conform thereto. The schedule of fees may be changed only with the approval of the Commissioner of Labor." The Commissioner of Labor may refuse to issue or may revoke any license for any good cause shown within the meaning and purpose of the act.

Plaintiff in error filed with the state Commissioner of Labor a written application for a license to conduct an employment agency. All conditions of the statute were complied with; but the commissioner rejected the application upon the sole ground that, in his opinion, the fees proposed to be charged in respect of certain permanent positions were excessive and unreasonable. This action of the commissioner was brought up for review to the supreme court of the state, and that court construing the statute as empowering the commissioner to fix and limit the charges to be made by the applicant, nevertheless sustained it as constitutional under the due process of law clause of the Fourteenth Amendment. 4 N. J. Mis. R. 623. Upon appeal to the state court of errors and appeals, the judgment was affirmed. 103 N. J. L. 708.

That the state has power to require a license and regulate the business of an employment agent does not admit of doubt. But the question here presented is whether the due process of law clause is contravened by the legislation attempting to confer upon the Commissioner of Labor power to fix the prices which the employment agent shall charge for his services. The question calls for an answer under the last of the three categories set forth by this Court in *Wolff Co.* v. *Industrial Court,* 262 U. S. 522, 535, that is to say: Has the business in question been devoted to the public use and an interest in effect granted to the public in that use? Or, in other words, is the business one "affected with a public interest," within the meaning of that phrase as heretofore defined by this Court? As was recently pointed out in *Tyson & Brother* v. *Banton,* 273 U. S. 418, 430, the phrase is not capable of exact definition; but, nevertheless, under all the decisions of this Court from *Munn* v. *Illinois,* 94 U. S. 113, it is the standard by which the validity of price-fixing legislation, in respect of a business like that here under consideration, must be tested.

In the *Tyson* case it was said (p. 430) that the interest meant was not "such as arises from the mere fact that the public derives benefit, accommodation, ease or enjoyment from the existence or operation of the business; and while the word has not always been limited narrowly as strictly denoting 'a right,' that synonym more nearly than any other expresses the sense in which it is to be understood." The business must be such (p. 434) "as to justify the conclusion that it has been *devoted* to a public use and its use thereby, in effect, *granted* to the public." And again (p. 438) after reviewing former decisions, it was said that "each of the decisions of this court upholding governmental price regulation, aside from cases involving legislation to tide over temporary emergencies, has turned

upon the existence of conditions, peculiar to the business under consideration, which bore such a substantial and definite relation to the public interest as to justify an indulgence of the legal fiction of a grant by the owner to the public of an interest in the use."

In *Wolff Co.* v. *Industrial Court, supra,* p. 537, it was said:

"It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by State regulation. . . . one does not devote one's property or business to the public use or clothe it with a public interest merely because one makes commodities for, and sells to, the public in the common callings of which those above mentioned are instances."

In *Adkins* v. *Children's Hospital,* 261 U. S. 525, this Court had under consideration an act of Congress fixing minimum wages for women and children in the District of Columbia. The legislation, so far as it affected women, was held invalid as contravening the due process of law clause of the Fifth Amendment, because it was an arbitrary interference with the right to contract in respect of terms of private employment. It was said (p. 546) that while there was no such thing as absolute freedom of contract, nevertheless, freedom of contract was the general rule and restraint the exception; and that "the exercise of legislative authority to abridge it can be justified only by the existence of exceptional circumstances."

The business of securing employment for those seeking work and employees for those seeking workers is essentially that of a broker, that is, of an intermediary. While we do not undertake to say that there may not be a deeper concern on the part of the public in the business of an employment agency, that business does not differ in sub-

stantial character from the business of a real estate broker, ship broker, merchandise broker or ticket broker. In the *Tyson* case, *supra,* we declared unconstitutional an act of the New York legislature which sought to fix the price at which theatre tickets should be sold by a ticket broker, and it is not easy to see how, without disregarding that decision, price-fixing legislation in respect of other brokers of like character can be upheld.

An employment agency is essentially a private business. True, it deals with the public, but so do the druggist, the butcher, the baker, the grocer, and the apartment or tenement house owner and the broker who acts as intermediary between such owner and his tenants. Of course, anything which substantially interferes with employment is a matter of public concern, but in the same sense that interference with the procurement of food and housing and fuel are of public concern. The public is deeply interested in all these things. The welfare of its constituent members depends upon them. The interest of the public in the matter of employment is not different in quality or character from its interest in the other things enumerated; but in none of them is the interest that "public interest" which the law contemplates as the basis for legislative price control. *Wolff Co.* v. *Industrial Court, supra,* p. 536. Under the decisions of this Court it is no longer fairly open to question that, at least in the absence of a grave emergency, *Tyson & Brother* v. *Banton, supra,* pp. 431, 437, the fixing of prices for food or clothing, of house rental or of wages to be paid, whether minimum or maximum, is beyond the legislative power. And we perceive no reason for applying a different rule in the case of legislation controlling prices to be paid for services rendered in securing a place for an employee or an employee for a place.

Brazee v. *Michigan,* 241 U. S. 340, cited by defendant in error lends no support to the judgment below. That

case involved the validity of a Michigan statute in respect of employment agencies. Section 5 of the act attempted to limit the fees which should be charged. The state supreme court held that the business was one properly subject to police regulation and control, but did not rule concerning the validity of § 5. This Court held that it was within the power of the state to require licenses for employment agencies and prescribe reasonable regulations to be enforced by the Commissioner of Labor. But it was said (p. 344):

"Provisions of § 5 in respect of fees to be demanded or retained are severable from other portions of the act and, we think, might be eliminated without destroying it. Their validity was not passed upon by the Supreme Court of the State and has not been considered by us."

And we since have held definitely that the power to require a license for and to regulate the conduct of a business is distinct from the power to fix prices. "The latter power is not only a more definite and serious invasion of the rights of property and the freedom of contract, but its exercise cannot always be justified by circumstances which have been held to justify legislative regulation of the manner in which a business shall be carried on." *Tyson & Brother* v. *Banton, supra,* p. 431; and see pp. 440–441.

To urge that extortion, fraud, imposition, discrimination and the like have been practiced to some, or to a great, extent in connection with the business here under consideration, or that the business is one lending itself peculiarly to such evils, is simply to restate grounds already fully considered by this Court. These are grounds for regulation but not for price fixing, as we have already definitely decided. *Tyson & Brother* v. *Banton, supra,* 442–445.

There are a number of states which have statutes like that now under consideration, and we are asked to give weight to that circumstance. It is to be observed, how-

ever, that with the exception of the decision now under review none of these statutes has been judicially considered, except in the State of California, where the legislation was declared unconstitutional. *Ex parte Dickey,* 144 Cal. 234; *In re Smith,* 193 Cal. 337. And it was said in oral argument, and not disputed, that, while legislation of this character existed in several states, generally it was not enforced, in some instances because the state's attorney-general had advised that the legislation was unconstitutional. In any event, under all the circumstances, and in the face of our prior decisions, we do not regard the mere existence in other states of statutory provisions like the one now under review as entitled to persuasive force.

Judgment reversed.

MR. JUSTICE SANFORD, concurring.

I concur in this result upon the controlling authority of *Tyson* v. *Banton,* 273 U. S. 418, which, as applied to the question in this case, I am unable to distinguish.

MR. JUSTICE STONE, dissenting.

The question is whether a state has constitutional power to require employment agencies to charge only reasonable fees for their services to those seeking employment. As the case is presented we must take it that the New Jersey Commissioner of Labor was right in holding that Ribnik's list of fees was unreasonably high.

Under the decisions of this Court not all price regulation, as distinguished from other forms of regulation, is forbidden. As those decisions have been explained, price regulation is within the constitutional power of a state legislature when the business concerned is "affected with a public interest." That phrase is not to be found in the Constitution. Concededly it is incapable of any precise definition. It has and can have only such meaning as

may be given to it by the decisions of this Court. As I read those decisions, such regulation is within a state's power whenever any combination of circumstances seriously curtails the regulative force of competition, so that buyers or sellers are placed at such a disadvantage in the bargaining struggle that a legislature might reasonably anticipate serious consequences to the community as a whole. *Munn* v. *Illinois,* 94 U. S. 113; *Brass v. Stoeser,* 153 U. S. 391; *German Alliance Insurance Co.* v. *Kansas,* 233 U. S. 389, 409; *Terminal Taxicab Co.* v. *District of Columbia,* 241 U. S. 252; *Block* v. *Hirsh,* 256 U. S. 135; *Marcus Brown Co.* v. *Feldman,* 256 U. S. 170; *Levy Leasing Co.* v. *Siegel,* 258 U. S. 242; see also *Knoxville Iron Co.* v. *Harbison,* 183 U. S. 13; *McLean* v. *Arkansas,* 211 U. S. 539; *Mutual Loan Co.* v. *Martell,* 222 U. S. 225; *Frisbie* v. *United States,* 157 U. S. 160. The price regulation may embrace businesses "which though not public in their inception may fairly be said to have risen to be such and have become subject in consequence to some governmental regulation." *Wolff Co.* v. *Industrial Court,* 262 U. S. 522, 535. The use by the public generally of the specific thing or business affected is not the test. The nature of the service rendered, the exorbitance of the charges and the arbitrary control to which the public may be subjected without regulation, are elements to be considered in determining whether the "public interest" exists. *Wolff Co.* v. *Industrial Court, supra,* 538. The economic disadvantage of a class and the attempt to ameliorate its condition may alone be sufficient to give rise to the "public interest" and to justify the regulation of contracts with its members, *Knoxville Iron Co.* v. *Harbison, supra; McLean* v. *Arkansas, supra; Mutual Loan Co.* v. *Martell, supra,* and obviously circumstances may so change in point of time or so differ in space as to clothe a business with such an interest which at other

times or in other places would be a matter purely of private concern. *Block* v. *Hirsh, supra,* 155.

I cannot say *a priori* that the business of employment agencies in New Jersey lacks the requisite "public interest." We are judicially aware that the problem of unemployment is of grave public concern; that the conduct of the employment agency business bears an important relationship to that larger problem and affects vitally the lives of great numbers of the population, not only in New Jersey but throughout the United States; that employment agencies, admittedly subject to regulation in other respects, *Brazee* v. *Michigan,* 241 U. S. 340, and in fact very generally regulated, deal with a necessitous class, the members of which are often dependent on them for opportunity to earn a livelihood, are not free to move from place to place, and are often under exceptional economic compulsion to accept such terms as the agencies offer. We are not judicially ignorant of what all human experience teaches, that those so situated are peculiarly the prey of the unscrupulous and designing. In *Adams* v. *Tanner,* 244 U. S. 590, a statute of Washington which in effect attempted to abolish the business was held unconstitutional because employment agencies were deemed not "inherently immoral or dangerous to public welfare," but, as was there emphasized, capable, under regulation, of being conducted in a useful and honest manner. But it was not questioned that the business was subject to grave abuses, involving frauds and impositions upon a peculiarly helpless class, among which the exaction of exorbitant fees was perhaps the least offensive. The Supreme Court of New Jersey, in an opinion in the present case which was adopted by the Court of Errors and Appeals, said: "It is common knowledge that an employment agency is a business dealing with a great body of our population, native and foreign born, which is

susceptible to imposition, deception and immoral influences. . . ."

In dealing with the question of power to require reasonable prices in this particular business, we should remember what was specifically pointed out by the Court in *Tyson* v. *Banton,* 273 U. S. 418, 438, that whether a business is affected with a "public interest" turns "upon the existence of conditions, peculiar to the business under consideration." In the respects mentioned, or most of them, and in others to be pointed out, it seems to me that there is a marked difference between the character of this business and that of real estate brokers, ship brokers, merchandise brokers, and, more than all, of ticket brokers, who were involved in *Tyson* v. *Banton, supra.* There the attempt was made to limit the advance which brokers might charge over box office prices for theatre tickets, an expedient adopted to break up their monopolistic control of a luxury, not a necessity. Those affected by the practices of the ticket brokers constituted a relatively small part of the population within a comparatively small area of the State of New York. They were not necessitous. The consequences of the fraud and extortion practiced upon them were not visited upon the community as a whole in any such manner as are fraud and imposition practiced upon workers seeking employment. Here the effort is made, as in *Knoxville Iron Co.* v. *Harbison, supra; McLean* v. *Arkansas, supra; Mutual Loan Co.* v. *Martell, supra; Erie R. R.* v. *Williams,* 233 U. S. 685, first, to protect from abuses a class unable to protect itself, for whose welfare the police power has often been allowed broad play, and, second, to mitigate the evils which unemployment brings upon the community as a whole.

Some presumption should be indulged that the New Jersey legislature had an adequate knowledge of such local conditions as the circumstances of those seeking employ-

ment, the number and distribution of employment agencies, the local efficacy of competition, the prevalent practices with respect to fees. On this deserved respect for the judgment of the local lawmaker depends, of course, the presumption in favor of constitutionality, for the validity of a regulation turns "upon the existence of conditions, peculiar to the business under consideration." *Tyson* v. *Banton, supra,* 438. Moreover, we should not, when the matter is not clear, oppose our notion of the seriousness of the problem or the necessity of the legislation to that of local tribunals. "This Court, by an unbroken line of decisions from Chief Justice Marshall to the present day, has steadily adhered to the rule that every possible presumption is in favor of the validity of an act of Congress until overcome beyond rational doubt." *Adkins* v. *Children's Hospital,* 261 U. S. 525, 544. And the enactments of state legislatures are entitled to no less respect. If, therefore, our consideration of the general conditions surrounding employment agencies, which it was thought in *Brazee* v. *Michigan, supra,* made them subject to regulation, was to go no further than that of the Court, I should still have supposed that plaintiff in error had not sustained the burden which rests on him to show that this law is unconstitutional. *Erie R. R.* v. *Williams, supra.* But even if the presumption is not to be indulged, and the burden no longer to be cast on him who attacks the constitutionality of a law, we need not close our eyes to available data throwing light on the problem with which the legislature had to deal. See *Muller* v. *Oregon,* 208 U. S. 412, 420–421; *McLean* v. *Arkansas, supra,* 549.

For thirty years or more the evils found to be connected with the business of employment agencies in the United States have been the subject of repeated investigations, official and unofficial, and of extensive public comment. They have been the primary reason for the

establishment of public employment offices in the various States.[1]

Quite apart from the other evils laid at the door of the private agencies,[2] the data supplied by these investigations and reports afford a substantial basis for the conclusion of the New Jersey legislature that the business is peculiarly subject to abuses relating to fee-charging, and

[1] As early as 1912 free employment offices were maintained by at least fifteen states,—Colorado, Connecticut, Illinois, Indiana, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Ohio, Oklahoma, Rhode Island, West Virginia, Wisconsin; and by municipalities in California, Montana, New Jersey and Washington. The State of New York had maintained an office in New York City as early as 1896; and in Nebraska a statute providing for an office had been passed but no appropriation had been made for its maintenance. See Statistics of Unemployment and the Work of Employment Offices, U. S. Bur. of Labor, Bull. No. 109, pp. 35, 36. The authors of the inquiry conducted for the Russell Sage Foundation reported, "One conclusion drawn from [our] findings has been that we must have public bureaus to take the place of the private fee-charging agencies. That is, in so far as people are informed on the question and have expressed their sentiments, most of them appeared convinced that we should have public employment bureaus because of the abuses of some fee-charging agencies quite regardless of other considerations. In addition, however, the feeling has been growing that this service in the nature of the case should be free, and that the very fact of fee-charging carries with it a dangerous temptation to abuse and fraud." Public Employment Offices, Harrison and others (1924) p. 5. Compare Report of New Jersey Bureau of Statistics of Labor and Industries, 1893, pp. 73–78.

[2] The numerous governmental reports on the undesirable practices of the agencies, other than those relating to fee-charging and therefore not directly material here, are summarized in the opinion of Mr. Justice Brandeis in *Adams* v. *Tanner*, 244 U. S. 590, 597–616. See also Public Employment Exchanges, Report of City Club of New York, 1914; Labor Exchanges, J. B. Andrews, 63d Cong., 3d Sess., Sen. Doc. No. 956; Free Public Employment Offices, U. S. Bureau of Labor Statistics, Bulletin No. 68, pp. 1–6; Proceedings, Ninth Annual Convention, Association of Governmental Labor Officials, 1923, U. S. Bureau of Labor Statistics No. 323, pp. 71, 72.

that for the correction of these the restriction to a reasonable maximum charge is the only effective remedy. These data, to be gathered from numerous independent and public investigations, may be briefly summarized as follows:

First. They show that the agencies, left to themselves, very generally charge extortionate fees. The Commission on Industrial Relations, created by Act of August 23, 1912, c. 351, 37 Stat. 415, reported to Congress at a time when prices were materially lower than today, "Fees are often charged out of all proportion to the service rendered. We know of cases where $5, $9, $10, and even $16 a piece has been paid for jobs at common labor. In one city the fees paid by scrubwomen is at the rate of $24 a year for their poorly paid work." [3] Exorbitant fees are taken for merely registering the applicants, no effort whatever being made to find them work.[4] To stimulate

[3] Report of Commission on Industrial Relations, 64th Cong., 1st Sess., Sen. Doc. No. 415, Vol. I, p. 109. See also Vol. II, pp. 1168, 1169; Monthly Labor Review, Bureau of Labor Statistics, October, 1922, p. 15. In California during 1920 the average fee charged by clerical agencies was 30% of the first month's wages. Report of California Bureau of Labor Statistics, 1919–1920. See Report of Massachusetts Commission on Immigration, 1914, pp. 38–47.

[4] Employment Bureaus, Willoughby, Monographs on American Social Economics, No. VI, U. S. Commission to the Paris Exposition of 1900, pp. 3–4. See Report of Illinois Free Employment Offices, 1900, *passim; id.*, 1907, p. 71; Pennsylvania Dept. of Labor and Industry, Bulletin, 1920, Vol. 7, No. 5, pp. 7–15; Report of Iowa Bureau of Labor Statistics, 1890, pp. 217–240; Report of New York Industrial Commissioner, 1922, p. 23; Proceedings, American Association of Public Employment Officers, 1913, 1914, 1915, U. S. Bureau of Labor Statistics, Bulletin No. 192, pp. 79, 80; Hearings on H. R. 16130 before House Committee on Labor, 63d Cong., 2d Sess., Part I; Hearings on S. 688, S. 1442, H. R. 4305 before Joint Committees on Labor, 66th Cong., 1st Sess., Part I.

In Public Employment Offices in the United States, U. S. Bureau of Labor Statistics, Bull. No. 241 (1918) p. 6, it is declared: "If the

the payment of such fees the agencies advertise for classes of laborers for whom no jobs are available.[5] According to the Massachusetts Commission to Investigate Employment Offices, the ordinary forces of competition seem powerless to prevent or remedy this situation, because but little capital is required to open an office, and because the clients of the agencies are constantly new.[6]

Second. These data show that the fees charged are often discriminatory. It is made known in slack season that but few jobs are available and that to these will be referred the applicants who tender the larger "extra fees"

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private employment agencies had been conducted with ordinary honesty and efficiency, the striving for a greater degree of justice to the worker would not have been able to make any headway against the accepted doctrine of individualism, which assumes that privately conducted businesses are always preferable to publicly conducted businesses. The irregularities and abuses of the private employment agencies, however, became too notorious to be overlooked.

"The charges usually preferred against private employment agencies concern the fees exacted, the practices in referring applicants to jobs, and the places where the employment agencies are frequently located. Fees for registration were, and still are, charged by many private employment agencies, although these agencies make no effort to render any service in return for the fee. If the registered applicant makes a complaint, he is asked to pay an extra fee on the promise of getting first consideration. The fees charged are oftentimes exorbitant."

[5] Employment Bureaus, Willoughby, supra, pp. 3–4. The Act of June 19, 1906, c. 3438, 34 Stat. 304, 307, enacted by Congress for the District of Columbia, requires (§ 8) a refund of one-half the fee if a fair opportunity for employment is not secured within four days; and provides that "the whole fee and any sums paid by the applicant for transportation in going to and returning from such employer shall be refunded within four days of demand, if no employment of the kind applied for was vacant at the place to which the applicant was directed."

[6] Report of Mass. Commission to Investigate Employment Offices (1911) p. 15.

or "presents."[7] There is ground for the belief that this is a particular danger in New Jersey, for a large proportion of its agencies specialize in employees for hotels and resorts where the positions are seasonal and temporary.[8] The whole supply of labor must, at the beginning and again at the end of the season, search for new positions at the same time.

Third. Fee-splitting has been a recurrent subject of complaint. It "is frequently practiced, part of the fee charged to the worker being paid over by the private employment agent to the employer or his foreman. This practice is closely akin to job selling by foremen and superintendents. . . . Both 'fee-splitting' and 'job-selling' result in short time employment and frequent discharges, for each time a job is filled a new fee is 'split' or a fresh price exacted. The resultant wastage from accelerated labor turnover, from extortionate and multiplied fees, from demoralization of workers, from unemployment and irregularity of employment is incalculably great."

[7] Statistics of Unemployment and the Work of Employment Offices, U. S. Bureau of Labor Bulletin No. 109, p. 36.

[8] In 1920 thirty out of the ninety-two agencies in the state were of that type. Report of New Jersey Dept. of Labor, 1921, pp. 59–60. Legislation enacted in New Jersey in 1907 which left the regulation of employment agencies to the municipalities was found in practice to be ineffective because of the laxity of local enforcement. Report of New Jersey Commission of Immigration, 1914, pp. 57–66.

During a labor shortage the private agencies in New Jersey have been found to use a different device to stimulate fees artificially. After the war many of the women drawn by it into industry failed to return to domestic work. In the consequent shortage of domestics, the agencies encouraged women to change jobs, collecting a new fee at each change. Report of New Jersey, Dept. of Labor, 1919, pp. 144–146. Section 9 of the act provided by Congress for the District of Columbia, *supra,* provides, "That no such person [*i. e.,* licensed employment agent] shall induce or attempt to induce any domestic employee to leave his employment with a view to obtaining other employment through such agency."

Public Employment Offices in the United States, U. S. Bureau of Labor Statistics Bulletin No. 241 (1918) p. 6.[9] While their fees are unregulated, the private agencies are free to charge those seeking employment enough to cover both the charge for their service and the gratuity paid to the foreman or employer. A legislature would certainly not be unreasonable in concluding that the fixing of a reasonable maximum fee was the appropriate and only effective method of assuring private agencies fair compensation while preventing them from abuses of this character.

Fourth. It is reported that at times of widespread unemployment the private agencies are known to raise their fees out of all proportion to the reasonable value of their services.[10] There is a public interest at such times in

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[9] This practice has been reported as prevalent in railroad building where it is known as the "three gang system"—at any one time there is one gang, just discharged, on its way home; another at work but on the point of being dismissed; a third, hired by the agency and on its way to the job. See Public Employment Offices, Harrison and others, *supra*, p. 550. Compare Report of U. S. Bureau of Immigration, 1907, pp. 70–71; *id.*, 1911, pp. 121–122; Report of U. S. Immigration Commission, 61st Cong., 3d Sess., Sen. Doc. No. 747, Vol. II, pp. 321; 391–408; 443–449.

The Congressional act passed for the District of Columbia, *supra*, provides (§ 8): "No such licensed person shall divide fees with contractors or their agents or other employers or anyone in their employ to whom applicants for employment are sent."

[10] "In the summer, when employment is plentiful, the fees are as low as 25¢, and men are even referred to work free of charge. But this must necessarily be made up in winter when work is scarce. At such times, when men need work most badly, the private employment offices put up their fees and keep the unemployed from going to work until they can pay $2, $3, $5 and even $10 and more for their jobs. This necessity of paying for the privilege of going to work, and paying more the more urgently the job is needed, not only keeps people unnecessarily unemployed, but seems foreign to the spirit of American freedom and opportunity." Report of Commission on Industrial Relations, 64th Cong., 1st Sess., Sen. Doc. No. 415, Vol. I, p. 110.

bringing about a prompt readjustment of the labor supply to industry's need for labor. The additional barrier to a quick readjustment created by the agencies' raising of their rates affects that interest adversely. The establishment of a reasonable maximum rate [11] is well calculated to obviate the abuse.

Fifth. Finally, it is pointed out that the private agencies charge the employee and do not charge the employer for a service that is rendered to both. The convenience of being furnished with employees is similar to that of being directed to a position; but less effort is required to collect compensation for the whole service from the employee alone. His necessities are normally greater. His bargaining power is normally weaker. The setting of a maximum fee need not mean—in New Jersey, does not mean—that an absolute limit is placed on the agency's return. The agency may still charge the employer in addition for such service as is rendered to him.[12] The establishment of reasonable fees is thus, in one aspect, merely a method of

[11] The usual practice of the legislatures is, of course, not to fix one fee to be charged regardless of the type of position furnished, but to group employment offices according to their classes of clients and promulgate different fee schedules for the different groups. See Report of Massachusetts Commission to Investigate Employment Offices, 1911, pp. 26–28.

[12] Some agencies have already done so. Report of Massachusetts Commission to Investigate Employment Offices, 1911, p. 29. Compare Report of Commission on Industrial Relations, 64th Cong., 1st Sess., Sen. Doc. No. 415, Vol. I, p. 110. The act of Congress to regulate agencies in the District of Columbia limited the fee which the agencies might charge employers as well as that chargeable to those seeking positions Act of June 19, 1906, c. 3438, § 8, 34 Stat. 304, 307. In Massachusetts the municipalities were empowered by statute to regulate the fees of the agencies. Mass. Rev. Laws (1902) c. 102; Mass. Acts (1920) c. 216. In December, 1920, the ordinances in force in Boston permitted domestic and common labor agencies to collect, both from the employer and the employee, only 25% of the first week's wages. U. S. Bureau of Labor Statistics, Monthly Labor Review, October, 1922, p. 7. In Oklahoma fees may not be collected

providing that the patrons of the agency shall be required to pay only for the service rendered to them.

Legislation for the correction of these and other evils has been general throughout the United States.[13] Among the earliest comprehensive schemes for that purpose was the Act of June 19, 1906, c. 3438, 34 Stat. 304, adopted by Congress for the District of Columbia.[14] For numer-

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both from the employer and the employee; but the amount the employee may be charged is limited to a percentage of his first month's salary. Okla. Acts (1917) c. 181.

[13] Thirty-nine states have enacted statutes regulating or taxing private employment agencies; only Alabama, Arizona, Delaware, Florida, Mississippi, North Dakota, New Mexico, South Carolina and Vermont are without state laws on the subject, and in some of these the agencies are taxed by municipalities. See U. S. Bureau of Labor Statistics, Monthly Labor Review, October, 1922, p. 1; N. C. Acts, 1925, c. 127. In Canada the agencies are subject to rigorous regulation, including the fixing of their charges. Employment Agencies Act, May 1, 1914, Provincial Act 4 Geo. V, c. 38; see Report of Ontario Commission on Unemployment, 1916, pp. 41, 121–123; Report of Trades and Labor Branch, Dept. of Public Works, Province of Ontario, 1917, pp. 88–91; Lescohier, The Labor Market (1919) pp. 150–153.

General systems of regulation, with such provisions as the requirement of bonds, the publication and filing of fee schedules, the payment of license fees, etc., but without limitation of the fees that may be charged applicants, are in force in Alabama, Gen. Laws (1923) No. 181; Florida, Rev. Gen. Stat. (1920) § 888; Georgia, Code (1926) § 2158(32)B; Kentucky, Stat. (1903) § 3011; Louisiana, Stat. (Wolff, 1920) pp. 1100–1102; Maryland, Annot. Code (Bagby, 1924) art. 56, § 232; Minnesota, Gen. Stat. (1923) §§ 4246, 4247; New Hampshire, Pub. Laws (1926) c. 179; Washington, Code (Pierce, 1919) § 8876; West Virginia, Code (Barnes, 1923) c. 32, §§ 1, 109. An Idaho statute purports to abolish private agencies. Idaho Comp. Stat. (1919) §§ 2297, 2308–2310. A similar statute, Wash. Laws (1915) 1, was declared unconstitutional in *Adams* v. *Tanner*, 244 U. S. 590.

[14] The rates legally chargeable were increased by Act of February 20, 1909, c. 166, 35 Stat. 641, which left the other material provisions of the original act unchanged.

ous classes of employees (including all domestic servants and farm help) it regulates (§ 8) not only the fee which may be charged to the applicant for work, but also the amount that the agency may receive from the employer. It requires a refund of half the fee if a fair opportunity for work is not secured in four days, and a refund of the whole fee and transportation expenses if no employment of the kind asked was vacant at the place to which the applicant was directed.

Among the states, twenty-one have limited the total fees that may be charged, ten by fixing a stated maximum,[15] and eleven by restricting the charge to a named percentage of the salary earned during some period.[16] In eight states the maximum registration fee is fixed by statute, and that fee is required to be returned if no work is found for the applicant.[17] In seventeen states if no

[15] Colo. Comp. Laws (1921) § 4296; Me. Rev. Stat. (1916) c. 42, as amended by Laws (1917) c. 139; Mass. Gen. Laws (1921) c. 140, §§ 41–46, 202–205 (operating under these sections the municipalities fix the rates, U. S. Bureau of Labor Statistics, Monthly Labor Review, October, 1922, p. 7); Mont. Rev. Codes (1921) §§ 4157–4172; Ohio Gen. Code (1926) §§ 886–897; Pa. Stat. (1920) §§ 10130–10164; R. I. Gen. Laws (1923) c. 51, § 18; S. Dak. Acts (1919) c. 190; Tex. Rev. Civ. Stat. (1925) Title 83, c. 13; Wis. Stat. (1927) c. 105.

[16] Calif. Gen. Laws (Hillyer, Supp. 1921–1925) c. 102, § 11½; Conn. Labor Laws (Revision of 1920) §§ 2333–2337; Ind. Annot. Stat. (Burns, 1914) §§ 7131a–7131i, as amended by Acts (1921) p. 263; Iowa Acts (1925) c. 39; Mich. Acts (1925) No. 255; Neb. Comp. Stat. (1922) § 7734; N. Y. Gen. Bus. Law, § 185; N. Car. Pub. Laws (1925) c. 127; Okla. Comp. Stat. (1921) §§ 7184–7207; Ore. Laws (Olson, 1920) Title 38, c. 10; Utah Comp. Laws (1917) §§ 2440–2458, 3076(6), as amended by Laws (1919) c. 130, and Laws (1921) c. 48, 49.

[17] Ark. Acts (1917) No. 11; Colo. Comp. Laws (1921) § 4296; Ill. Rev. Stat. (1927) c. 48, § 79 (fee limited but not returnable); Kan. Rev. Stat. (1923) 44–407; Mo. Rev. Stat. (1919) § 6751; Neb. Comp. Stat. (1922) §§ 7720, 7734; Va. Code (1924) § 1803; Wyo. Comp. Stat. (1920) § 3468.

work is furnished the agency must return the entire fee collected.[18]

It is of course true that the enactment of a particular type of legislation, even though general, and a widespread and competent opinion that it is wise and necessary, do not establish its constitutionality. But that such legislation has been enacted and continued in force over considerable periods of time and in widely separated areas, and is supported by a concurrence of informed opinion, may not be disregarded in determining, first, whether the conditions peculiar to the business under consideration make it one in which, as in insurance companies, there is a paramount public concern; and, second, whether the regulation adopted is reasonably calculated to safeguard that interest. See *Muller* v. *Oregon, supra,* 420–421; *McLean* v. *Arkansas, supra.*

Examination of the various reports of public bodies and the legislation referred to can, I think, leave no doubt that the practices of the private agencies with respect to their fees presented a problem for legislative consideration different from any other that this Court has passed on in ruling on the power to regulate prices, but certainly more akin to that in *Munn* v. *Illinois, supra,* and *German Alliance Insurance Co.* v. *Kansas, supra,* than to that in *Tyson* v. *Banton, supra,* and, unless we are to establish once and for all the rule that only public utilities may be

[18] Calif. Stat. (1913) c. 282, Stat. (1915) c. 551, Stat. (1923), c. 413; Ill. Rev. Stat. (1927) c. 48, § 79 ($2 may be retained as a registration fee); Iowa Code (1924) § 1546 (a small fixed sum may, however, be retained as a registration fee); Kan. Acts (1911) c. 187; Mass. Gen. Laws (1921) c. 140 (under municipal regulations); Me. Rev. Stat. (1916) c. 42; Mo. Rev. Stat. (1919) §§ 6751–6755; Mont. Rev. Codes (1921) § 4164; Nev. Rev. Laws (1919) p. 2783, § 10; N. Y. Gen. Bus. Law, § 186; Okla. Comp. Stat. (1921) § 7185; Ore. Laws (Olson, 1920) Title 38, c. 10, § 6730; Pa. Stat. (1920) § 10142; S. Dak. Acts (1919) c. 190; Tenn. Acts (1917) c. 78; Va. Code (1924) § 1803; Wyo. Comp. Stat. (1920) § 3468.

regulated as to price, the validity of the statute at hand would seem to me to be beyond doubt. Certainly it would be difficult to show a greater necessity for price regulation.

It is said that if there be abuses in this business, the business may be regulated but not by the fixing of reasonable prices, and that that was decided in *Tyson* v. *Banton, supra.* So far as the significant facts in that case are concerned, it bears little resemblance to this one. Ticket brokers and employment brokers are similar in name: in no other respect do they seem alike to me. To overcharge a man for the privilege of hearing the opera is one thing; to control the possibility of his earning a livelihood would appear to be quite another. And I shall not stop to argue that the state has a larger interest in seeing that its workers find employment without being imposed upon, than in seeing that its citizens are entertained. Here, too, if the business is subject to regulation, as seems to be admitted, the regulation which is appropriate and effective is some curtailment of the exorbitant fees charged and not some other form of control which would have no tendency to correct the evils aimed at.

I cannot accept as valid the distinction on which the opinion of the majority seems to me necessarily to depend, that granted constitutional power to regulate there is any controlling difference between reasonable regulation of price, if appropriate to the evil to be remedied, and other forms of appropriate regulation which curtail liberty of contract or the use and enjoyment of property. Obviously, even in the case of businesses affected with a public interest, other control than price regulation may be appropriate, and price regulation may be so inappropriate as to be arbitrary or unreasonable, and hence unconstitutional. To me it seems equally obvious that the Constitution does not require us to hold that a business, subject to every other form of reasonable regulation,

is immune from the requirement of reasonable prices, where that requirement is the only remedy appropriate to the evils encountered. In this respect I can see no difference between a reasonable regulation of price and a reasonable regulation of the use of property, which affects its prices or economic return. The privilege of contract and the free use of property are as seriously cut down in the one case as in the other.

To say that there is constitutional power to regulate a business or a particular use of property because of the public interest in the welfare of a class peculiarly affected, and to deny such power to regulate price for the accomplishment of the same end, when that alone appears to be an appropriate and effective remedy, is to make a distinction based on no real economic difference, and for which I can find no warrant in the Constitution itself nor any justification in the opinions of this Court.

The price paid for property or services is only one of the terms in a bargain; the effect on the parties is similar whether the restriction on the power to contract affects the price, or the goods or services sold. Apart from the cases involving the historic public-callings, immemorially subject to the closest regulation, this Court has sustained regulations of the price in cases where the legislature fixed the charges which grain elevators, *Brass* v. *Stoeser, supra; Budd* v. *New York,* 143 U. S. 517, and insurance companies might make, *German Alliance Insurance Co.* v. *Kansas, supra;* or required miners to be paid per ton of coal unscreened instead of screened, *McLean* v. *Arkansas, supra; Rail Coal Co.* v. *Ohio Industrial Commission,* 236 U. S. 338; or required employers who paid their men in store orders to redeem them in cash, *Knoxville Iron Co.* v. *Harbison, supra; Dayton Coal Co.* v. *Barton,* 183 U. S. 23; *Keokee Coke Co.* v. *Taylor,* 234 U. S. 224; or fixed the fees chargeable by attorneys appearing for injured employees before workmen's compensation commissions,

Yeiser v. *Dysart,* 267 U. S. 540; or fixed the rate of pay for overtime work, *Bunting* v. *Oregon,* 243 U. S. 426; or fixed the time within which the services of employees must be paid for, *Erie R. R.* v. *Williams, supra;* or established maximum rents, *Block* v. *Hirsh,* 256 U. S. 135; *Marcus Brown Co.* v. *Feldman,* 256 U. S. 170; or fixed the maximum rate of interest chargeable on loans, *Griffith* v. *Connecticut,* 218 U. S. 563. It has sustained restrictions on the other element in the bargain where legislatures have established maximum hours of labor for men, *Holden* v. *Hardy,* 169 U. S. 366, or for women, *Muller* v. *Oregon,* 208 U. S. 412; *Hawley* v. *Walker,* 232 U. S. 718; *Riley* v. *Massachusetts,* 232 U. S. 671; *Miller* v. *Wilson,* 236 U. S. 373; *Bosley* v. *McLaughlin,* 236 U. S. 385; or prohibited the payment of wages in advance, *Patterson* v. *Bark Eudora,* 190 U. S. 169; *Strathearn S. S. Co.* v. *Dillon,* 252 U. S. 348; or required loaves of bread to be of a certain size, *Schmidinger* v. *Chicago,* 226 U. S. 578. In each of these cases the police power of the state was held broad enough to warrant an interference with free bargaining in cases where, despite the competition that ordinarily attends that freedom, serious evils persisted.

Similar evils are now observed in the conduct of employment agencies. I see no reason why a state may not resort to the same remedy. There may be reasonable differences of opinion as to the wisdom of the solution here attempted. These I would be the first to admit. But a choice between them involves a step from the judicial to the legislative field. *Erie R. R.* v. *Williams, supra,* 699; *German Alliance Ins. Co.* v. *Kansas, supra; Munn* v. *Illinois, supra,* 132. That choice should be left where, it seems to me, it was left by the Constitution—to the States and to Congress.

MR. JUSTICE HOLMES and MR. JUSTICE BRANDEIS join in this dissent.

REED ET AL. *v.* THE COUNTY COMMISSIONERS OF DELAWARE COUNTY, PENNSYLVANIA, ET AL.

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

No. 744. Argued and submitted April 25, 26, 30, 1928.—Decided May 28, 1928.

Resolutions of the U. S. Senate created a committee of Senators to investigate the means used to influence the nomination of candidates for the Senate, and empowered it to require attendance of witnesses and production of books and papers, to take and preserve all ballot-boxes, etc., used in a certain senatorial election, "and to do such other acts as may be necessary in the matter of said investigation." The committee and their agent brought suit in a federal court against county officers to obtain possession of the ballot-boxes, etc. *Held:*

1. That the general authority conveyed by the clause above quoted is to be confined to acts of the same general class as those specifically authorized. P. 389.
2. The context, the practice of the Senate to rely on its own powers, and the attending circumstances show that the Senate did not intend to authorize the committee to invoke the power of the Judicial Department. *Id.*
3. Therefore, the plaintiffs were not "authorized by law to sue," within the meaning of Jud. Code, § 24, defining jurisdiction of the District Court. *Id.*

21 F. (2d) 1018, affirmed.

CERTIORARI, 276 U. S. 613, to a decree of the Circuit Court of Appeals, which affirmed a decree of the District Court, 21 F. (2d) 144, dismissing a bill brought by the members of a special committee of the Senate, and their agent, against county officers, for the purpose of requiring the latter to deliver to the former the ballot-boxes, ballots, etc., used in a senatorial election.

Mr. Levi Cooke, for petitioners. *Senators James A. Reed, Charles L. McNary, William H. King,* and *Robert*

M. La Follette, Jr., and *Mr. Jerry C. South*, the petitioners in the case, and *Senator Guy D. Goff* and *Mr. Frederic P. Lee*, Legislative Counsel for the Senate, were on the brief.

This cause presents a controversy which requires the exercise of the judicial power of the United States. The District Court dismissed the petition upon the ground that the cause presented for determination could not result in a judgment, the rendition of which would be the exercise of judicial powers. The point was not raised or argued by counsel for either petitioners or respondents before that court. The court came to this conclusion by the following steps: The Constitution vests in the Senate the determination of the rules of its proceedings; the regulation of the mode and manner of procedure of its committees is a part of the determination of the rules of proceedings; this determination is exclusively for the Senate, except that "in cases or controversies such, for instance, as habeas corpus proceedings," a court may construe the rules of proceedings of the Senate; the Senate would not be bound by a judgment of the court in the instant case, "because of its constitutional right to determine under its rules of proceedings whether or not the committee it once authorized to act for it, has continuing power to act under that authority."

The trial court shows unnecessary concern regarding further possible action by the Senate when the authority of the committee plainly discloses the Senate's determination to investigate the election of a Senator, a purpose the accomplishment of which primarily requires the possession of the ballot boxes and election papers pleaded as the subject of the suit.

The subject-matter of the litigation is the ballot boxes and election papers and the right of possession thereto. As an incident to arriving at its decision, the court must determine the status of a Senate special select committee. The fact that the cause involves the determination

through court proceedings of legal status, does not prevent the cause from being a case or controversy within the meaning of those terms as used in the Constitution, nor the judgment of the court rendered therein from being an exercise of judicial power. *McGrain* v. *Daugherty,* 273 U. S. 135; *Tutun* v. *United States,* 270 U. S. 568; *Fidelity Nat'l Bank* v. *Swope,* 274 U. S. 123.

Jurisdiction was vested in the District Court by § 24, ¶ First, of the Judicial Code.

This is a civil suit in equity. Relief in the form of a mandatory injunction is within the power of a federal court of equity to grant. *Covington Stockyards Co.* v. *Keith,* 139 U. S. 128; *In re Lennon,* 166 U. S. 548; *Washington ex rel. Markham* v. *Seattle,* 1 F. (2d) 605; *id.,* 2 F. (2d) 264. Mandatory injunctions may be issued by a federal court in equity against state and municipal officers to compel the performance of ministerial duties.

The federal courts have jurisdiction in equity to render assistance to the National Government by appropriate remedy in the exercise of a sovereign power or in the discharge of a sovereign duty vested in or imposed upon the National Government by the Constitution, expressly or impliedly. *In re Debs,* 158 U. S. 564; *United States* v. *San Jacinto Tin Co.,* 125 U. S. 273; *United States* v. *Bell Telephone Co.,* 128 U. S. 215; *United States* v. *Rickert,* 188 U. S. 432; *Heckman* v. *United States,* 224 U. S. 413; *Sanitary District* v. *United States,* 266 U. S. 405; *Colorado* v. *Toll,* 268 U. S. 228; *Missouri* v. *Holland,* 252 U. S. 416.

The constitutional power of inquiry of the Senate is involved in the present case. *Newberry* v. *United States,* 256 U. S. 232; *McGrain* v. *Daugherty,* 273 U. S. 135.

The constitutional power of inquiry has been vested by the Senate in the special select committee.

The people of Pennsylvania have rights conferred on them by the Seventeenth Amendment in respect of the

election of members of the United States Senate. Such rights involve the relationship of citizens of the United States to the Federal Government. The United States, as *parens patriae,* is authorized to protect these rights when protection is appropriate. *Massachusetts* v. *Mellon,* 262 U. S. 447; *Florida* v. *Mellon,* 273 U. S. 12.

There is no clear, adequate, and complete remedy at law.

The suit is brought by the United States and by officers of the United States authorized by law to sue. The United States is the real party in interest. It is the constitutional powers of the National Government that are involved. These are powers of inquiry auxiliary to the power to judge the elections, returns, and qualifications of members of the Senate, or auxiliary to the power to legislate for the regulation of the times and manner of holding Senatorial elections, not only in order to protect the Senate, but also to protect the electoral rights of citizens of the United States. The suit presents for decision the right of the United States to preserve the integrity of the legislative branch of the Government in part through the exercise by a Senate Committee of these constitutional powers of inquiry.

Any suit brought in the exercise of a constitutional power of the United States on behalf of citizens of the United States, or for the protection of the interests of the United States, or any of its judicial, legislative, or executive agencies, is a suit in which the United States is the real party in interest. *United States* v. *San Jacinto Tin Co.,* 125 U. S. 273; *In re Debs,* 158 U. S. 564; *Sanitary District* v. *United States,* 266 U. S. 405. It may not be said that the National Government has a less interest in the execution of powers of the legislative branch of the Government than of the executive branch.

If a suit involves a public interest which the United States undertakes to protect, or the interest of one of its

own governmental agencies, such a suit is a suit "brought by the United States" whether or not so entitled. *Benton* v. *Woolsey,* 12 Pet. 27; *Jecker* v. *Montgomery,* 18 How. 110. See also the following cases to the effect that suit against an officer of the United States is a suit against the United States if the United States is the real party in interest: *International Postal Supply Co.* v. *Bruce,* 194 U. S. 601; *Louisiana* v. *McAdoo,* 234 U. S. 627; *Wells* v. *Roper,* 246 U. S. 335; *Lambert Co.* v. *B. & O. R. R. Co.,* 258 U. S. 377; *Morrison* v. *Work,* 266 U. S. 481.

If it were found that, in order to maintain jurisdiction, the United States, even though the real party in interest, is nevertheless required to appear on the record as a complainant, the United States may, in the discretion of the Court, without dismissal of the petition, be joined with the present petitioners by amendment under Rule 19 of the Equity Rules.

A suit may be brought by the United States, though not instituted by the Department of Justice. The Congress has the power to designate the officers or agencies to represent the Government in suits other than those brought to enforce the separate constitutional rights of either House.

There may not be imputed to Congress any intent to vest in the Department of Justice the discretion as to whether or not suit should be instituted to enforce any of the separate constitutional rights of the Senate. But even if such intent were so imputed and an Act of Congress to such effect could be found, such an Act should not be construed as affording an exclusive procedure. It could not deprive the Senate of its power to resort directly, if it so desired, to the courts in aid of the execution by the Senate of one of its separate powers under the Constitution. The Senate itself, or a duly authorized committee or other representative thereof, is the only governmental agency having the right to determine

whether or not resort shall be had to the courts for the enforcement of such rights and to determine by whom the Senate is to be represented in any necessary judicial proceedings.

The petitioners are officers of the United States. They include four members of the United States Senate. Whether or not an United States Senator is an "officer of the United States" within the meaning of § 24 of the Judicial Code is a question of statutory interpretation and not a question of construction of the Constitution. *Lamar* v. *United States,* 240 U. S. 60; *id.,* 241 U. S. 103.

It has been held (*Lamar* v. *United States,* 241 U. S. 103) that a Representative in Congress is "an officer acting under the authority of the United States" within the meaning of a statute punishing a person for pretending to be such an officer.

In *Ex parte Yarborough,* 110 U. S. 651, this Court said that the Constitution "created the office of member of Congress." Cited with approval in *Swafford* v. *Templeton,* 185 U. S. 487, and *Wiley* v. *Sinkler,* 179 U. S. 58; and see *United States* v. *Aczel,* 219 Fed. 917, *id.,* 232 Fed. 652. *Burton* v. *United States,* 202 U. S. 344; *United States* v. *Germaine,* 99 U. S. 508; and *United States* v. *Mouat,* 124 U. S. 303, distinguished.

In the few cases in state courts in which the question has arisen, the holding has been that a Senator or Representative in Congress is not a state officer, but is an officer of the United States. See *State ex rel. Eaton* v. *Schmahl,* 140 Minn. 219; *State ex rel. Chandler* v. *Howell,* 104 Wash. 99; *State ex rel. Spofford* v. *Gifford,* 22 Idaho 613; *Eversole* v. *Brown,* 21 Ky. L. Rep. 925.

Since the adoption of the Seventeenth Amendment the *Lamar* case is controlling; a member of either House of Congress is an officer of the United States within the meaning of such statutes as § 24 of the Judicial Code.

The petitioner, South, was appointed by the committee as an officer authorized to represent it and act as its attorney. The Constitution, Art. II, § 2, recognizes that officers of the United States may be appointed in a manner other than by the President, heads of departments, or courts of law, as specified in that section. The constitutional authority of the Senate to choose its own officers is one such other method of appointment.

The resolutions need not state in terms that the committee might institute suit. Such a power is implied from the powers to "require by subpœna or otherwise" and "to do all acts necessary." The committee is the agent of the Senate in conducting the inquiry. Under the ordinary principles of agency, authority "to do all acts necessary" to accomplish an end, or similar language, or authority to take possession of certain documents or papers, includes the power to bring suit. *State ex rel. Giroux* v. *Giroux,* 15 Mont. 137; *Briggs* v. *Yetzer,* 103 Iowa 342; *Ryan* v. *Tudor,* 31 Kans. 366; *Joyce* v. *Duplessis,* 15 La. Ann. 242. See also *Citizens' Nat'l Bank* v. *Berry & Co.,* 53 Kans. 696; *Potter* v. *N. Y. Infant Asylum,* 44 Hun. (N. Y.) 367. The authority is vested in the special select committee by "law." A resolution of the Senate is law if adopted in the execution of one of the separate constitutional powers of the Senate. The history of § 24, par. First, gives force to this contention. The phrase "under the authority of any Act of Congress," in 3 Stat. 245, was subsequently changed to "authorized by law." Rev. Stats. § 563. Under this much broader phrase it would seem that not only officers authorized by Act of Congress but also officers authorized by the Constitution, by treaty, or by resolution of either House of Congress adopted in the exercise of its separate constitutional powers, are included.

The suit is not a suit against a State.

Use of its own forces is not the exclusive method of enforcing the Senate's process. In the event of disobedience to a subpoena, the Senate may proceed *vi et armis* and through its own force, exerted by the Sergeant at Arms or his deputies, arrest the witness (*McGrain* v. *Daugherty,* 273 U. S. 135), or seize the papers subpoenaed; or may through its own proceedings punish the contempt. These remedies are available whether the Senate is exerting powers of inquiry auxiliary to its functions regarding its membership (*Anderson* v. *Dunn,* 6 Wheat. 204; *Marshall* v. *Gordon,* 243 U. S. 521; Hinds' Prec. §§ 1604, 1666, 1669, and 1671; S. Doc. 278, 53d Cong., 2d sess., p. 311), or whether it is exerting powers of inquiry auxiliary to its legislative functions (Hinds' Prec. §§ 1720 and 1722; *McGrain* v. *Daugherty,* supra; unpublished opinion of Justice Hoehling in *Sinclair* v. *United States* in the Supreme Court of the District of Columbia, July 14, 1924; S. Rept. 142, 38th Cong., 2d sess., p. 20 of the "Journal of the Committee").

The above remedies, however, are not exclusive. If such remedies were exclusive, it could be only by reason of an implied constitutional prohibition preventing the Senate from resorting to the courts. It is not believed that any such constitutional prohibition can be implied. See *In re Chapman,* 166 U. S. 661; *I. C. C.* v. *Brimson,* 154 U. S. 447; *In re Debs,* 158 U. S. 564.

The status of the special select committee is a continuing one.

Mr. Albert J. Williams for respondents.

The case is moot. The respondents have in the most practical manner recognized the right of the Senate through one of its duly authorized committees to demand and receive the ballot boxes and their contents and other papers and records appertaining to said election. Though

some of them are missing, the right to them is not denied; they have simply been lost or destroyed.

The District Court can exercise only such jurisdiction as is authorized by acts of Congress. *United States* v. *Hudson,* 7 Cranch 32; *The Mayor, etc.* v. *Smith,* 6 Wall. 247; *Kentucky* v. *Powers,* 201 U. S. 1.

This is not a suit by the United States. It is fundamental that the United States should have the right to determine when and by whom litigation shall be instituted, to enforce its sovereignty and protect its interests. It has done so. Civil actions in which the United States is concerned are to be prosecuted by the United States Attorneys. Rev. Stats. § 771; *Confiscation Cases,* 7 Wall. 454; *United States* v. *McAvoy,* Fed. Cas. 15654; *United States* v. *Rosenthal,* 121 Fed. 862. An Act of Congress was necessary to enable the Attorney General, other officers of the Department of Justice and special assistants to conduct grand jury proceedings. Act of June 30, 1906, c. 3935, 34 Stat. 816. Rev. Stats. § 361 places the authority to appear in this Court on behalf of the United States or its officers in the Attorney General and officers of his department.

Congress has therefore designated who shall act for the United States in instituting and prosecuting suits in its name and to protect its interests. The Senate is no more exempt from these acts than any other branch of the Government. In the exercise of its prerogatives by its officers and process, the Senate may act without let or hindrance, but when it applies in the name of the United States to the judicial branch of the Government for assistance in the enforcement of its powers, there is no good reason why it is not just as amenable to the law it helped create, prescribing what officer and department shall institute and conduct all suits by the United States, as any other branch of the Government. Petitioners

challenge the right of Congress to deny the Senate the right to choose whom it will to represent it in its resort to the Courts in aid of one of its separate powers under the Constitution. Therein they lose sight of the fact that such a suit, if maintainable at all, must be a suit by the United States and not of the Senate.

In the case at bar the suit was not brought in the name of the United States, and was not instituted and conducted by either the District Attorney or any officer of the Department of Justice (distinguishing *Benton* v. *Woolsey,* 12 Pet. 27, and *Jecker* v. *Montgomery,* 18 How. 110); it lacks all the earmarks of a suit by the United States and in fact and in name is not a suit by the United States, but by the members of a committee of the Senate, and that is all. Even their status as a committee of the Senate was in question until the passage of Senate Resolution No. 10, 70th Congress.

The suit is not by an officer of the United States authorized by law to sue. We have heretofore questioned whether the term "officer" as used in the Act applies to a Senator, and contended that it should be restricted to "officers" within § 2, Art. II, of the Constitution, citing *United States* v. *Germaine,* 99 U. S. 508. But the primary question to determine in a given case, is whether authority has been given by law to sue. If so, and the one to whom the authority is given is an officer of the United States, even though not within § 2, Art. II, of the Constitution, he would seem to be within the meaning of the Act.

It must be conceded that the Senate cannot of its own motion create power. All its powers are derived from the Constitution or Act of Congress. It cannot enlarge upon those powers nor vest greater powers in its committees. When it passes a resolution to conduct an inquiry and appoints a committee to conduct it, it does not create

power; it but delegates to the committee a power inherent in the Senate. This must be so. Thereunder neither the Senate nor the House can do singly what Congress can.

In short, if the Senate has not power to sue, it cannot legally grant such a power to one of its committees. Can the Senate sue? How would it sue? By joining all the members? It is not a legal entity and therefore could not sue in a corporate capacity. It is manifest that the Senate cannot sue. No provision has been made for it to do so, nor any machinery provided for it to do so. What it cannot do, it cannot enable one of its committees to do. Hence it cannot by law authorize any of its members to sue. Therefore, the resolutions in question are not an authorization by law to sue.

The petitioners ceased to be a committee of the Senate on the expiration of the 69th Congress.

Mr. Justice Butler delivered the opinion of the Court.

The petitioners brought this suit in the United States court for the eastern district of Pennsylvania. The court held it was without jurisdiction and dismissed the case. 21 F. (2d) 144. The Circuit Court of Appeals adopted its opinion and affirmed the decree. 21 F. (2d) 1018.

Petitioners maintain that the district court had jurisdiction under the first paragraph of § 24 of the Judicial Code, U. S. C. Tit. 28, § 41, which provides that the district courts shall have original jurisdiction "of all suits of a civil nature, at common law or in equity, brought by the United States, or by any officer thereof authorized by law to sue . . ."

Petitioners, other than South, are United States Senators and constitute a special committee created by Senate Resolution 195, passed May 19, 1926, to make investigation of means used to influence the nomination of candidates for the Senate. The Resolution empowered the committee "to require by subpœna or otherwise the at-

tendance of witnesses, the production of books, papers, and documents, and to do such other acts as may be necessary in the matter of said investigation."

At a general election held in Pennsylvania, November 2, 1926, William S. Vare and William B. Wilson were opposing candidates for the United States Senate. Vare was given the certificate of election and Wilson initiated a contest. Thereafter, January 11, 1927, the Senate passed Resolution 324. It recites that Wilson charges fraudulent and unlawful practices in connection with Vare's nomination and the election and declares that, unless preserved for the use of the Senate, evidence relating to the election will be lost or destroyed. The Resolution empowers the special committee "to take . . . and preserve all ballot boxes, . . . ballots, return sheets, . . . and other records, books and documents used in said senatorial election. . . ." It confers on the committee "all powers of procedure with respect to the subject matter of this resolution that said committee possesses under Resolution Numbered 195 . . . with respect to the subject matter of that resolution." And it requires the Sergeant at Arms of the Senate to attend and execute the directions of the committee.

The Chairman of the Committee on Audit and Control of Contingent Expenditures having refused to approve the special committee's vouchers for expenses after the expiration of that Congress, the Sergeant at Arms refused to execute its orders. Thereupon the special committee directed the petitioner South, as its representative, to take possession of the boxes, ballots and other things referred to in Resolution 324.

Respondents are the commissioners, the prothonotary and a justice of the peace of Delaware County, Pennsylvania. They are authorized custodians of boxes, ballots and other things used in connection with the election. These were demanded by South in behalf of the commit-

tee. Respondents declined to give them up, and this suit was brought to obtain possession of them.

Petitioners do not claim that any Act of Congress authorizes the committee or its members, collectively or separately, to sue. Of course, South's authority is no greater than that of the committee which he represents. The suit cannot be maintained unless the committee or its members were authorized to sue by Resolutions 195 and 324, even if it be assumed that the Senate alone may give that authority. The power is not specifically granted by either resolution. Petitioners rely on the general language in Resolution 195 which follows the express authorization of the committee to use its own process to require the production of evidence. The words are "and to do such other acts as may be necessary in the matter of said investigation." The resolutions are to be construed having regard to the power possessed and customarily exerted by the Senate. It is the judge of the elections, returns and qualifications of its members. Art. I, § 5. It is fully empowered, and may determine such matters without the aid of the House of Representatives or the Executive or Judicial Department. That power carries with it authority to take such steps as may be appropriate and necessary to secure information upon which to decide concerning elections. It has been customary for the Senate—and the House as well—to rely on its own power to compel attendance of witnesses and production of evidence in investigations made by it or through its committees. By means of its own process or that of its committee, the Senate is empowered to obtain evidence relating to the matters committed to it by the Constitution. *McGrain* v. *Daugherty,* 273 U. S. 135, 160, 161, 167, 174. And Congress has passed laws calculated to facilitate such investigations. R. S. §§ 101–104, U. S. C. Tit. 2, §§ 191–194. Petitioners have not called attention to any action of the Senate, and we know of none,

that supports the construction for which they contend. In the absence of some definite indication of that purpose, the Senate may not reasonably be held to have intended to depart from its established usage. Authority to exert the powers of the Senate to compel production of evidence differs widely from authority to invoke judicial power for that purpose. The phrase "such other acts as may be necessary" may not be taken to include everything that under any circumstances might be covered by its words. The meaning of the general language employed is to be confined to acts belonging to the same general class as those specifically authorized. *Oates* v. *National Bank,* 100 U. S. 239, 244. *Barrett* v. *Van Pelt,* 268 U. S. 85, 90. *Baltimore & Ohio Railroad Co.* v. *United States, ante,* p. 291. The context, the established practice of the Senate to rely on its own powers, and the attending circumstances oppose the construction for which petitioners contend and show that the Senate did not intend to authorize the committee, or anticipate that there might be need, to invoke the power of the Judicial Department. Petitioners are not "authorized by law to sue."

Decree affirmed.

QUAKER CITY CAB COMPANY *v.* COMMONWEALTH OF PENNSYLVANIA.

ERROR TO THE SUPREME COURT OF PENNSYLVANIA.

No. 139. Argued April 20, 1928.—Decided May 28, 1928.

A law of Pennsylvania (Pa. L. 1889, 420, 431; Pa. St., 1920, § 20,388) provides that a tax be laid on the gross receipts derived by foreign or domestic corporations from their operation of taxicabs in intrastate transportation of passengers, but does not tax the like receipts of individuals and partnerships in the same kind of business. *Held:*

1. The equal protection clause of the Fourteenth Amendment extends to foreign corporations within the jurisdiction of the State, and

safeguards to them protection of laws applied equally to all in the same situation. P. 400.

2. The equal protection clause does not detract from the right of the State justly to exert its taxing power or prevent it 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. *Id.*
3. The right to withhold from a foreign corporation permission to do local business therein does not enable the State to require such a corporation to surrender the protection of the Federal Constitution. *Id.*
4. Characterization of a tax by the state court is not binding here. P. 401.
5. The practical operation of the taxing provision is to be regarded, and it is to be dealt with, according to its effect. *Id.*
6. The tax is not of a kind peculiarly applicable to corporations, as are taxes on their capital stock or franchises, nor a tax taken in lieu of any other tax or used as a measure of one intended to fall elsewhere, but is specifically and solely a tax on gross receipts, which could be laid on receipts belonging to natural persons quite as conveniently as on those of corporations. The discrimination, made to depend entirely upon the fact that the receipts taxed belong to corporations, and not justified by any difference in the source of the receipts or in the situation or character of the property employed, rests on a purely arbitrary basis. P. 402.
7. The provision of the state enactment violates the equal protection clause of the Fourteenth Amendment. *Id.*

287 Pa. 161, reversed.

ERROR to a judgment of the Supreme Court of Pennsylvania, affirming a judgment of the Court of Common Pleas, 29 Dauphin Co. Rep. 90, against the Cab Company and in favor of the State, on the Cab Company's appeal from a settlement of gross receipts taxes made by the Auditor General and approved by the Treasurer of the State.

Mr. Owen J. Roberts, with whom *Mr. Douglass D. Storey* was on the brief, for plaintiff in error.

In such a case as this, valid tax classification cannot rest solely upon the character of the operator (that is, whether it be corporate or non-corporate), when there is no other difference in the situation or the circumstances of the operators. The tax is not of a kind peculiar to corporations. It is unlike a capital stock tax, which of necessity can apply only to artificial taxpayers, or an excise tax. Even in Pennsylvania this distinction is important. *Schoyer* v. *Comet Oil Co.*, 284 Pa. 189.

In *Fort Smith Lumber Co.* v. *Arkansas,* 251 U. S. 532, the tax was a capital stock tax, which obviously can be levied only upon corporations and other associations having the characteristics of corporations. If the principle should be extended, then there is no reason why corporations cannot be classified for the purpose of paying any tax. Real estate and personal property taxes could be levied on real estate and personal property only when owned by corporations. In fact, all taxes could be levied only upon corporate beings.

The tax is not an excise, a privilege, or a license tax. *Commonwealth* v. *Harrisburg Light & Power Co.*, 284 Pa. 175. This Court itself definitely held that this tax was not a privilege tax. *Phila. & Southern Mail S. S. Co.* v. *Commonwealth,* 122 U. S. 326.

The present statute which repealed the acts involved in that case, made no change in the nature of the tax, but only followed the rule there announced and limited the tax to the "gross receipts . . . received from passengers and freight traffic transported wholly within this State."

In dealing with excise, license, and privilege taxes, the latitude is very broad, and purely artificial selections have been sustained which are not sanctioned with respect to other taxes. In *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, the Court made it clear that the tax was sustained not because it was imposed on the business (which it ad-

mitted was the same "whether conducted by individuals or corporations") but because it was imposed only on the privilege of conducting the business in corporate form. Other leading cases like the one last cited are: *Magoun* v. *Illinois Trust & Savings Bank,* 170 U. S 283; *Spreckels Sugar Refining Co.* v. *McClain,* 192 U. S. 397; *Ohio Tax Cases,* 232 U. S. 576; *Cheney Bros. & Co.* v. *Massachusetts,* 246 U. S. 147; *Southern Ry. Co.* v. *Watts,* 260 U. S. 519; *Roberts & Schaeffer Co.* v. *Emmerson,* 271 U. S. 50.

But broad as seems to be the power of selection in the imposition of such taxes, there is a limit. In *Southern Ry. Co.* v. *Greene,* 216 U. S. 400, an additional franchise tax on foreign corporations for the privilege of doing business was held invalid. See *Bethlehem Motors Corp'n* v. *Flynt,* 256 U. S. 421, which completely answers the contention that plaintiff in error can avoid taxation by surrendering its charter and operating as a general partnership. This it cannot do, with its outstanding obligations, any more easily that the foreign corporations could comply with the arbitrary terms of the North Carolina statute, with which that case dealt. See *Air Way Electric Appliance Corp'n* v. *Day,* 266 U. S. 71.

The classification being based solely upon whether the taxicab operator is an artificial being, it is arbitrary and illegally discriminatory. The discrimination is real. The corporate taxicab operator pays every tax which the non-corporate taxicab operator pays. In addition, the corporate (domestic and foreign) operator pays a capital stock tax of 5 mills upon the actual value of its capital stock and a bonus of ⅓ of 1% on the par value of all issued stock, if it be a domestic corporation, or ⅓ of 1% on the amount of capital actually employed in Pennsylvania, if it be a foreign corporation.

The case at bar, therefore, is totally unlike *General American Tank Car Corp'n* v. *Day,* 270 U. S. 367, where

the special tax of 25 mills on the dollar of the assessed value of the rolling stock of foreign corporations was in lieu of all other state taxes which averaged approximately 25 mills.

In dealing with taxes other than (1) taxes peculiar to corporations and (2) excise, license, or privilege taxes, this Court has consistently taken the stand that, while the Fourteenth Amendment does not impose upon the legislature an iron rule of equal taxation, it does impose the rational constitutional rule that so-called classifications cannot be made solely with reference to the character of the taxpayer; that is, whether it is a natural or an artificial person. *California R. R. Tax Cases,* 13 Fed. 722, (dismissed by compromise, *County of San Mateo* v. *Southern Pacific R. R. Co.,* 116 U. S. 138); *County of Santa Clara* v. *Southern Pacific R. R. Co.,* 18 Fed. 385, (affirmed on another ground, *Santa Clara County* v. *Southern Pacific R. R. Co.,* 118 U. S. 394, but see concurring opinion, and Guthrie, Fourteenth Amendment, p. 121); *Magoun* v. *Illinois Trust & Savings Bank,* 170 U. S. 283; *Quong Wing* v. *Kirkendall,* 223 U. S. 59; *Pullman Co.* v. *Knott,* 235 U. S. 23; *Chalker* v. *Birmingham & Northwestern Ry. Co.,* 249 U. S. 522; *Royster Guano Co.* v. *Virginia,* 253 U. S. 412; *Schlesinger* v. *Wisconsin,* 270 U. S. 230; *Hanover Fire Ins. Co.* v. *Harding,* 272 U. S. 494.

The rule that the legislature may exempt from the general class a particular group which operates for a distinctly different purpose, as in *Citizens Telephone Co.* v. *Fuller,* 229 U. S. 322, is only application of the same general principle which permits the legislature, if it chooses, to " exempt certain classes of property from any taxation at all, such as churches, libraries, and the property of charitable institutions." *Bell's Gap R. R. Co.* v. *Pennsylvania,* 134 U. S. 232.

The same rule was applied in *Northwestern Mut. Life Ins. Co.* v. *Wisconsin,* 247 U. S. 132, where an annual

license tax on level premium life insurance companies was sustained although fraternal and beneficial societies having lodges and insuring only the lives of members were exempt.

The decisions of state courts condemn a classification based solely upon whether the taxpayer is a corporation or a natural person. *Russell* v. *Croy,* 164 Mo. 69; *Southwestern Bell Telephone Co.* v. *Middlekamp,* 1 F. (2d) 563; *Gamble-Robinson Fruit Co.* v. *Thoresen,* 53 N. D. 28.

The several state constitutions contain provisions relative to uniformity of taxation. While they are expressed in different language, the basic idea is to protect taxpayers from unfair and arbitrary classifications and discriminations. The following cases, we believe, establish the rule that the classification made in the case at bar is wholly arbitrary and illusory. *Pullman Palace Car Co.* v. *Texas,* 64 Tex. 274; *Parker* v. *North British & M. Ins. Co.,* 42 La. Ann. 428; *Adams* v. *Yazoo & Mississippi Valley R. R. Co.,* 77 Miss. 194; *State* v. *Stonewall Ins. Co.,* 89 Ala. 335; *U. S. Express Co.* v. *Ellyson,* 28 Ia. 370; *Std. Life & Accident Ins. Co.* v. *Detroit,* 95 Mich. 466; *Danville* v. *Quaker Maid,* 211 Ky. 677.

The discrimination in this statute is clear and hostile against the corporate taxicab operators and is of an unusual character unknown to the practice in Pennsylvania. *Bell's Gap R. R. Co.* v. *Pennsylvania,* 134 U. S. 232. *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245, distinguished.

Mr. John Robert Jones, with whom *Mr. Thomas J. Baldridge* was on the brief, for defendant in error.

The construction put by the court below upon the statutes and constitution of its own State is not open to review in this Court. The Pennsylvania court held the plaintiff in error to be a transportation corporation, operating a device for the transportation of passengers

and their luggage upon the public highways and therefore within the terms of the section and subject to the tax. The transportation of passengers or freight, or both, is the business which the companies named are empowered by law to transact, which, in the case of the plaintiff in error, is the business authorized by its charter, and which the State permitted it, as a foreign corporation, to perform within its borders, and for which the Public Service Commission granted it a certificate of public convenience. The sole business of the plaintiff in error is that of the transportation of passengers and their luggage solely within the State. To the receipts of such business alone was the rate of taxation applied to determine the amount of the tax. Under the act if plaintiff in error had had no receipts from such business, it would not have been liable for the payment of any tax.

"The tax," as was said in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, "is not payable unless there be a carrying on or doing of business in the designated capacity, and this is made the occasion for the tax, measured by the standard prescribed."

That the tax is not a property tax is clear, not only from the language of § 23 but also by the construction placed upon it by the Supreme Court. This view is strengthened by the fact that a capital stock tax, which is a property tax, is imposed upon such companies under §§ 20 and 21 of the same act (changed by subsequent legislation as to the method of computing and determining the amount). It is a tax upon the business of the companies measured in amount by the gross receipts or income resulting from the conduct and operation of such business. It is a tax upon the doing of a business and in respect to a carrying on thereof, in a sum equivalent to eight mills upon each dollar of the gross receipts received from the transacting or performing of such business. It is not a tax upon the property of the corporation.

The tax is imposed upon both domestic and foreign corporations, and is confined to business done solely within the State. All within the class are treated alike. Hence the issue turns upon the power of the State to classify, and whether or not the classification made by the act rests upon a reasonable basis and is not illusory or arbitrary. Is the particular classification open to objection because it precludes the assumption that it was made in the exercise of legislative judgment and discretion?

The principles governing the application of the Fourteenth Amendment were considered in *Bell's Gap R. R. Co.* v. *Pennsylvania,* 134 U. S. 232; *Keeney* v. *New York,* 222 U. S. 525; *St. Louis, etc. R. R.* v. *Arkansas ex rel. Norwood,* 235 U. S. 350; *Maxwell* v. *Bugbee,* 250 U. S. 525; *Swiss Oil Corp'n* v. *Shanks,* 273 U. S. 407.

Flint v. *Stone Tracy Co.,* 220 U. S. 107, is conclusive in this case.

The Pennsylvania tax is limited and confined to the precise business for which the companies made subject to the tax were created and were permitted to transact within the borders of the State. Plaintiff in error is required further to secure from the Public Service Commission of the State a certificate of public convenience to use the public highways as prescribed in such certificate and the law authorizing its issue. The tax is not payable by the corporation unless it is carrying on or doing business in the designated capacity of a transportation company, and, as was said by this Court in *Flint* v. *Stone Tracy Co., supra,* "this is made the occasion for the tax, measured by the standard prescribed"; and if there be no receipts from such corporate activity there is no tax. Is this not conclusive in this case?

Having in mind the facts that plaintiff in error is a foreign corporation and is engaged solely in an intrastate business in Pennsylvania, and that it is taxed, as are

domestic corporations, solely with reference to the receipts of such business and in the same manner as domestic corporations, and that the State of Pennsylvania had the power to exclude it from the operation of its business within the State (*Hooper* v. *California,* 155 U. S. 648) and, therefore, the power to prescribe the conditions and limitations of its business operations within the State, and that the present law was an ingredient of the Pennsylvania system of taxation many years prior to the entrance of plaintiff in error to Pennsylvania,—especially pertinent is the language of this Court in *Crescent Oil Co.* v. *Mississippi,* 257 U. S. 129. See also *Horn Silver Mining Co.* v. *New York,* 143 U. S. 305; *Paul* v. *Virginia,* 8 Wall. 168; *New York* v. *Roberts,* 171 U. S. 658; *Brown-Forman Co.* v. *Kentucky,* 217 U. S. 563; *Southwestern Oil Co.* v. *Texas,* 217 U. S. 114; *Pacific Express Co.* v. *Seibert,* 142 U. S. 339; *Metropolitan Street Ry. Co.* v. *New York,* 199 U. S. 1.

The classification is valid, whether the tax be regarded as an excise upon the business of the companies, their activities in the State, or a tax upon the franchise or privilege of doing business in the State, or as a property tax. The construction placed upon the act and the Constitution of the State by the state court is accepted by this Court.

The tax is not imposed upon the gross receipts as property, but only in respect of the carrying on of the business. *Spreckels Sugar Refining Co.* v. *McClain,* 192 U. S. 397. If there be no gross receipts from transportation wholly within the State, there is no tax. There is no tax payable unless there is a carrying on or doing of business in the designated capacity. *Phila. S. S. Co.* v. *Pennsylvania,* 122 U. S. 326, distinguished. *Horn Silver Mining Co.* v. *New York,* 143 U. S. 305; *St. Louis, etc., R. R.* v. *Arkansas,* 235 U. S. 350; *State Tax on Railway Gross Receipts,* 15 Wall. 284.

The principles and policy of the law of taxation in Pennsylvania are fairly outlined in *Commonwealth* v. *Sharon Coal Co.*, 164 Pa. 304; *Commonwealth* v. *Brewing Co.*, 145 Pa. 83; *Seabolt* v. *Commissioners*, 187 Pa. 318; *Commonwealth* v. *Delaware Division Canal Co.*, 123 Pa. 594. It is significant that, while the tax upon the business of certain classes of corporations measured by their gross receipts has been in force in Pennsylvania many years, and several of the statutes imposing it have been before this Court (see *State Tax on Railway Gross Receipts*, 15 Wall. 284; *Phila. S. S. Co.* v. *Pennsylvania*, 122 U. S. 326), it does not appear that any such contention was made as is made in the present case.

Authorities invoked to support an argument that a tax on an incident or function of property is a direct tax upon the property itself simply show that the States cannot, directly or indirectly burden the exercise by Congress of the powers committed to it by the Constitution, nor may Congress burden the agencies or instrumentalities employed by the States in the exercise of their power. Such doctrine does not in any way affect the instant case. Assuming, for the purpose of argument, that the tax imposed is a tax upon property; how stands the case of plaintiff in error? It appears that the authorities cited by it not only do not support its contention, but on the contrary expressly negative it.

Mr. Justice Butler delivered the opinion of the Court.

Judgment was entered in the Court of Common Pleas of Dauphin County, Pennsylvania, in favor of the Commonwealth for "gross receipts taxes for the six months ending the 31st day of December, 1923," amounting with interest and commission to $6,049.94. The tax is claimed under § 23 of an Act of June 1, 1889, P. L. 420, 431.

The provisions here material are printed in the margin.* The gross receipts taxed were derived by plaintiff in error from the use of its motor vehicles for the transportation within Pennsylvania of persons and their luggage. Plaintiff in error contended that if applied to such receipts the section violates the equal protection clause of the Fourteenth Amendment. The highest court of the State upheld the Act and affirmed the judgment. 287 Pa. 161.

Plaintiff in error is a New Jersey corporation authorized to do business in Pennsylvania as a foreign corporation; and, since June 1, 1917, it has carried on a general taxicab business in Philadelphia. The Supreme Court held that the section taxes gross receipts from the operation of taxicabs. It provides that every transportation company, whether incorporated in Pennsylvania or elsewhere, owning or operating any device for the transportation of passengers, " shall pay to the state treasurer a tax of eight mills upon the dollar upon the gross receipts of said corporation . . . received from passengers . . . transported wholly within this State . . ."

Plaintiff in error was subject to competition in its business by individuals and partnerships operating taxicabs. The Act does not apply to them, and no tax is imposed on their receipts. Corporations operating taxicabs are not exempted from any of the taxes imposed on

* " That every . . . transportation company, . . . now or hereafter incorporated or organized by or under any law of this Commonwealth, or now or hereafter organized or incorporated by any other State or by the United States or any foreign government, and doing business in this Commonwealth, and owning [or] operating . . . any railroad . . . or other device for the transportation of freight or passengers or oil . . . shall pay to the state treasurer a tax of eight mills upon the dollar upon the gross receipts of said corporation . . . received from passengers and freight traffic transported wholly within this State . . ."

natural persons carrying on that business. And every such corporation whether domestic or foreign pays a capital stock tax of five mills on the actual value of its capital stock and a bonus of one-third of one per cent on the par value of all stock issued if it be a domestic corporation, and a like rate on its capital employed in Pennsylvania if it be a foreign corporation. Act of July 22, 1913, P. L. 903. § 1, Act of May 3, 1899, P. L. 189. § 1, Act of May 8, 1901, P. L. 150. The Supreme Court said that it is immaterial whether individuals engaged in a like taxicab business are subject to the tax here involved and that corporations may be placed in a class separate from individuals and so taxed.

The equal protection clause extends to foreign corporations within the jurisdiction of the State and safeguards to them protection of laws applied equally to all in the same situation. Plaintiff in error is entitled in Pennsylvania to the same protection of equal laws that natural persons within its jurisdiction have a right to demand under like circumstances. *Kentucky Finance Corp'n* v. *Paramount Exch.*, 262 U. S. 544, 550. The equal protection clause does not detract from the right of the State justly to exert its taxing power or prevent it 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." *Power Co.* v. *Saunders*, 274 U. S. 490, 493. It is established that a corporation, by seeking and obtaining permission to do business in a State does not thereby become bound to comply with, or estopped from objecting to, the enforcement of its enactments that conflict with the Constitution of the United States. The right to withhold from a foreign corporation permission to do local business therein does not enable the State to require such a corporation

to surrender the protection of the Federal Constitution. *Power Co.* v. *Saunders, supra,* 497. *Hanover Insurance Co.* v. *Harding,* 272 U. S. 494, 507. *Frost* v. *Railroad Commission,* 271 U. S. 583, 593 *et seq. Fidelity & Deposit Co.* v. *Tafoya,* 270 U. S. 426, 434. *Western Union Tel. Co.* v. *Foster,* 247 U. S. 105, 114. *Looney* v. *Crane Co.,* 245 U. S. 178, 188. *Sioux Remedy Co.* v. *Cope,* 235 U. S. 197, 203.

The section declares the imposition to be a tax "upon gross receipts." And the Supreme Court said: "The real subject of the tax is the gross receipts of a company engaged in the transportation of freight or passengers . . ." That statement is not affected by a later expression referring to the tax as a "state tax on business or income" in contrast with a "local tax on property" such as hacks, cabs and other vehicles. The variation of language used by the court evidently is intended to be, and is, without significance. The words of the section are too plain to require explanation. They could not reasonably be given any other meaning. But, in any event, a characterization of the tax by the state court is not binding here. *Louisville Gas & Electric Co.* v. *Coleman, ante,* p. 32. *St. Louis Compress Co.* v. *Arkansas,* 260 U. S. 346, 348. There is no controversy as to the application of the tax. Plaintiff in error assumes that the section covers its gross receipts, as held by the state court, but insists that the section is invalid because it does not extend to like receipts of natural persons and partnerships. No doubt there are situations in which, as appears in *Cudahy Packing Co.* v. *Minnesota,* 246 U. S. 450, and other cases, a percentage of gross earnings may be taken as a tax on property used in the business and properly may be deemed not to be a tax or burden on such earnings. But the practical operation of the section is to be regarded, and it is to be dealt with according to its effect. *Frick* v. *Pennsylvania,* 268 U. S. 473. *Panhandle Oil Co.* v. *Mississippi,*

ante, p. 218. Here the tax is one that can be laid upon receipts belonging to a natural person quite as conveniently as upon those of a corporation. It is not peculiarly applicable to corporations as are taxes on their capital stock or franchises. It is not taken in lieu of any other tax or used as a measure of one intended to fall elsewhere. It is laid upon and is to be considered and tested as a tax on gross receipts; it is specifically that and nothing else.

In effect § 23 divides those operating taxicabs into two classes. The gross receipts of incorporated operators are taxed while those of natural persons and partnerships carrying on the same business are not. The character of the owner is the sole fact on which the distinction and discrimination are made to depend. The tax is imposed merely because the owner is a corporation. The discrimination is not justified by any difference in the source of the receipts or in the situation or character of the property employed. It follows that the section fails to meet the requirement that a classification to be consistent with the equal protection clause must be based on a real and substantial difference having reasonable relation to the subject of the legislation. *Power Co.* v. *Saunders, supra.* No decision of this Court gives support to such a classification.* In no view can it be held to have more than an arbitrary basis. As construed and applied by the state court in this case, the section violates the equal protection clause of the Fourteenth Amendment. See *The Railroad Tax Cases,* 13 Fed. 722. *County of Santa Clara* v. *Southern Pacific R. R. Co.,* 18 Fed. 385. *Northern Pacific R. Co.* v. *Walker,* 47 Fed. 681. The tax cannot be sustained.

Judgment reversed.

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* And the Supreme Court of Pennsylvania has condemned such a classification. *Schoyer* v. *Comet Oil & Refining Co.,* 284 Pa. 189, 196–197.

MR. JUSTICE HOLMES.

I think that the judgment should be affirmed. The principle that I think should govern is the same that I stated in *Louisville Gas & Electric Co.* v. *Coleman, ante,* p. 41. Although this principle was not applied in that case I do not suppose it to have been denied that taxing acts like other rules of law may be determined by differences of degree, and that to some extent States may have a domestic policy that they constitutionally may enforce. *Quong Wing* v. *Kirkendall,* 223 U. S. 59. If usually there is an important difference of degree between the business done by corporations and that done by individuals, I see no reason why the larger businesses may not be taxed and the small ones disregarded, and I think it would be immaterial if here and there exceptions were found to the general rule. *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 158, *et seq. Citizens Telephone Co.* v. *Fuller,* 229 U. S. 322. *Amoskeag Savings Bank* v. *Purdy,* 231 U. S. 373, 393. *Miller* v. *Wilson,* 236 U. S. 373, 384. *Armour & Co.* v. *North Dakota,* 240 U. S. 510, 517. Furthermore if the State desired to discourage this form of activity in corporate form and expressed its desire by a special tax I think that there is nothing in the Fourteenth Amendment to prevent it.

MR. JUSTICE BRANDEIS, dissenting.

It has been the consistent policy of Pennsylvania since 1840 to subject businesses conducted by corporations to heavier taxation than like businesses conducted by individuals.[1] It has likewise been the consistent policy of

[1] Pennsylvania was the first state to adopt a general corporation tax. P. L. 1839–1840, p. 612. In 1868 the tax was extended to foreign corporations. P. L. 1868, p. 108. The courts of Pennsylvania have regularly upheld the power of the Legislature, under the state

the State since 1864 to subject some kinds of businesses conducted by corporations to heavier taxation than other businesses conducted by corporations.[2] Pursuant to this policy, the legislature of Pennsylvania laid, in 1889, upon public service corporations furnishing transportation for hire, a gross receipts tax of eight mills on each dollar of gross receipts earned wholly within the State. Act of June 1, 1889, P. L. 1889, pp. 420, 431 (Pa. Stat. 1920, § 20,388). That statute has remained unchanged so far as affects the question here involved.[3] It applies equally to every corporation engaged in the same kind of business, and makes no discrimination between foreign and domestic corporations. But neither this specific tax, nor any equivalent tax, is laid upon individuals or partnerships engaged in the same business. Nor is this tax or an equivalent laid upon corporations which supply certain other public services.

The Supreme Court of the State has construed this statute as applicable to all taxicab corporations; and has held the Quaker City Cab Company, a foreign corporation doing an intrastate business in Pennsylvania since the year 1917, liable for the taxes accrued on that business

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and Federal Constitution, to place heavier tax burdens on corporations than on individuals. See *Kittanning Coal Co.* v. *Commonwealth*, 79 Pa. St. 100; *Commonwealth* v. *Delaware Division Coal Co.*, 123 Pa. St. 594; *Commonwealth* v. *Germania Brewing Co.*, 145 Pa. St. 83; *Commonwealth* v. *National Oil Co.*, 157 Pa. St. 516; *Commonwealth* v. *Sharon Coal Co.*, 164 Pa. St. 284, 304.

[2] P. L. 1864, p. 218; P. L. 1866, p. 82; P. L. 1867, p. 1363; P. L. 1877, p. 6; P. L. 1879, p. 112; P. L. 1889, p. 420; P. L. 1925, pp. 702, 706.

[3] So far as is material to the present case, the tax goes back to the Act of March 20, 1877, P. L. 6. It was that act, as amended by the Act of June 7, 1879, P. L. 112, which was before this Court in *Philadelphia & Southern Mail S. S. Co.* v. *Pennsylvania*, 122 U. S. 326. The Act of June 1, 1889, P. L. 420, 431, amended the earlier legislation so as to remove its repugnance to the commerce clause.

for the last six months of 1923, which was agreed on as a test period. The Company claims that the statute as construed and applied violates the Federal Constitution. There is no contention that it violates either the commerce clause or the due process clause. The claim is that it denies equal protection of the laws; and the contention is rested specifically upon the ground that the exaction "is not a tax peculiar to corporations."

As the statute applies equally to domestic and to foreign corporations, cases like *Southern Ry. Co.* v. *Greene,* 216 U. S. 400; *Kentucky Finance Corporation* v. *Paramount Auto Exchange,* 262 U. S. 544; *Hanover Fire Insurance Co.* v. *Harding,* 272 U. S. 494; and *Power Manufacturing Co.* v. *Saunders,* 274 U. S. 490, have no application. And no claim is made that the Federal Constitution prevents a State from taxing corporations engaged in one class of business more heavily than those engaged in another. *Southwestern Oil Co.* v. *Texas,* 217 U. S. 114; *Brown-Forman Co.* v. *Kentucky,* 217 U. S. 563; *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245; *Oliver Iron Mining Co.* v. *Lord,* 262 U. S. 172. The fundamental question requiring decision is a general one. Does the equality clause prevent a State from imposing a heavier burden of taxation upon corporations engaged exclusively in intrastate commerce, than upon individuals engaged under like circumstances in the same kind of business? The narrower question presented is, whether this heavier burden may be imposed by a form of tax "not peculiarly applicable to corporations." That is, by a tax of such a character that it might have been extended to individuals if the legislature had seen fit to do so.

The equality clause does not forbid a State to classify for purposes of taxation. Discrimination through classification is said to violate that clause only where it is such as "to preclude the assumption that it was made in the exercise of legislative judgment and discretion." *Stebbins*

v. *Riley*, 268 U. S. 137, 143. In other words, the equality clause requires merely that the classification shall be reasonable. We call that action reasonable which an informed, intelligent, just-minded, civilized man could rationally favor. In passing upon legislation assailed under the equality clause we have declared that the classification must rest upon a difference which is real, as distinguished from one which is seeming, specious, or fanciful, so that all actually situated similarly will be treated alike; that the object of the classification must be the accomplishment of a purpose or the promotion of a policy, which is within the permissible functions of the State; and that the difference must bear a relation to the object of the legislation which is substantial, as distinguished from one which is speculative, remote or negligible.[4] Subject to this limitation of reasonableness, the equality clause has left unimpaired, both in range and in flexibility, the State's power to classify for purposes of taxation. Can it be said that the classification here in question is unreasonable?

The difference between a business carried on in corporate form and the same business carried on by natural persons is, of course, a real and important one. As was stated in *Flint* v. *Stone-Tracy Co.*, 220 U. S. 107, 161–162, "it could not be said . . . that there is no substantial differ-

[4] See *Missouri Pacific Ry. Co.* v. *Mackey*, 127 U. S. 205, 209–210; *Bell's Gap R. R. Co.* v. *Pennsylvania*, 134 U. S. 232, 237; *Pacific Express Co.* v. *Seibert*, 142 U. S. 339, 350–355; *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis*, 165 U. S. 150, 155–160; *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283, 293–296; *Orient Insurance Co.* v. *Daggs*, 172 U. S. 557, 562–564; *Atchison, Topeka & Santa Fe R. R. Co.* v. *Matthews*, 174 U. S. 96, 104–110; *Muller* v. *Oregon*, 208 U. S. 412, 421–423; *Southwestern Oil Co.* v. *Texas*, 217 U. S. 114, 125–127; *Quong Wing* v. *Kirkendall*, 223 U. S. 59, 62–63; *Fort Smith Lumber Co.* v. *Arkansas*, 251 U. S. 532, 533–534; *Watson* v. *State Comptroller*, 254 U. S. 122, 124–125; *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245, 254–258.

ence between carrying on of business by the corporations taxed, and the same business when conducted by a private firm or individual. The thing taxed is not the mere dealing in merchandise, in which the actual transactions may be the same, whether conducted by individuals or corporations, but the tax is laid upon the privileges which exist in conducting business with the advantages which inhere in the corporate capacity of those taxed, and which are not enjoyed by private firms or individuals." Because of this difference Congress has repeatedly discriminated against incorporated concerns and in favor of the unincorporated. The Corporation Tax Act of August 5, 1909, c. 6, § 38, 36 Stat. 11, 112, imposed a tax of one per cent on the net income of corporations when a corresponding tax was not imposed upon the income of individuals. Since the adoption of the Sixteenth Amendment the net income of both corporations and individuals has been subjected to taxes of the same nature; but the tax imposed has discriminated heavily against at least many of the businesses which are incorporated.[5]

The imposition of the heavier tax on corporations by means of an annual tax in the form of a franchise tax de-

[5] Under the War Revenue Act of October 3, 1917, c. 63, §§ 1, 4, 40 Stat. 300, 301, 302, the normal tax on individuals was 4% while that on corporations was 6%. The Revenue Act of 1918, c. 18, §§ 210, 230, 40 Stat. 1057, 1062, 1075, imposed on individuals a normal tax of 12% for 1918 and 8% thereafter, with sub-normal rates of 6% and 4% respectively; the rate on corporations was 12% for 1918, 10% thereafter; the excess profits tax imposed by § 301 of the same act, 40 Stat. 1057, 1088, applied only to corporations. Under the Act of 1921, c. 136, §§ 210, 230, 42 Stat. 227, 233, 252, the rate on individuals was 8% with a sub-normal rate of 4%, whereas the rate on corporations was to be 10% for 1921, and 12½% for following years. The Act of June 2, 1924, c. 234, §§ 210, 230, 43 Stat. 253, 264, 282, lowered the normal rate on individuals to 6% with sub-normal rates of 2% and 4%, but made no change in the rate to be paid by corporations. The Act of February 26, 1926, c. 27, §§ 210, 230, 44 Stat. 9, 21, 39, further lowered the rate on individuals to 5% with

clared to be for the privilege of doing business in corporate form is common, and since *Home Insurance Co.* v. *New York,* 134 U. S. 594, 606–607, the validity of such a tax has not been questioned. This heavier burden the State may impose by means of an annual franchise tax in addition to the ordinary property and excise taxes imposed upon all persons, natural and artificial. Or it may impose the heavier burden by means of a franchise tax which will be the sole tax upon the corporation. That is, it may make the franchise tax so high as to include both the tax representing the special privilege of doing business in corporate form and the equivalent for taxes borne by natural persons engaged in the same occupation. Few propositions are better settled than the rule that, in determining whether a state tax violates the Federal Constitution, we are to look at the operation or effect of the tax and not at its name or form. *Clark* v. *Titusville,* 184 U. S. 329, 333–334; *Brown-Forman Co.* v. *Kentucky,* 217 U. S. 563, 571; *Interstate Busses Corporation* v. *Blodgett,* 276 U. S. 245. Compare *Atchison, Topeka & Santa Fe R. R. Co.* v. *Matthews,* 174 U. S. 96, 103. Since a State is permitted to impose upon the corporation more than a pro rata share of the common burden of taxation, I find nothing in the Federal Constitution which prohibits it from adopting any of the familiar kinds of taxes as the means of the heavier imposition. Surely, there is nothing inherently objectionable in the long established, commonly used gross earnings tax, which should prevent its being selected for that purpose.

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sub-normals of 1½% and 3%, but raised the rate of the corporation income tax to 13% for 1925 and 13½% thereafter.

The Report of the Secretary of the Treasury for 1927, p. 48, states: "If we include the tax paid by individuals on the dividends received from corporations, the rate of tax on net corporate income is 15.27 per cent, whereas had all the corporations been taxed as partnerships the average rate of tax on their net income would have been 9.1 per cent."

Why Pennsylvania should have chosen to impose upon corporations a heavier tax than upon individuals or partnerships engaged under like circumstances in the same line of business, or why it should have selected this particular form of tax as the means of doing so, we have no occasion to enquire. The State may have done this, because, in view of the advantages inherent in corporate organization, the Legislature believed that course necessary in order to insure a just distribution of the burdens of government. In *Flint* v. *Stone-Tracy Co.*, 220 U. S. 107, 162, this Court listed the advantages which justify the imposition of special taxes on corporations: "The continuity of the business, without interruption by death or dissolution, the transfer of property interests by the disposition of shares of stock, the advantages of business controlled and managed by corporate directors, the general absence of individual liability, these and other things inhere in the advantages of business thus conducted, which do not exist when the same business is conducted by private individuals or partnerships." [6]

[6] This reason for heavier taxation of corporations was stressed in Congress both in the debate on the proposed amendment to the War Revenue Bill of 1898 taxing corporations on their gross receipts, and in the debate on the corporation tax amendment to the Tariff Bill of 1909. See 31 Cong. Rec. 4964, 5092, 5101; 44 Cong. Rec. 4237. Senator Root stated: "My own state has for many years grouped all corporations within its borders, with certain specific exceptions, in a class upon the revenues of which it imposes a tax imposed on no other members of the community. And it is a late day for us to be told that there is no right in the United States to adopt this old, familiar, general basis of classification for the purpose of imposing an excise tax. It is founded upon reason, sir, and not alone upon authority." 44 Cong. Rec. 4005–4006.

The states, too, have acted upon this theory. See Annual Report of the Assessors of New York, 1882, pp. 15–17; Communication of the Secretary of State and the Attorney General of Kansas, relating to the bill for an annual franchise tax, 1911.

In proposing the enactment of a tax of one shilling on the pound on the profits and income of concerns with limited liability, April 19,

In Pennsylvania the practice of imposing heavier burdens upon corporations dates from a time when there,[7] as elsewhere in America, the fear of growing corporate power was common. The present heavier imposition may be a survival of an early effort to discourage the resort to that form of organization. The apprehension is now less common. But there are still intelligent, informed, just-minded and civilized persons who believe that the rapidly growing aggregation of capital through corporations constitutes an insidious menace to the liberty of the citizen; that it tends to increase the subjection of labor to capital; that, because of the guidance and control necessarily exercised by great corporations upon those engaged in business, individual initiative is being impaired and creative power will be lessened; that the absorption of capital by corporations, and their perpetual life, may bring evils similar to those which attended mortmain; that the evils incident to the accelerating absorption of business by corporations outweigh the benefits thereby secured; and that

1920, the Chancellor of the Exchequer said: "I justify it on much broader grounds. Companies incorporated with a limited liability enjoy privileges and conveniences by virtue of the law for which they may well be asked to pay some acknowledgment." The statement is quoted in Report of the Secretary of the Treasury for 1920, p. 42.

[7] A commission appointed pursuant to joint resolution of the Legislature of Pennsylvania reported in 1862: "Corporations in this State are very numerous and very powerful. They have not only drawn within their control an immense amount of capital, but they have drawn within their power the entire commerce of the State. . . . The franchises of corporations are property, and the legitimate subject of taxation; in fixing a tax upon corporations these extraordinary privileges, their franchises, constitute the first grounds of the Commonwealth's claim to contribution, and in that consists her right to discriminate in favor of the public." Shortly after this report the Legislature passed the Act of April 30, 1864, P. L. 218, the first of the special taxes on corporations which have since formed an integral part of the revenue system of the State.

the process of absorption should be retarded. The Court may think such views unsound. But, obviously, the requirement that a classification must be reasonable does not imply that the policy embodied in the classification made by the legislature of a State shall seem to this Court a wise one. It is sufficient for us that there is nothing in the Federal Constitution which prohibits a State from imposing a heavier tax burden upon corporations organized for the purpose of engaging exclusively in intrastate commerce; and that there is nothing inherently objectionable in the instrument which Pennsylvania selected for imposing the heavier burden—the gross receipts tax.

For these reasons, I should have no doubt that the statute of Pennsylvania was well within its power, if the question were an open one. But it seems to me that the validity of such legislation has been established by a decision of this Court rendered after much consideration. The contention here sustained differs in no essential respect from that made and overruled in *Flint* v. *Stone-Tracy Co.*, 220 U. S. 107, 161. There, as here, the tax was imposed merely because the owner of the business was a corporation, as distinguished from an individual or a partnership. There, as here, the character of the owner was the sole fact on which the distinction was made to depend. There, as here, the discrimination was not based on any other difference in the source of the income or in the character of the property employed. The cases differ in but two respects, neither of them material. In the *Flint* case the tax was on net income while here it is on gross receipts; and the *Flint* case arose under the Fifth Amendment while the present case arises under the Fourteenth. But a tax on net income is no more "peculiarly applicable to corporations" than is a tax on gross receipts; and in the *Flint* case it was distinctly ruled that "even if the principles of the Fourteenth Amendment were ap-

plicable to the present case," the tax must be upheld. More recently in *Fort Smith Lumber Co.* v. *Arkansas,* 251 U. S. 532, 534, the validity of a state statute discriminating against corporations was sustained, and it was said that " a State may have a policy in taxation," and that " a discrimination between corporations and individuals with regard to a tax like this cannot be pronounced arbitrary, although we may not know the precise ground of policy that led the State to insert the distinction in the law." Compare *Southwestern Oil Co.* v. *Texas,* 217 U. S. 114, 126. In my opinion, the judgment of the Supreme Court of Pennsylvania should be affirmed.

MR. JUSTICE HOLMES concurs in this opinion.

MR. JUSTICE STONE, dissenting.

That businesses carried on in corporate form may be taxed while those carried on by individuals or partnerships are left untaxed, was the rule broadly applied under the Fifth Amendment in *Flint* v. *Stone-Tracy Company,* 220 U. S. 107, and I can see no reason for not applying it here under the Fourteenth Amendment as well. It is no objection to a taxing statute that the classification is based on two distinct elements—here the doing of business in a corporate form, upheld in *Flint* v. *Stone-Tracy Co., supra,* (and see *Home Insurance Co.* v. *New York,* 134 U. S. 594; *Fort Smith Lumber Co.* v. *Arkansas,* 251 U. S. 532), and the character of the business done as distinguished from other classes of business, upheld in *Southwestern Oil Co.* v. *Texas,* 217 U. S. 114; *Brown-Forman Co.* v. *Kentucky,* 217 U. S. 563; *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245. For it was decided in *Stebbins* v. *Riley,* 268 U. S. 137, that such a combination of two permissible bases of classification may itself be made the basis of a classification.

NATIONAL LEATHER COMPANY *v.* COMMONWEALTH OF MASSACHUSETTS.

ERROR TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

No. 205. Argued February 23, 1928.—Decided May 28, 1928.

A law of Massachusetts (G. L., 1921, c. 63) imposes an excise on foreign corporations for the privilege of carrying on or doing business in the State, at a fixed rate per thousand dollars upon such proportion of the fair cash value of all the shares constituting the capital stock of the corporation taxed, as the value of the assets, real and personal, employed in business within the State bears to the value of its total assets. Petitioner, a Maine corporation, had its offices and transacted its business wholly in Massachusetts, the business comprising the buying of hides and skins, having them tanned by others, and selling the leather through the tanners. It operated no tanneries itself. It owned all the stock of two subsidiary Maine corporations, both having tanneries and engaged in tanning in Massachusetts, one of which did tanning for petitioner alone, and the other chiefly so, though it also had selling branches in other States. In assessing petitioner's excise, the value of the stocks of the subsidiaries was included as part of its assets employed by it in business within Massachusetts. *Held:*

1. That the finding that the subsidiary stocks were so employed was justifiable, and that their inclusion in computing the excise was not to tax property beyond the State's jurisdiction, in violation of the due process clause of the Fourteenth Amendment, even assuming that they had no situs in Massachusetts for the purpose of imposing a direct property tax. Pp. 422, 423.
2. The question whether the value of the stock of one of the subsidiaries attributable to its business in other States should have been deducted, is not presented, inasmuch as its decision was left open by the court below as dependent on a different statutory remedy from the one invoked in this case. P. 424.
3. Whether the subsidiaries would be subject to similar excises, and the constitutional propriety of so taxing them, either independently or in connection with the excise against petitioner, is not considered. *Id.*

256 Mass. 419, affirmed.

ERROR to a decree of the Supreme Judicial Court of Massachusetts, dismissing petitions for the recovery of excise taxes levied upon a foreign corporation for the privilege of doing business in Massachusetts. The judgment was entered in the Supreme Judicial Court in Suffolk County on a rescript from the full court.

Mr. Philip Nichols, with whom *Mr. Putnam B. Smith* was on the brief, for plaintiff in error.

A State cannot require of a foreign corporation, as a condition of doing even a purely local business within its limits, that it pay an excise tax upon or measured by property not within the jurisdiction of the State. *Union Refrigerator Transit Co.* v. *Kentucky,* 199 U. S. 194; *Southern Ry. Co.* v. *Kentucky,* 274 U. S. 76; *Western Union* v. *Kansas,* 216 U. S. 1; *Looney* v. *Crane Co.,* 245 U. S. 178; *International Paper Co.* v. *Massachusetts,* 246 U. S. 135; *Alpha Cement Co.* v. *Massachusetts,* 268 U. S. 203.

The inclusion of the stock of the subsidiary companies among the assets employed by plaintiff in error in business in Massachusetts, for the purpose of measuring the "corporate excess" taxable in Massachusetts, was in effect the imposition of a tax upon such stock. Under the Massachusetts law, corporate excess is the amount by which the value of the aggregate capital stock exceeds the value of the fixed assets, such as real estate and machinery, and the non-taxable securities only, and consequently tangible personal property and taxable securities are included in the corporate excess, as well as good-will and franchise value. The corporate excess of a foreign corporation doing business in Massachusetts thus determined is allocated to Massachusetts in the same proportion that the assets employed in business in Massachusetts bear to the entire assets.

Therefore, the determination of the situs of the assets of a foreign corporation not only establishes the apportionment of the good-will or franchise value, if any, as between Massachusetts and other States in which the corporation owns property or does business, but, with respect to tangible personal property and securities which would be taxable if owned by an individual resident, it settles the question whether the property is to be taxed by Massachusetts or not; and the inclusion of the stock of the other two companies among the "assets employed in business in Massachusetts" by plaintiff in error was thus in effect the direct taxation of such stock in the hands of plaintiff in error.

The stock of the other companies owned by plaintiff in error was not within the jurisdiction of Massachusetts. A corporation has its domicil in the State which created it, and even if its principal, or only, place of business is in another State, it is still a foreign corporation within such State. The primary situs of stock in a corporation is the domicil of the stockholder, and when one corporation owns stock in another, the situs of the stock so held is the State in which the corporation owning the stock was organized. *Sturgis* v. *Carter,* 114 U. S. 511; *Hawley* v. *Malden,* 232 U. S. 1; *Wright* v. *L. & N. R. R. Co.,* 236 U. S. 687.

Decisions holding that, when capital in the form of intangible property is regularly employed in business within a State, such property may be subject to taxation in such State, although the owner is a non-resident or a foreign corporation, are confined to credits in the form of notes or otherwise in the hands of an agent for investment and reinvestment in the regular course of business. *New Orleans* v. *Stempel,* 175 U. S. 309; *Bristol* v. *Washington County,* 177 U. S. 133; *State Board* v. *Comptoir Nationale D'Escompte,* 191 U. S. 388; *Scottish Ins. Co.*

v. *Bowland,* 196 U. S. 611; *Metropolitan Life Ins. Co.* v. *New Orleans,* 205 U. S. 395; *Liverpool Ins. Co.* v. *Orleans Board of Assessors,* 221 U. S. 346; *DeGanay* v. *Lederer,* 250 U. S. 376.

This principle has never until the present case been extended to shares of stock in corporations.

The fact that the stock certificates happened to be kept in Massachusetts is of no importance, at least when the stock was not commonly bought, sold, or pledged by the taxpayer and there was no business advantage in keeping the stock certificates in any particular place. *Kennedy* v. *Hodges,* 215 Mass. 112; *Clark* v. *Treasurer, etc.,* 218 Mass. 292; *Welch* v. *Treasurer, etc.,* 223 Mass. 87.

In a case like the present, the ownership of the stock is merely a means of enjoying a beneficial interest in the business and property of the corporations, and liability to taxation, if it exists at all, must be based on the residence of the taxpayer, the State in which the corporations were organized, or the State in which their property was located or their business carried on. The first two possible grounds of taxing jurisdiction admittedly do not exist in the present case.

Jurisdiction for tax purposes over the shares of a foreign corporation owned by a non-resident cannot, however, be made to rest on the situs of the corporate property or the doing of corporate business within the taxing State. *R. I. Hospital Trust Co.* v. *Doughton,* 270 U. S. 69.

The " corporate fiction " cannot constitutionally be disregarded and the plaintiff in error treated as the owner of the property of its subsidiaries, or as carrying on business through them as its agents, because it owns all of their corporate stock, when such a course is not necessary to do justice, but will work gross injustice by taxing the same property twice.

It is well settled that a corporation is not doing business within a State merely because a subsidiary corporation of which it owns all the stock is doing business in such State. *Philadelphia, etc. Ry. Co.* v. *McKibben,* 243 U. S. 264; *People's Tobacco Co.* v. *American Tobacco Co.,* 246 U. S. 79; *Cannon Mfg. Co.* v. *Cudahy Co.,* 267 U. S. 333.

The present case is not only one of double taxation, but of double taxation coupled with an arbitrary discrimination. If the Commonwealth is justified in disregarding the "corporate fiction," it should carry such disregard to its logical conclusion and tax affiliated companies on their combined assets and corporate excess, and not recognize the corporate fiction in taxing the subsidiaries and disregard it in taxing the parent corporation, and thus, in effect, tax the same property twice when all other property in the Commonwealth is taxed but once.

There is a peculiar injustice in the application of this tax in that the value of the tanneries—the real estate and machinery—which are locally taxed, is deducted from the value of the corporate excess of the corporations which own them, and if plaintiff in error were treated throughout as the owner of the assets, instead of the stock, of the subsidiaries, the tanneries as well as the other property of the subsidiaries would be taxed but once. But here, while it is treated as the owner of the assets of the subsidiaries situated in Massachusetts for the purpose of acquiring taxing jurisdiction, it is treated as the owner of the stock of the subsidiaries for the purpose of measuring the tax, so that the value of the assets locally taxed cannot be deducted from its corporate excess.

The decision of the Supreme Judicial Court of Massachusetts rests upon a misconstruction of the statute which, if controlling, renders the statute clearly unconstitutional.

Mr. James S. Eastham, Assistant Attorney General of Massachusetts, with whom *Messrs. Arthur K. Reading,* Attorney General, *F. Delano Putnam,* and *R. Ammi Cutter,* Assistant Attorneys General, were on the brief, for defendant in error.

The Commissioner of Corporations and Taxation has determined as a matter of fact that the shares of stock in the subsidiary corporations were assets of the plaintiff in error actually employed in business in Massachusetts. His finding should not be upset unless plainly wrong as a matter of fact, or unless as a matter of law shares of stock are assets incapable of being employed in business outside the State of the domicil either of the corporation owning or of that issuing the shares.

It is within the power of a State to levy an excise tax upon a foreign corporation for the privilege of doing intrastate business within the State, including as part of the measure of the tax intangible assets employed in business within the State by the taxpayer corporation. Such intangible assets may properly include shares of stock, belonging to the taxpayer, in foreign subsidiary corporations (if such shares are employed as capital of the taxpayer within the State) without in any way depriving the taxpayer corporation of its property without due process of law.

The Massachusetts corporation tax, contained in General Laws (1921), c. 63, is an excise tax measured in part by corporation excess. Shares of stock may be used in a place where they are subject to control. They may be subject to control outside the State of their technical *situs.* In a business sense, certificates of stock represent capital; they have an intrinsic value commensurate with the value of the shares which they represent—and thus may become the basis upon which the owner of the shares is enabled to obtain credit at the place where the certificates are found.

The ownership of shares in subsidiaries may well be for the purpose of exercising control of certain processes essential to the conduct of business within the taxing State by the parent company. Like other intangibles, shares of stock may acquire a "business situs" outside the domicil either of the stockholder or of the corporation issuing the shares.

The facts presented by the record show clearly that the Commissioner of Corporations and Taxation was warranted in finding that the shares in the subsidiary companies were employed in business within Massachusetts during the years in question.

MR. JUSTICE SANFORD delivered the opinion of the Court.

The National Leather Co., a Maine corporation, applied by two petitions to the Supreme Judicial Court of Massachusetts for Suffolk County,[1] for the abatement of portions of the taxes that had been exacted of it by the commissioner of corporations and taxation, under Chapter 63 of the General Laws, for the privilege of carrying on business in Massachusetts in the years 1922 and 1923. The petitions alleged that the statute as applied was an attempt to tax property not within the jurisdiction of Massachusetts and repugnant to the Fourteenth Amendment. The cases were consolidated, and at the hearing, by order of the presiding justice, were reserved for determination by the full court upon the pleadings and an agreed statement of facts. The court *in banc* sustained the excise, 256 Mass. 419; and in accordance with its rescript the court for Suffolk County dismissed the petitions. The writ of error was properly directed to the latter court. See *Davis* v. *Cohen Co.*, 268 U. S. 638, 639.

The statute provides that every foreign corporation shall pay annually "with respect to the carrying on or

[1] These proceedings were instituted under G. L. c. 63, § 77.

doing of business by it within the commonwealth," an excise consisting in part of an amount " equal to five dollars per thousand upon the value of the corporate excess employed by it within the commonwealth," which is defined as " such proportion of the fair cash value of all the shares constituting the capital stock . . . as the value of the assets, both real and personal, employed in any business within the Commonwealth . . . bears to the value of the total assets of the corporation," with certain exceptions not here material. § 30, cl. 4; § 39(1).

The business of the National Leather Co.—hereinafter called the petitioner—was the purchasing of hides and skins, having them tanned by other companies, and selling the leather through the tanners. It operated no tanneries itself. Its business was conducted wholly in Massachusetts; its business offices were located there; and it carried on no active business outside the State. Among other properties it owned the entire capital stock, except a few qualifying shares, of the A. C. Lawrence Leather Co. and the National Calfskin Co., two other Maine corporations. Its upper leather was tanned chiefly by these two subsidiary corporations; and its sole leather by other corporations in which it had no interest.

The business of the Lawrence Company was the tanning of hides, principally for upper leather, which it sold on a commission basis. Most of its tanning was done for the petitioner. Its tanneries were in Massachusetts, where it was engaged in business, but it was qualified to do business and had selling branches in four or five other States. The business of the Calfskin Company was tanning hides of the petitioner. Its tannery was in Massachusetts, where it was engaged in business. It had no property or selling branches outside Massachusetts, and was not qualified to do business in any other State except Maine.

In determining the portions of the excises based upon "corporate excess" the commissioner included all the capital stock of the Lawrence Company and the Calfskin Company owned by the petitioner, as part of the assets employed by it in business within Massachusetts; but did not include any stocks owned by it in other corporations which were not engaged in business within Massachusetts.

The petitions for abatement were directed solely to the portions of the excises assessed by reason of this inclusion of the capital stocks of the Lawrence and Calfskin Companies.

The petitioner contends that the inclusion of these stocks as part of the assets employed by it in business in Massachusetts for the purpose of measuring its taxable corporate excess is in effect the imposition of a tax upon the stocks themselves; that these stocks, as distinguished from the assets of the subsidiary corporations, had no situs in Massachusetts and were not within its jurisdiction; and that the statute, so applied, is therefore beyond the power of the State and violates the due process clause of the Fourteenth Amendment.

The Massachusetts court, in holding that the statute had been properly construed and applied by the commissioner and in sustaining the validity of the taxes, said: "The commissioner . . . in determining under G. L. c. 63, § 44, the 'corporate excess employed within the Commonwealth, by every foreign corporation' doing domestic business here is required to give those words the definition and to follow the legislative mandate in G. L. c. 63, § 30, cl. 4. . . . The petitioner held the stock in its two subsidiary corporations for the lawful prosecution of its business. All the facts recited lead to the conclusion that there was no error of law in including the shares of stock for computation of the excise of the petitioner. The entire business of the petitioner was con-

ducted in this Commonwealth, the certificates of stock of the subsidiary corporations actually were kept here, all the business of one and a large part of the business of the other was carried on here, and the petitioner made use of the activities of these subsidiary corporations as essential parts of its business. Without discussing whether any one or more of these factors standing alone would justify the method employed in ascertaining the excise, their collective force is sufficient to that end. The interpretation of the words of the statute requires this result. . . . The language of the statute . . . is explicit and its meaning is not clouded or obscure. It cannot render subject to direct taxation property not within the jurisdiction; but where other essential elements are present the excise is justified. . . . Apart from the domicil of the several corporations and looking for the moment only at tangible property and its physical location, there is jurisdiction to sustain taxation in this Commonwealth. All the business of the petitioner and of one of its subsidiaries and a principal part of the business of the other subsidiary is conducted in Massachusetts. . . . [There] is no direct tax on property, but an excise on a foreign corporation, levied solely on the privilege of doing domestic business within this Commonwealth, measured in part on the value of stock employed in business in this Commonwealth. . . . The question, whether the value of the stock of the Lawrence Company attributable to that part of its business and property in other States ought to have been deducted is not presented on this record. That relates to overvaluation, as to which a different remedy is provided . . . G. L., c. 63, § 71."

For present purposes it may be assumed that the capital stocks of the two subsidiary companies had no situs in Massachusetts which brought them within the jurisdiction of that State for the purpose of imposing a direct property tax. See *Rhode Island Trust Co.* v. *Doughton,*

270 U. S. 69, 80. But here the statute does not impose any direct tax upon these stocks and, as construed by the Massachusetts court, merely treats them as assets employed by the petitioner in its business within the State, and therefore requires that they be included when the total assets so employed by it are computed for the purpose of arriving at the proportionate part of the value of its own capital shares—determined by comparing the assets employed in business within the State with the total assets wheresoever employed or located—on which the excise for the privilege of carrying on its business within the State is imposed.

It is settled law that a State may lawfully impose upon a foreign corporation a tax for the privilege of doing business within its borders which is measured by the proportionate part of its total gross receipts that are received within the State, *Maine* v. *Grand Trunk Ry. Co.,* 142 U. S. 217, 228; or by the proportionate part of its total capital stock which is represented by the property located and business transacted within the State, *Hump Hairpin Co.* v. *Emmerson,* 258 U. S. 290, 293, *American Mfg. Co.* v. *St. Louis* (C. C. A.), 8 F. (2d) 447, 450; or by the proportionate part of its total net income which is attributable to the business carried on within the State, *Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S. 113, 120, *Bass, etc. Ltd.* v. *Tax Comm.,* 266 U. S. 271, 282.

Here both the commissioner, the administrative officer charged with the enforcement of the statute, and the Massachusetts court, have found that the capital stocks of the two subsidiary companies were employed by the petitioner in carrying on its business within Massachusetts. We find no adequate reason for disturbing this conclusion. On the contrary, looking to the substance of the transactions and not merely to form, we think that the petitioner, through its ownership of the capital stock of the two subsidiary corporations and the control which it

thereby exercised over them, did, in a very real and practical sense, employ these stocks as an instrumentality in carrying on its business within Massachusetts—to the extent, at least, that the controlled activities and property of the subsidiary corporations were within the State. *Cf. Edwards* v. *Chile Copper Co.*, 270 U. S. 452, 456. And since the Massachusetts court did not determine whether the value of the stock in the Lawrence Company attributable to that part of its business and property in other States should have been deducted, for the reason that, as to such overvaluation, if any, a different statutory remedy was provided, we have no occasion to consider that question.

It is said that under the Massachusetts statute the subsidiary corporations were subject to similar excises on their own account, and therefore there will be what is akin to double taxation. But we are not here concerned with an excise tax on the subsidiary corporations and need not consider its constitutional propriety either independently or in connection with the excise against the petitioner.

Judgment affirmed.

MR. JUSTICE MCREYNOLDS is of opinion that the effect of the challenged judgment is to tax property beyond the jurisdiction of Massachusetts, and that therefore it should be reversed.

SISSETON AND WAHPETON BANDS OF SIOUX INDIANS *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 596. Argued April 27, 1928.—Decided May 28, 1928.

1. The Act of March 4, 1927, granting the appellants in this case one year within which to "appeal," was intended to confer the right of appeal as distinguished from the right to petition for certiorari conferred by the Jurisdictional Act of February 13, 1925. P. 427.

2. The Act of April 11, 1916, which provides "that all claims of whatsoever nature which the Sisseton and Wahpeton bands of Sioux Indians may have or claim to have against the United States shall be submitted to the Court of Claims . . . . for the amount due or claimed to be due said bands from the United States under any treaties or laws of the United States," and which confers jurisiction upon that court "to hear and determine all claims of said bands against the United States," etc., is not to be construed as authorizing the court to render a judgment for the Indians contrary to express provisions of the treaties and statutes involved, upon the ground that such provisions were induced by mistake of fact or were not understood by individual members of the bands when adopted. P. 436.

So *held* respecting:

(1) A claim for the difference between the amount received by the Indians under an Act of March 2, 1861, for lands north of the Minnesota River, at 30 cents per acre—the allowance fixed by the Senate in 1860 pursuant to a Treaty of 1858—and the amount they would have received at $1.25 per acre—the price at which their lands south of the river were sold under an Act of March 3, 1863, and which the court below found to be their value at that time; the claim resting on the argument that the northern lands must also have been worth the larger price in 1860, and that they must have been undervalued through a mistake of the parties. P. 428.

(2) A claim for additional compensation for land in Dakota Territory which had been ceded by the Indians and paid for by the United States under an agreement ratified by Congress (Act of Feb. 14, 1873), the ground for the claim being that, through a mutual mistake of the parties, the area involved was underestimated by three million acres, and the amount of the claim being for a corresponding addition to the amount agreed to and paid. P. 432.

(3) A claim for the full principal amount of a trust fund set apart by treaty (July 23, 1851) in consideration of a cession of lands to the Government, and which had been paid, pursuant to the treaty, by payment of interest at 5% for a period of fifty years; the basis of the claim being that such a trust obligation could not be discharged by such payments, and that the treaty was misunderstood by some of the Indians—not the representatives who negotiated it—as providing for payment of the principal also at the end of the fifty-year period. P. 434.

3. An Act of March 3, 1863, following a Sioux Indian outbreak, directed the President to set aside for the Sisseton and Wahpeton bands, lands sufficient to provide each member willing to adopt the pursuit of agriculture with 80 acres of agricultural land. *Held*, (1) that recovery for failure to fulfill this obligation would require a finding of how many of the Indians were willing to follow such pursuit; (2) that the Act was not intended for the benefit of those who did not avail themselves of it because they were then in open hostility to the Government. Pp. 430, 437.
4. Jurisdiction over Indians and their tribal lands belongs to Congress and cannot be exercised by the courts in the absence of legislation conferring such rights as are subject to judicial cognizance. P. 437.

58 Ct. Cls. 302, affirmed.

APPEAL from a judgment of the Court of Claims dismissing a petition of the above-named bands of Indians claiming compensation on account of lands and trust funds.

Mr. Thomas Sterling, with whom *Messrs. Robert T. Tedrow* and *Walter W. McCaslin* were on the brief, for appellants.

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

MR. JUSTICE STONE delivered the opinion of the Court.

Appellants filed their petition in the Court of Claims under the Act of April 11, 1916, c. 63, 39 Stat. 47, printed in the margin so far as material,[1] conferring on the Court

[1] "That all claims of whatsoever nature which the Sisseton and Wahpeton bands of Sioux Indians may have or claim to have against the United States shall be submitted to the Court of Claims, with the right to appeal to the Supreme Court of the United States by either party, for the amount due or claimed to be due said bands from the United States under any treaties or laws of Congress; and jurisdiction is hereby conferred upon the Court of Claims to hear and determine all claims of said bands against the United States and also any legal or equitable defense, set off, or counterclaim which the United

of Claims jurisdiction to hear and determine all claims of the Sisseton and Wahpeton bands of Indians against the United States. The Court of Claims on its findings of fact and conclusions of law gave judgment dismissing the petition. 58 Ct. Cls. 302. This Court denied an application for certiorari. 275 U. S. 528. The present appeal was taken under Act of Congress approved March 4, 1927, c. 522, 44 Stat. Part III, p. 1847. It specifically granted to appellants one year from date within which to appeal and was intended, we think, to confer a right of appeal as distinguished from the right to petition for certiorari within three months of the judgment, conferred by §§ 3 and 8 of the Jurisdictional Act of February 13, 1925.

Appellants ask review by this Court of four items of their claim, all of which were denied by the court below. All involve the question, among others, whether under the special act conferring jurisdiction on the Court of Claims the authority of that court was limited to adjudicating the rights of appellants arising under treaties and statutes of the United States, in accordance with accepted principles of law and equity, or whether it could go behind those treaties and statutes and allow recovery of amounts not authorized to be paid by them, on grounds of inadequacy of consideration and mistake.

States may have against said Sisseton and Wahpeton bands of Sioux Indians, and to enter judgment, and in determining the amount to be entered herein the court shall deduct from any sums found due said Sisseton and Wahpeton bands of Sioux Indians any and all gratuities paid said bands or individual members thereof subsequent to March third, eighteen hundred and sixty-three; Provided, That in determining the amount to be entered herein, the value of the land involved shall not exceed the value of such land on March third, eighteen hundred and sixty-three. If any such question is submitted to said court it shall settle the rights, both legal and equitable, of said bands of Indians and the United States, notwithstanding lapse of time or statute of limitations."

The four items of claim now presented differ in some respects from the claims set up in the petition. The facts now relied on, so far as disclosed by the findings, to which the consideration of this Court is limited, may be summarized as follows:

I.

APPELLANTS' CLAIM FOR ADDITIONAL COMPENSATION FOR LANDS CEDED UNDER THE TREATY OF 1858.

This claim is in substance founded upon an asserted difference between the value of certain lands of petitioners and the amount allowed and paid for them under treaties of the United States with the Indians and subsequent action taken under them. The Court of Claims found that the petitioners were two bands of the Sioux Indians, having their habitat prior to July 3, 1851, along the upper Minnesota River. On that date they negotiated a treaty with the United States, later modified by the Senate of the United States, and as modified ratified by the Indians and the United States Government in September, 1852. 10 Stat. 952, 958. The treaty ceded to the United States all the lands of petitioners in the territory of Minnesota and Iowa.

By Article III as originally drafted reservations for the petitioners were set apart along the Minnesota River and following the negotiations of the treaty the petitioners, together with two other bands, the Wahpakoota and Medawakanton Indians, were removed to those reservations. These provisions for reservations for the four bands were stricken out of the treaty as ratified and a new provision substituted that the Indians should be paid ten cents an acre for these lands, payment to be in lieu of the reservations as originally provided for in Art. III of the Treaty as negotiated, the sum so paid to be added to the trust fund for the Indians provided for in other sections of the

treaty. The sum so paid and allotted to the trust fund amounted to $112,000. The President of the United States was authorized to set apart another reservation for these bands of Indians outside of the ceded territory, but no other reservation was in fact so set apart under the provisions of this treaty.

By Treaty of June, 1858, 12 Stat. 1031, 1037, it was stipulated that those portions of the reservations lying south of the Minnesota River should constitute reservations for the four bands with provisions for allotment and that the disposition to be made of the portions of the reservations on the north side of the river should be left to the United States Senate for decision. Senate Resolution of June 27, 1860, 12 Stat. 1042, provided that the Indians should be allowed 30¢ an acre for the lands lying on the north side of the river. These lands consisted of 469,000 acres for which the Indians were paid $170,880, payment being provided for by the Act of March 2, 1861, c. 85, 12 Stat. 221, 237.

In August, 1862 and until 1864, the Sisseton and Wahpeton bands participated in an outbreak of the Sioux Indians, during which many white settlers were massacred, and large amounts of property destroyed. In consequence, Congress, by Act of February 16, 1863, abrogated all treaties between them and the United States, declared all their lands and rights of occupancy within the State of Minnesota and all annuities and claims previously accorded to them forfeited and provided for payment of the damages suffered by citizens in consequence of the outbreak from funds of the Indians in the hands of the Government. By Act of March 3, 1863, lands in the reservation on the south side of the Minnesota River were sold, the Sisseton and Wahpeton bands ultimately receiving from the sale $647,457. The Court of Claims found that the value of these lands on March 3, 1863, was $1.25

an acre. The appellants argue here that as these lands were worth $1.25 an acre March 3, 1863, the lands on the north side of the river were worth that amount when sold for 30¢ an acre three years before, June 27, 1860, and that they are now entitled to recover the difference, aggregating $541,120 between the value so ascertained and the amount actually received from the sale, on the ground that there must have been a material mistake of the parties as to the value of the land and that the jurisdictional Act under which this suit was brought authorized the recovery of the value of the land as of March 3, 1863.

II.

APPELLANTS' CLAIM FOR COMPENSATION ARISING UNDER THE ACT OF MARCH 3, 1863, 12 STAT. 819.

Following the Sioux Indian outbreak of 1862 Congress, by Act of March 3, 1863, c. 119, 12 Stat. 819, provided that the President should set apart for the Sisseton and Wahpeton bands, among others, unoccupied lands outside the limits of any state sufficient to provide each member willing to adopt the pursuit of agriculture with eighty acres of agricultural land. Shortly afterwards such lands were so designated and set apart at Crow Creek on the Missouri River in Dakota territory. At this time, as a result of military operations against the Indians, two hundred and ninety-five full blood Indians of the Sisseton and Wahpeton bands, and one hundred and twelve half breeds of the four bands were military prisoners at Fort Snelling. They, with prisoners of other bands, were removed to the reservation at Crow Creek, arriving there about May 30th of that year, and lands were then finally set apart for them in the following July. Military operations were continued until 1864, during which most of the other members of the bands were driven out of the State

of Minnesota to points west of the Missouri River and into Canada. After the cessation of military operations, these other members of the two bands, numbering in 1866 between six hundred and eight hundred, gathered and settled near Fort Wadsworth in the eastern part of Dakota territory where, with the acquiescence of the Government, they remained until 1867 when the Lake Traverse and Devil's Lake reservations were set apart for them.

In the meantime an unsuccessful effort had been made by the Government to negotiate a treaty with these fragments of the bands for the extinguishment of their claim to lands in the Dakota territory, which claims were considered doubtful because the lands were claimed by other Indians. It does not appear that any material numbers of additional members of the bands went to the Crow Creek reservation or how many, if any, were willing to adopt the pursuit of agriculture.

By Art. II of the Treaty of February 19, 1867, the Sisseton and Wahpeton bands ceded to the United States the right to construct wagon roads, railroad and telegraph lines and other public improvements across the lands claimed by them and described in the treaty, and in consideration of the "confiscation of all their annuities, reservations and improvements" by the Government, it was provided that there should be set apart a permanent reservation for such members of the bands as had not been sent to the Crow Creek reservation. Such reservations were set apart, which became known as the Lake Traverse and Devil's Lake reservations. On the basis of these findings appellants contend that under the Act of March 3, 1863, they were entitled to recover the value of an allowance of eighty acres of agricultural land for each member of the bands, aggregating 322,080 acres of land, which, at $1.25 an acre, found by the Court of Claims to be the value at that date, amounts to $402,600.

III.

APPELLANTS' CLAIM FOR COMPENSATION FOR LANDS ALLEGED TO HAVE BEEN CEDED BUT NOT PAID FOR UNDER THE TREATY OF SEPTEMBER 20, 1872.

By Act of June 7, 1872, c. 325, 17 Stat. 281, the Secretary of the Interior was directed to report to Congress what title or interest the Sisseton and Wahpeton bands had in any portion of the land described in the second article of the Treaty of February 19, 1867, under which the Lake Traverse and Devil's Lake reservations were set apart, and also "whether any, and if any, what compensation ought in justice and equity to be made to the said bands of Indians respectively for the extinguishment of whatever title they may have to said lands." Under the statute the Secretary appointed a commission to make an investigation of the Indians' title to the land and if it found such title to be valid and complete to negotiate for the relinquishment of the title upon terms "at once favorable to the government and just to the Indians."

On October 3, 1872, the commission reported that prior to the treaty of February 19, 1867, the title to the tract of the Sisseton and Wahpeton bands was doubtful, as other bands of Sioux Indians claimed a common interest in the lands, but that the United States had, by that treaty, recognized the title of the Sisseton and Wahpeton bands and was by it estopped from denying their title. The commission reported that it estimated the tract of land to have an area of over eight million acres and that the value of the lands should be fixed at the sum of $800,000, although the Indians urged $200,000 more than this sum as the proper value and one of the commissioners was of the opinion that $800,000 was more than should be allowed.

The commission submitted with its report a proposed treaty which it had negotiated with the Indians under date of September 20, 1872 (Kappler's Indian Laws & Treaties, Vol. 2, p. 1057), under which the bands were to cede all their interest in the lands as well as all lands in the territory of Dakota, except the Lake Traverse and Devil's Lake reservations. The principal, but not the only consideration, was the $800,000, payable to the Indians in annual installments of $80,000 each, without interest.

By Act of February 14, 1873, c. 138, 17 Stat. 437, 456, Congress ratified and confirmed that portion of the treaty providing for the cession of the lands and the payment of $800,000, and appropriated $80,000 for the first installment payment. The treaty, as thus amended, and confirmed by Congress, was ratified by the Indians May 2, 1873 (Kappler's Indian Laws and Treaties, Vol. 2, p. 1059). The stipulated annual installments were appropriated and paid, the appropriation acts providing that the several installments were " for the relinquishment by said Indians of their claim to or interest in the land described in the second article of the Treaty made with them February 19, 1867." 18 Stat. 167, 441; 19 Stat. 192, 287; 20 Stat. 81, 310; 21 Stat. 127, 497; 22 Stat. 81.

In making the treaty or agreement of September 20, 1872, it was the belief and understanding of the parties that the approximate area of the tract of land to be sold and ceded by the Indians was eight million acres. In fact, the actual area of the land, as later determined, was eleven million acres. The Court of Claims found that the value of the land was not satisfactorily shown by the evidence either on March 3, 1863, or at the time of the making of the agreement or treaty.

Appellants contend that there was a mutual mistake of fact as to the quantity of land ceded and that the

Court of Claims should have awarded compensation at the rate of 10¢ an acre for the three million acres of land in excess of the eight million acres which was supposed to be the approximate area of the land at the time of the agreement.

IV.

Appellants' Claim for Payment of the Principal of the Trust Fund Created Under the Treaty of July 23, 1851.

The Treaty of July 23, 1851, provided for the creation of a trust fund to be paid by the Government to the Sisseton and Wahpeton bands for the cession by them of lands to the Government under this treaty. It was provided that the fund should be held by the Government and 5% interest on it paid annually by the Government to the Indians for a period of fifty years, which payments when completed were to be full payment of and to extinguish the trust fund. Under the treaty as submitted to the Senate for ratification, the amount of the trust fund was designated as $1,360,000, but under the treaty as amended by the Senate and ratified by the Indians, this amount was increased to $1,472,000.

Until the Indian outbreak of 1862 and the Act of February 16, 1863, the Government paid the stipulated annual payments and, notwithstanding the forfeiture of their rights by the Act of February 16, 1863, the Government has, under subsequent acts of Congress, accounted to the Indians for the remaining payments covering the entire fifty year period, less such amounts as were paid to citizens for damages sustained by them by reason of the outbreak.

The petitioners claim the right to recover the full principal sum set apart for them in addition to the installments paid which, alone, the treaty authorized, on the

ground that as the specified fund was designated as a trust fund the obligation of the Government with respect to it could not be discharged by the payment of an amount equivalent to annual interest upon the fund for fifty years, and also because the Court of Claims found that some members of the two bands did not understand at the time the treaty was made that the payment of interest on the trust fund for fifty years was to be in full payment of the principal, and did understand that at the end of the fifty-year period the principal was also to be paid over to the Indians.

It will be observed that of the four claims, Claims I, III, and IV are based on alleged mistakes which are urged as a sufficient basis for disregarding the express provisions of the treaties and statutes concerned, Claim I being based on an alleged mistake as to the value of the land purchased under a treaty; Claim III being based on a supposed mistake as to the amount of land purchased by the Government for a lump sum under a treaty, and Claim IV being based upon an alleged mistake of individual members of the bands as to the amount to be paid under the Treaty of July 23, 1851, although the Court of Claims found that it did not appear that their representatives, the chiefs and headmen who negotiated the treaty, did not understand the provisions of it.

It is also to be noted that there are no specific findings, supporting the claims, that the stipulated payments referred to in Claims I, III and IV were based on mistake or that different amounts would have been stipulated for and paid, had the parties or either of them been aware of the supposed mistakes or the equitable considerations now pressed upon us. To supply the lack of such findings petitioners are compelled to rely on inferences which they seek to draw from the facts as found and already stated in this opinion.

If we were to assume that the act conferring jurisdiction on the Court of Claims in this case is broad enough to allow a recovery based upon mistakes or other considerations inducing the treaties and acts of Congress with which we are now concerned we should find it difficult to discern in the findings any basis for the inferences necessary to support a recovery on such a theory. But we think it plain that that act only gave authority to the Court of Claims to hear and determine claims "for the amount due or claimed to be due said bands from the United States under any treaties or laws of Congress." It does not purport to alter or enlarge any rights conferred on petitioners by the treaties or laws of the United States or authorize any recovery except in accordance with the legal principles applicable in determining those rights under laws and treaties of the United States. See *United States* v. *Old Settlers,* 148 U. S. 427, 468, 469; *United States* v. *Mille Lac Chippewas,* 229 U. S. 498, 500.

To give the relief now sought it would be necessary to render a judgment predicated upon the abrogation of express provisions of the treaties and statutes concerned and the substitution for them of other provisions which Congress has never enacted or authorized. These are political, not judicial powers. The Act does not purport to bestow such powers on the Court of Claims and it would require resort to a violent and inadmissible presumption to infer any such purpose in the act. Cf. *United States* v. *Old Settlers, supra;* and see *Lone Wolf* v. *Hitchcock,* 187 U. S. 553, 567.

The second claim stands upon a somewhat different footing, but here also are wanting findings of fact essential to support the claim. The Act of March 3, 1863, directed the President to set aside for the Sisseton and Wahpeton bands, lands sufficient in extent to enable them to assign to each member of the band "who is willing to adopt the pursuit of agriculture, eighty acres of agricultural land,"

but there is no finding showing how many, or that any of the Indians were willing to follow the pursuit of agriculture after the adoption of the Act of March 3. Hence there is no foundation for any recovery which might be awarded on the basis of allotments to which only those members of the band were entitled who were willing to follow the pursuit of agriculture.

So far as those members of the band in amity with the United States were concerned, the findings show that they were provided for in the Crow Creek reservation set apart under the act of Congress. Appellants' present claim extends to those who were then in active hostility to the United States, the subject of its military operations and who were fleeing from capture by the military arm of the Government. The Act of March 3, 1863, passed at the very time of these operations could not, we think, have been intended for the benefit of those Indians who were then in open hostility to the Government and who for that reason did not avail of its benefits or comply with the conditions.

Nor can it now be deemed the basis of any claim for damages against the United States cognizable by a court—a conclusion at which we arrive quite independently of any consideration of the fact that the United States later made provision for these hostile and fugitive members of the two bands in the Lake Traverse and Devil's Lake reservations. Jurisdiction over them and their tribal lands was peculiarly within the legislative power of Congress and may not be exercised by the courts in the absence of legislation conferring rights upon them such as are the subject of judicial cognizance. See *Lone Wolf* v. *Hitchcock, supra,* 565; *Cherokee Nation* v. *Hitchcock,* 187 U. S. 294; *Stephens* v. *Cherokee Nation,* 174 U. S. 445, 483. This the jurisdictional Act of April 11, 1916, plainly failed to do.

Affirmed.

OLMSTEAD ET AL. *v.* UNITED STATES

GREEN ET AL. *v.* SAME.

McINNIS *v.* SAME.

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

Nos. 493, 532 and 533. Argued February 20, 21, 1928.—Decided June 4, 1928.

1. Use in evidence in a criminal trial in a federal court of an incriminating telephone conversation voluntarily conducted by the accused and secretly overheard from a tapped wire by a government officer, does not compel the accused to be a witness against himself in violation of the Fifth Amendment. P. 462.
2. Evidence of a conspiracy to violate the Prohibition Act was obtained by government officers by secretly tapping the lines of a telephone company connected with the chief office and some of the residences of the conspirators, and thus clandestinely overhearing and recording their telephonic conversations concerning the conspiracy and in aid of its execution. The tapping connections were made in the basement of a large office building and on public streets, and no trespass was committed upon any property of the defendants. *Held,* that the obtaining of the evidence and its use at the trial did not violate the Fourth Amendment. Pp. 457–466.
3. The principle of liberal construction applied to the Amendment to effect its purpose in the interest of liberty, will not justify enlarging it beyond the possible practical meaning of "persons, houses, papers, and effects," or so applying "searches and seizures" as to forbid hearing or sight. P. 465.
4. The policy of protecting the secrecy of telephone messages by making them, when intercepted, inadmissible as evidence in federal criminal trials, may be adopted by Congress through legislation; but it is not for the courts to adopt it by attributing an enlarged and unusual meaning to the Fourth Amendment. P. 465.
5. A provision in an order granting certiorari limiting the review to a single specific question, does not deprive the Court of jurisdiction to decide other questions presented by the record. P. 466.
6. The common law of evidence having prevailed in the State of Washington since a time antedating her transformation from a

Territory to a State, those rules apply in the trials of criminal cases in the federal courts sitting in that State. P. 466.

7. Under the common law, the admissibility of evidence is not affected by the fact of its having been obtained illegally. P. 467.
8. The rule excluding from the federal courts evidence of crime procured by government officers by methods forbidden by the Fourth and Fifth Amendments, is an exception to the common law rule. *Id.*
9. Without the sanction of an Act of Congress, federal courts have no discretion to exclude evidence, the admission of which is not unconstitutional, because it was unethically procured. P. 468.
10. The statute of Washington, adopted in 1909, making the interception of telephone messages a misdemeanor, cannot affect the rules of evidence applicable in federal courts in criminal cases. *Id.*

19 F. (2d) 842, 848, 850, affirmed.

CERTIORARI, 276 U. S. 609, to judgments of the Circuit Court of Appeals affirming convictions of conspiracy to violate the Prohibition Act. See 5 F. (2d) 712; 7 F. (2d) 756, 760. The order granting certiorari confined the hearing to the question whether the use in evidence of private telephone conversations, intercepted by means of wire tapping, violated the Fourth and Fifth Amendments.

Mr. John F. Dore, with whom *Messrs. F. C. Reagan* and *J. L. Finch* were on the brief, for petitioners in No. 493.

The principles controlling this case were first announced by this Court in *Boyd* v. *United States,* 116 U. S. 616. They have never been deviated from, but have been reiterated again and again in a series of cases, the last of which is *Byars* v. *United States,* 273 U. S. 28. See also *Gouled* v. *United States,* 255 U. S. 298.

If incriminating evidence is secured by means of trickery, subterfuge, trespass or fraud, and, after it has been so secured, finds its way into the hands of government officials, no legal ground can be urged against its introduction in evidence, for the reason that no constitutional question

is involved. If, however, the fraud, subterfuge, trespass or theft is perpetrated by government officials, or if a government official participates directly or indirectly therein, the evidence thus secured is not admissible for the reason that it was secured in a manner which violates the provisions of the Fourth and Fifth Amendments to the Constitution. *Byars* v. *United States, supra; United States* v. *Mandel,* 17 F. (2d) 270; *Rudkin,* J., in case at bar, dissenting opinion.

The *Boyd* case lays down search and seizure law, and nothing but search and seizure law, but it involved neither a search nor a seizure.

Silverthorne Lumber Co. v. *United States,* 251 U. S. 385, was ruled by application of the Fourth Amendment, but it was not a search and seizure case either. Upon appeal to this Court, it was held that the proceedings were an attempt to do indirectly what the Government could not do directly.

Gouled v. *United States, supra,* did not involve a search and seizure as these words are employed in legal parlance, but the case was ruled by search and seizure law and application of the Fourth and Fifth Amendments.

It is not necessary that the act complained of be strictly a search or seizure, if its effect be to compel a man to furnish the evidence to convict himself of crime, and the act be one of governmental agency. See *Village of Euclid* v. *Ambler Realty Co.,* 272 U. S. 365.

These principles apply to "all invasions on the privacies of life." No exact definition of this term has been found, but obviously it is a comprehensive term and surely includes the right to be let alone.

The right to the exclusive enjoyment of a telephone free of interference from anybody, is a right of privacy. No government agent has a right to interpose an earpiece upon it any more than he has a right to raise the curtain and peek through another's window. If two persons are

conversing in a room of one of them, an intrusion therein by a government agent secretly is an intrusion upon their right of privacy. Is it any the less so if they are in separate rooms connected by a telephone and some interloper " listens in " by means of " tapping " the wire? Such conduct constitutes an invasion of the privacies of life, and when done by a government agent, falls within the condemnation of the *Boyd* case; and evidence thereby secured is inadmissible for the purpose of securing a conviction in a criminal case.

Mr. Frank R. Jeffery, for petitioner in No. 533, and some of the petitioners in No. 532.

This Court has held that the Fourth and Fifth Amendments were inspired by the same abuses, preceding the adoption of the Constitution, and they must be liberally construed in favor of the citizen and his liberty, and that stealthy encroachments upon the rights guaranteed by them will not be tolerated. *Boyd* v. *United States,* 116 U. S. 616.

The majority opinion of the Circuit Court of Appeals for the Ninth Circuit places a narrow construction upon the rights protected by these Amendments, declaring that "the purpose of the Amendments is to prevent the invasion of homes and offices and seizure of incriminating evidence found therein."

The majority opinion concedes that the tapping of the defendants' telephone wires is an "unethical intrusion on the privacies of persons who are suspected of crime," but holds that "it is not an act which comes within the letter of the prohibition of constitutional provisions."

These declarations of the Circuit Court of Appeals are directly contrary to the holdings of this Court. In *Ex parte Jackson,* 96 U. S. 727, this Court did not limit the application of the Amendments to the " invasion of homes and offices." Neither has this Court limited the applica-

tion of these Amendments to the "letter" of the same. On the contrary, the underlying thought in each decision of this Court affecting these Amendments has been to apply the "spirit" of them. In the *Boyd* case this Court declares that these principles "apply to all invasions on the part of the Government and its employees of the security of a man's home and the privacies of life." In that case no search and seizure were involved, if the words "search and seizure" be given their literal meaning. The Court in its decision admitted, in effect, that no actual search and no actual seizure were involved, but held that the result was the same as if an actual search and an actual seizure were made.

It definitely established that it is not the mere form and substance of the acts of government agents which determine whether the search and seizure are in violation of the constitutional provisions, but it is the results accomplished by such acts. If such acts "effect the sole object and purpose of search and seizure," then they come within the inhibition of the Fourth and Fifth Amendments.

In the case at bar, the sole object of the government agents was to obtain evidence relating to transactions in liquor by the defendants. The conversations heard over the telephone were of evidential value only. It is no crime to exchange messages relating to the possession and sale of liquor. The crime is to possess and sell liquor, and conversations concerning the possession or sale are only admissible when the liquor which is possessed or sold is seized. Suppose that the messages relating to the possession and sale of the liquor had been sent by letter. No warrant to search the homes, offices or persons of the defendants for such letter could have been obtained. *Gouled* v. *United States,* 255 U. S. 298. Likewise, no valid search warrant could be obtained by government agents to tap the telephone lines of the defendants for

the purpose of securing evidence of the private messages and conversations relating to the possession or sale of liquor.

Furthermore, the admission of the evidence of government agents as to the messages transmitted over the telephone wires compelled the defendants to give evidence against themselves just as effectively as if they had been forced to take the witness stand and themselves testify as to the messages sent over the telephone; yea, just as effectively as if the defendants had been required to produce in court private messages sent by letter of exactly the same import as the messages sent by 'phone. The result is to compel the defendants to become the unwilling source of evidence to convict them of crime, which this Court in the *Boyd* case held to be a violation of the defendants' right under the Fifth Amendment.

It would indeed be difficult to attempt to enumerate all of those things coming within the phrase "the privacies of life," but it would be equally difficult to suggest any more sacred or any greater privacy of life under present conditions than that of using a private telephone line for transmitting private and confidential communications to one's family and business associates. What greater invasion of this privacy of life could be contemplated than to have one's private and confidential communications intercepted and overheard by promiscuous government agents by means of secretly tapping one's telephone? The telephone as a means of communication was not known to the world at the time of Lord Camden's judgment, or at the time of the adoption of the Fourth and Fifth Amendments, or even at the time of the decision of this Court in the *Boyd* case. The only means of communication at that time was by letter, and the right to transmit a secret message in a letter without having it intercepted and read by government agents was de-

clared by this Court in no uncertain language in the case of *Ex parte Jackson,* 96 U. S. 727.

It is not the paper which is protected by the constitutional inhibitions, but it is the message contained in the letter. In the same manner, any message transmitted by telephone or telegraph should be protected. The interpretation of the language of the Amendments should be sufficiently liberal and elastic to apply the principles laid down in the *Boyd* case to the conditions of to-day. That this is the true criterion is declared by this Court in *Village of Euclid* v. *Ambler Realty Co.,* 272 U. S. 365.

The telephones used by the defendants were theirs against all the world, even against the telephone company while their tolls were paid. The telephone lines leading to the defendants' houses and offices, as well as the telephone equipment in the houses and offices, were the private property of the defendants. They had the right to the exclusive use and enjoyment of them, except the license given by them to connect other lines with their lines for the purpose of receiving incoming calls. When the government agents tapped the defendants' telephone lines they committed a trespass upon the property rights of the defendants. The effect of this trespass was to project themselves into the houses and offices of the defendants, with the same result as if they had broken through the windows or doors and secretly seized letters containing the identical messages that were transmitted over the 'phones. The result was not only an unlawful search for evidence, but an unlawful seizure by means of which the defendants, in effect, were compelled to testify against themselves. As stated by Judge Rudkin, those who use the telephone are not broadcasting to the world. Under modern conditions the telephone has, to a large extent, supplanted the mails as a means of transmitting private messages. It has become indispensable to every home and office. If the stamp of approval is put upon the ac-

tion of government agents in seeking and obtaining evidence against those suspected of crime by means of tapping private telephone lines, the door is opened wide for the great mass of citizens using the telephone for lawful purposes to have their private and confidential communications relating to business and family subjected to the scrutiny of government agents. Such a system of espionage would become deplorable and unbearable. It would deprive the citizenship of the country of the personal security and the enjoyment of the privacies of life guaranteed by the Constitution, and subject them to an espionage unequalled by the conditions prevailing under the King's officers prior to the Revolution.

Messrs. Arthur E. Griffin, George F. Vanderveer, and *Samuel B. Bassett,* on a brief for petitioners in No. 532.

The right to use the telephone, and the right of privacy in its enjoyment, are property rights which the courts have repeatedly upheld. It was precisely this right of privacy or secrecy in business matters which this Court protected in the *Boyd* case. The same was true in *Weeks* v. *United States,* 232 U. S. 383, where the article involved was a canceled lottery ticket having no pecuniary value whatever and which had been seized by government agents solely for evidential purposes. In both of these cases this Court said that each of these Amendments threw much light upon the other because they were designed to remedy the same abuses. And it has always been held that any search and seizure was unreasonable under the provisions of the Fourth Amendment which had for its purpose the compulsory extortion of evidence, no matter what the form of the evidence, to be used in violation of the Fifth Amendment.

In the *Gouled* case it was held immaterial whether the seizure of a man's papers was accompanied by force or threat of force, or whether it was accomplished by stealth.

Ex parte Jackson condemned the "bare inspection" of letters in the mail, entirely without reference to the question whether the owner was thereby deprived of his papers or not. It was the violation of their privacy that was obnoxious to the law. See Cooley, Const. Lim., 7th ed., p. 424; *Ex parte Brown,* 7 Mo. App. 484; *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385. None of these decisions can be reconciled with the narrow interpretation which the Solicitor General would place upon these Amendments.

It is doubtless true that a message transmitted by telephone is in no sense a paper. But it is also true that privacy is as essential to the conduct of business by telephone or telegraph as by mail, and the courts have always been as ready to protect privacy in the one case as in the other. The Constitution was not written for a day or a year, nor can it be re-written to meet every changing circumstance of our lives. For this reason Constitutions deal with principles.

The Government suggests that the case can not be distinguished from a case where a federal officer on a public street overhears conversations within a citizen's private residence, or where a federal officer joins a band of conspirators and listens from day to day to conversations in their homes and elsewhere. But it seems to us that both these cases are clearly distinguishable from the case at bar on the precise basis that in neither of them was there any wrongful invasion of any right of privacy, but on the contrary in both hypothetical cases the conspirators had themselves thrown privacy to the four winds and, of course, could not be heard to complain of the results of their own folly. Here it is appropriate to call attention to the statute of Washington forbidding the intercepting of telephone or telegraph messages, Remington's Comp. Stats., § 2656, Subdiv. 18, and to a federal statute passed by Congress in 1912 to protect the privacy of the radio.

The abuses of which we complain in this case are identical in kind with those to which the English people were subjected during the latter half of the Eighteenth Century, and the speeches of Lord Chatham and James Otis, and the letters of Thomas Jefferson and John Adams, leave no doubt in our minds as to how they would have felt on the subject of having government agents tap their private telephone wires. *Burdeau* v. *McDowell,* 256 U. S. 465.

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

The Fifth Amendment can only be invoked by first showing that there has been a violation of the Fourth Amendment. The third clause of the Fifth Amendment "nor shall be compelled in any criminal case to be a witness against himself" merely gave constitutional sanction to a rule of common law well established at the time the Constitution was adopted. 6 Jones on Evidence, 2d ed., § 2474; *Twining* v. *New Jersey,* 211 U. S. 78.

Obviously the case has nothing to do with the provision against self-incrimination in its original and primary sense, that is, the compulsion of the accused by legal process to produce in court evidence either testimonial or physical. Ordinarily evidence of incriminating oral statements made by the accused before, during, or after the commission of a crime, overheard by a witness and testified to by him in court, is always competent.

The only inhibition against evidence in this form is that which forbids evidence of extorted confessions. Here there was neither extortion nor confession. There was no coercion, threat or promise. Moreover, the conversations were not in the nature of confessions. They were a part and parcel of the criminal transaction. The prohibition officers, relating in court what they overheard, were testi-

fying as immediate witnesses of the crime, as much so as would be a witness who testified to having seen liquor delivered and the price paid.

Aside from the rule against duress of legal process and extorted confessions, it was a fundamental and time-honored rule of common law that evidence was not rendered inadmissible in a criminal case by illegality of the means by which it was obtained. This rule of the common law is still in force in England and Canada and in a majority of the States. The illegality dealt with in many of the state cases was the violation of the constitutional rights under provisions of state constitutions substantially identical with the Fourth Amendment. 5 Jones on Evidence, c. 22; Blakemore on Prohibition, 2d. ed., p. 519; Cornelius on Search and Seizure, p. 45; Search and Seizure, 8 Am. Bar. Ass'n Journal, p. 479; *State* v. *Aime,* 62 Utah 476; *State* v. *Owens,* 302 Mo. 348.

In the light of *Boyd* v. *United States,* 116 U. S. 616; *Adams* v. *New York,* 192 U. S. 585; *Weeks* v. *United States,* 232 U. S. 383; *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385; *Gouled* v. *United States,* 255 U. S. 298; *Agnello* v. *United States,* 269 U. S. 20; *Amos* v. *United States,* 255 U. S. 313; *Byars* v. *United States,* 273 U. S. 28; and *Marron* v. *United States,* 275 U. S. 192, it is not open to question that evidence obtained by federal officers in violation of the Fourth Amendment is inadmissible as evidence in criminal trials in federal courts. To that extent the common law rule and anything said to the contrary in the *Adams* case has been abandoned.

The limits of this departure from the common law rule are, however, definite. The reason for it appears to be the close interrelation that is conceived to exist between the Fourth and the Fifth Amendments. It has never been extended to evidence obtained illegally in the general sense, but only where the illegality amounts to a violation of the Fourth Amendment. Evidence obtained

by trespass, fraud, unethical or even criminal methods, is admissible if the Fourth Amendment be not violated. 5 Jones on Evidence, §§ 2075 et seq.; *Adams* v. *New York, supra; Hester* v. *United States,* 265 U. S. 57; *McGuire* v. *United States,* 273 U. S. 95; *Koths* v. *United States,* 16 F. (2d) 59; *United States* v. *Mandel,* 17 F. (2d) 270.

The Fifth Amendment therefore is not involved in this case, unless it can be invoked as a result of a violation of the Fourth Amendment.

The Fourth Amendment was the direct consequence of two abuses practiced by the English Government—the use of general warrants and the use of writs of assistance. The *Wilkes* and *Entick* cases, in their criminal and civil aspects, attracted universal attention and aroused tremendous opposition to the use of general warrants, resulting in their condemnation by the courts and a declaration of their illegality by the House of Commons. May, Const. Hist. of England, p. 110 et seq.; 1 Cooley, Const. Lim., 8th ed., p. 612; *Boyd* v. *United States, supra*; 19 How. State Trials, 1029, 1153.

The use of writs of assistance in the American Colonies was authorized by the Act of Parliament of 1767, 7 Geo. III, c. 46. The use of the writs soon led to great public agitation and opposition, particularly in Massachusetts, led by James Otis, but their use continued to the outbreak of the Revolution. 3 Channing, Hist. of U. S., pp. 1–5 and 114. Knowledge and apprehension of these abuses—warrants and writs—was fresh in the minds of the colonial statesmen when it came to framing the Constitution.

The Virginia Constitution had already adopted a bill of rights, of which § 10 was as follows:

"That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particu-

larly described and supported by evidence, are grievous and oppressive, and ought not to be granted."

An amendment to the Federal Constitution similar to this was proposed by the Virginia ratification convention. Journal of the Convention of Virginia, p. 34. As introduced by James Madison at the first session of Congress it read:

"The right of the people to be secured in their persons, their houses, their papers, and their other property from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized." Annals of Congress, Vol. I, col. 434.

A committee of one member from each State was appointed to consider and report such amendments as ought to be proposed by Congress to the legislatures of the States. In the report of this committee was proposed an amendment differing but slightly from that originally proposed by Madison. The word "effects" was substituted for the words "other property." Mr. Gerry, saying that he presumed there was a mistake in the wording of the clause, moved that it be amended to read: "The right of the people to be secured in their persons, houses, papers, and effects against unreasonable seizures and searches . . ." Annals of Congress, Vol. I, col. 754.

The amendment came out of conference committee in its present form, and we have no light as to the reason for the further change in phraseology. It is quite apparent that the principal, if not the sole, peril in the minds of those who advocated the amendment and against which its protection was intended was the use of general warrants and the writs of assistance.

In *Boyd* v. *United States, supra,* the Court said that the judgment of Lord Camden in *Entick* v. *Carrington* might be considered as sufficiently explanatory of what was

meant by unreasonable searches and seizures; and Chief Justice Taft in the *Carroll* case said that the Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted.

This Court has frequently said that the Fourth and Fifth Amendments should be construed liberally; but it is submitted that by no liberality of construction can a conversation passing over a telephone wire become a "house," no more can it become a "person," a "paper," or an "effect." "Effects" is the least definite of the four words. This Court has said of "effects" that—

"when the word is used alone, or *simpliciter,* it means all kinds of personal estate. . . . But if there be some word used with it, restraining its meaning, then it is governed by that, or means something *ejusdem generis.*" *Planters Bank* v. *Sharp,* 6 How. 301, 321.

Giving to the word its literal import, the sense in which it is generally understood, its natural significance taken in connection with the context in which it appears, it does not seem possible to include within its meaning anything other than tangible personal property, or to extend it to include a telephone conversation or any intangible right of privacy of the parties with respect to such conversation.

Petitioners are urging the extension of the Fourth Amendment into a new field, the limits of which are difficult to define. If evidence obtained by tapping telephone wires at points not in private dwellings is excluded on constitutional grounds, on the same principle would not all manner of evidence gathered by ruse or entrapment have to be excluded? Suppose an officer obtains access to a telephone on a party line and listens to incriminating conversations of other parties having telephones on the line; suppose that, instead of tapping a wire, he goes to the telephone exchange and, with or without permission of the operator, plugs in on a private

line and listens; suppose he leases an office and puts a dictaphone in the wall of the adjoining office and listens; suppose without trespassing he is able to put his ear to the keyhole of the door of an office or house and listens; suppose he pretends to join a conspiracy and thereby gains access to the inner councils of the conspirators and hears the hatching of their criminal schemes. These examples, varying into slight shades of distinction, might be multiplied indefinitely to show the extremes to which the principle contended for would lead. Once cut loose from the fair literal import of the language of the Amendment, and there is no place to anchor.

In the construction of the Amendment a balance should be sought between that which will preserve the fundamental safeguard which the Amendment was designed to secure, and at the same time not unduly fetter the arm of the Government in the enforcement of law. The practical aspect of the problem is forcibly expressed in *People* v. *Mayen,* 188 Cal. 237.

If, in any circumstances, obtaining evidence by tapping wires is deemed an objectionable governmental practice, it may be regulated or forbidden by statute, or avoided by officers of the law, but clearly the Constitution does not forbid it unless it involves actual unlawful entry into a house.

Messrs. Otto B. Rupp, Charles M. Bracelen, Robert H. Strahan, and *Clarence B. Randall* on behalf of The Pacific Telephone and Telegraph Company, American Telephone and Telegraph Company, United States Independent Telephone Association, and the Tri-State Telephone and Telegraph Company, as *amici curiae,* filed a brief by special leave of Court.

The petitioners were using the telephone lines and facilities of the local telephone company, such as were available to everyone without discrimination. The func-

tion of a telephone system in our modern economy is, so far as reasonably practicable, to enable any two persons at a distance to converse privately with each other as they might do if both were personally present in the privacy of the home or office of either one. When the lines of two "parties" are connected at the central office, they are intended to be devoted to their exclusive use, and in that sense to be turned over to their exclusive possession. A third person who taps the lines violates the property rights of both persons then using the telephone, and of the telephone company as well. *Internat'l News Service* v. *Associated Press,* 248 U. S. 215.

It is of the very nature of the telephone service that it shall be private; and hence it is that wire tapping has been made an offense punishable either as a felony or misdemeanor by the legislatures of twenty-eight States, and that in thirty-five States there are statutes in some form intended to prevent the disclosure of telephone or telegraph messages, either by connivance with agents of the companies or otherwise.

The wire tapper destroys this privacy. He invades the "person" of the citizen, and his "house," secretly and without warrant. Having regard to the substance of things, he would not do this more truly if he secreted himself in the home of the citizen.

In view of what this Court has held as to the intent and scope of the Fourth and Fifth Amendments, it would not seem necessary to enter into any meticulous examination of their precise words. But if that be done, does not wire tapping involve an "unreasonable search," of the "house" and of the "person"? There is of course no search warrant, as in the nature of the case there could not be. If the agent should secrete himself in the house or office to examine documents, would not that constitute a "search"? Is the case any different in the eyes of the law if from a distance the agent physically

enters upon the property of the citizen, as he does when he taps the wire, and from that point projects himself into the house? Certainly in its practical aspect the latter case is worse than the first, because the citizen is utterly helpless to detect the espionage to which he is subjected.

If it be said that, in any event, there is no "seizure," that an oral conversation cannot be seized, we answer, in the first place, that this is a purely superficial view, which puts the letter above the spirit and intent of the law. The "privacy of life" and the liberty of the citizen have been invaded. And, in the second place, we do not understand that seizure is a necessary element to constitute the offense. An unreasonable search alone violates the Fourth Amendment. It is enough that the federal officer has made an unreasonable search, within the meaning of the Fourth Amendment, and has thereby unlawfully obtained evidence. The evidence so obtained is excluded under the provisions of the Fifth Amendment.

The Government itself provides the mail service, a public service, and the Government authorizes the telephone company to provide the telephone service, also a public service. It is settled that the communication in the mail is protected. Upon what reason, then, can it be said that the communication by telephone is not protected?

The telephone has become part and parcel of the social and business intercourse of the people of the United States, and the telephone system offers a means of espionage compared to which general warrants and writs of assistance were the puniest instruments of tyranny and oppression.

The telephone companies deplore the use of their facilities in furtherance of any criminal or wrongful enterprise. But it was not solicitude for law breakers that caused the people of the United States to ordain the Fourth and

Fifth Amendments as part of the Constitution. Criminals will not escape detection and conviction merely because evidence obtained by tapping wires of a public telephone system is inadmissible, if it should be so held; but, in any event, it is better that a few criminals escape than that the privacies of life of all the people be exposed to the agents of the Government, who will act at their own discretion, the honest and the dishonest, unauthorized and unrestrained by the courts. Legislation making wire tapping a crime will not suffice if the courts nevertheless hold the evidence to be lawful. Writs of assistance might have been abolished by statute, but the people were wise to abolish them by the Bill of Rights.

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

These cases are here by certiorari from the Circuit Court of Appeals for the Ninth Circuit. 19 F. (2d) 842 and 850. The petition in No. 493 was filed August 30, 1927; in Nos. 532 and 533, September 9, 1927. They were granted with the distinct limitation that the hearing should be confined to the single question whether the use of evidence of private telephone conversations between the defendants and others, intercepted by means of wire tapping, amounted to a violation of the Fourth and Fifth Amendments.

The petitioners were convicted in the District Court for the Western District of Washington of a conspiracy to violate the National Prohibition Act by unlawfully possessing, transporting and importing intoxicating liquors and maintaining nuisances, and by selling intoxicating liquors. Seventy-two others in addition to the petitioners were indicted. Some were not apprehended, some were acquitted and others pleaded guilty.

The evidence in the records discloses a conspiracy of amazing magnitude to import, possess and sell liquor un-

lawfully. It involved the employment of not less than fifty persons, of two seagoing vessels for the transportation of liquor to British Columbia, of smaller vessels for coastwise transportation to the State of Washington, the purchase and use of a ranch beyond the suburban limits of Seattle, with a large underground cache for storage and a number of smaller caches in that city, the maintenance of a central office manned with operators, the employment of executives, salesmen, deliverymen, dispatchers, scouts, bookkeepers, collectors and an attorney. In a bad month sales amounted to $176,000; the aggregate for a year must have exceeded two millions of dollars.

Olmstead was the leading conspirator and the general manager of the business. He made a contribution of $10,000 to the capital; eleven others contributed $1,000 each. The profits were divided one-half to Olmstead and the remainder to the other eleven. Of the several offices in Seattle the chief one was in a large office building. In this there were three telephones on three different lines. There were telephones in an office of the manager in his own home, at the homes of his associates, and at other places in the city. Communication was had frequently with Vancouver, British Columbia. Times were fixed for the deliveries of the "stuff," to places along Puget Sound near Seattle and from there the liquor was removed and deposited in the caches already referred to. One of the chief men was always on duty at the main office to receive orders by telephones and to direct their filling by a corps of men stationed in another room—the "bull pen." The call numbers of the telephones were given to those known to be likely customers. At times the sales amounted to 200 cases of liquor per day.

The information which led to the discovery of the conspiracy and its nature and extent was largely obtained by intercepting messages on the telephones of the conspirators by four federal prohibition officers. Small

wires were inserted along the ordinary telephone wires from the residences of four of the petitioners and those leading from the chief office. The insertions were made without trespass upon any property of the defendants. They were made in the basement of the large office building. The taps from house lines were made in the streets near the houses.

The gathering of evidence continued for many months. Conversations of the conspirators of which refreshing stenographic notes were currently made, were testified to by the government witnesses. They revealed the large business transactions of the partners and their subordinates. Men at the wires heard the orders given for liquor by customers and the acceptances; they became auditors of the conversations between the partners. All this disclosed the conspiracy charged in the indictment. Many of the intercepted conversations were not merely reports but parts of the criminal acts. The evidence also disclosed the difficulties to which the conspirators were subjected, the reported news of the capture of vessels, the arrest of their men and the seizure of cases of liquor in garages and other places. It showed the dealing by Olmstead, the chief conspirator, with members of the Seattle police, the messages to them which secured the release of arrested members of the conspiracy, and also direct promises to officers of payments as soon as opportunity offered.

The Fourth Amendment provides—"The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized." And the Fifth: "No person . . . shall be compelled, in any criminal case, to be a witness against himself."

It will be helpful to consider the chief cases in this Court which bear upon the construction of these Amendments.

Boyd v. *United States,* 116 U. S. 616, was an information filed by the District Attorney in the federal court in a cause of seizure and forfeiture against thirty-five cases of plate glass, which charged that the owner and importer, with intent to defraud the revenue, made an entry of the imported merchandise by means of a fraudulent or false invoice. It became important to show the quantity and value of glass contained in twenty-nine cases previously imported. The fifth section of the Act of June 22, 1874, provided that in cases not criminal under the revenue laws, the United States Attorney, whenever he thought an invoice, belonging to the defendant, would tend to prove any allegation made by the United States, might by a written motion describing the invoice and setting forth the allegation which he expected to prove, secure a notice from the court to the defendant to produce the invoice, and if the defendant refused to produce it, the allegations stated in the motion should be taken as confessed, but if produced, the United States Attorney should be permitted, under the direction of the court, to make an examination of the invoice, and might offer the same in evidence. This Act had succeeded the Act of 1867, which provided that in such cases the District Judge, on affidavit of any person interested, might issue a warrant to the marshal to enter the premises where the invoice was and take possession of it and hold it subject to the order of the judge. This had been preceded by the Act of 1863 of a similar tenor, except that it directed the warrant to the collector instead of the marshal. The United States Attorney followed the Act of 1874 and compelled the production of the invoice.

The court held the Act of 1874 repugnant to the Fourth and Fifth Amendments. As to the Fourth Amendment, Justice Bradley said (page 621):

"But, in regard to the Fourth Amendment, it is contended that, whatever might have been alleged against the constitutionality of the acts of 1863 and 1867, that of 1874, under which the order in the present case was made, is free from constitutional objection because it does not authorize the search and seizure of books and papers, but only requires the defendant or claimant to produce them. That is so; but it declares that if he does not produce them, the allegations which it is affirmed they will prove shall be taken as confessed. This is tantamount to compelling their production; for the prosecuting attorney will always be sure to state the evidence expected to be derived from them as strongly as the case will admit of. It is true that certain aggravating incidents of actual search and seizure, such as forcible entry into a man's house and searching amongst his papers, are wanting, and to this extent the proceeding under the Act of 1874 is a mitigation of that which was authorized by the former acts; but it accomplishes the substantial object of those acts in forcing from a party evidence against himself. It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be; because it is a material ingredient, and effects the sole object and purpose of search and seizure."

Concurring, Mr. Justice Miller and Chief Justice Waite said that they did not think the machinery used to get this evidence amounted to a search and seizure, but they agreed that the Fifth Amendment had been violated.

The statute provided an official demand for the production of a paper or document by the defendant for official search and use as evidence on penalty that by refusal he should be conclusively held to admit the incriminat-

ing character of the document as charged. It was certainly no straining of the language to construe the search and seizure under the Fourth Amendment to include such official procedure.

The next case, and perhaps the most important, is *Weeks* v. *United States,* 232 U. S. 383,—a conviction for using the mails to transmit coupons or tickets in a lottery enterprise. The defendant was arrested by a police officer without a warrant. After his arrest other police officers and the United States marshal went to his house, got the key from a neighbor, entered the defendant's room and searched it, and took possession of various papers and articles. Neither the marshal nor the police officers had a search warrant. The defendant filed a petition in court asking the return of all his property. The court ordered the return of everything not pertinent to the charge, but denied return of relevant evidence. After the jury was sworn, the defendant again made objection, and on introduction of the papers contended that the search without warrant was a violation of the Fourth and Fifth Amendments and they were therefore inadmissible. This court held that such taking of papers by an official of the United States, acting under color of his office, was in violation of the constitutional rights of the defendant, and upon making seasonable application he was entitled to have them restored, and that by permitting their use upon the trial, the trial court erred.

The opinion cited with approval language of Mr. Justice Field in *Ex parte Jackson,* 96 U. S. 727, 733, saying that the Fourth Amendment as a principle of protection was applicable to sealed letters and packages in the mail and that, consistently with it, such matter could only be opened and examined upon warrants issued on oath or affirmation particularly describing the thing to be seized.

In *Silverthorne Lumber Company* v. *United States,* 251 U. S. 385, the defendants were arrested at their homes and

detained in custody. While so detained, representatives of the Government without authority went to the office of their company and seized all the books, papers and documents found there. An application for return of the things was opposed by the District Attorney, who produced a subpoena for certain documents relating to the charge in the indictment then on file. The court said:

"Thus the case is not that of knowledge acquired through the wrongful act of a stranger, but it must be assumed that the Government planned or at all events ratified the whole performance."

And it held that the illegal character of the original seizure characterized the entire proceeding and under the *Weeks* case the seized papers must be restored.

In *Amos* v. *United States,* 255 U. S. 313, the defendant was convicted of concealing whiskey on which the tax had not been paid. At the trial he presented a petition asking that private property seized in a search of his house and store "within his curtilage," without warrant should be returned. This was denied. A woman, who claimed to be his wife, was told by the revenue officers that they had come to search the premises for violation of the revenue law. She opened the door; they entered and found whiskey. Further searches in the house disclosed more. It was held that this action constituted a violation of the Fourth Amendment, and that the denial of the motion to restore the whiskey and to exclude the testimony was error.

In *Gouled* v. *The United States,* 255 U. S. 298, the facts were these: Gouled and two others were charged with conspiracy to defraud the United States. One pleaded guilty and another was acquitted. Gouled prosecuted error. The matter was presented here on questions propounded by the lower court. The first related to the admission in evidence of a paper surreptitiously taken from the office of the defendant by one acting under the direc-

tion of an officer of the Intelligence Department of the Army of the United States. Gouled was suspected of the crime. A private in the U. S. Army, pretending to make a friendly call on him, gained admission to his office and in his absence, without warrant of any character, seized and carried away several documents. One of these belonging to Gouled, was delivered to the United States Attorney and by him introduced in evidence. When produced, it was a surprise to the defendant. He had had no opportunity to make a previous motion to secure a return of it. The paper had no pecuniary value, but was relevant to the issue made on the trial. Admission of the paper was considered a violation of the Fourth Amendment.

Agnello v. *United States,* 269 U. S. 20, held that the Fourth and Fifth Amendments were violated by admission in evidence of contraband narcotics found in defendant's house, several blocks distant from the place of arrest, after his arrest, and seized there without a warrant. Under such circumstances the seizure could not be justified as incidental to the arrest.

There is no room in the present case for applying the Fifth Amendment unless the Fourth Amendment was first violated. There was no evidence of compulsion to induce the defendants to talk over their many telephones. They were continually and voluntarily transacting business without knowledge of the interception. Our consideration must be confined to the Fourth Amendment.

The striking outcome of the *Weeks* case and those which followed it was the sweeping declaration that the Fourth Amendment, although not referring to or limiting the use of evidence in courts, really forbade its introduction if obtained by government officers through a violation of the Amendment. Theretofore many had supposed that under the ordinary common law rules, if the tendered evidence was pertinent, the method of obtaining it was

unimportant. This was held by the Supreme Judicial Court of Massachusetts in *Commonwealth* v. *Dana,* 2 Metcalf, 329, 337. There it was ruled that the only remedy open to a defendant whose rights under a state constitutional equivalent of the Fourth Amendment had been invaded was by suit and judgment for damages, as Lord Camden held in *Entick* v. *Carrington,* 19 Howell State Trials, 1029. Mr. Justice Bradley made effective use of this case in *Boyd* v. *United States.* But in the *Weeks* case, and those which followed, this Court decided with great emphasis, and established as the law for the federal courts, that the protection of the Fourth Amendment would be much impaired unless it was held that not only was the official violator of the rights under the Amendment subject to action at the suit of the injured defendant, but also that the evidence thereby obtained could not be received.

The well known historical purpose of the Fourth Amendment, directed against general warrants and writs of assistance, was to prevent the use of governmental force to search a man's house, his person, his papers and his effects; and to prevent their seizure against his will. This phase of the misuse of governmental power of compulsion is the emphasis of the opinion of the Court in the *Boyd* case. This appears too in the *Weeks* case, in the *Silverthorne* case and in the *Amos* case.

Gouled v. *United States* carried the inhibition against unreasonable searches and seizures to the extreme limit. Its authority is not to be enlarged by implication and must be confined to the precise state of facts disclosed by the record. A representative of the Intelligence Department of the Army, having by stealth obtained admission to the defendant's office, seized and carried away certain private papers valuable for evidential purposes. This was held an unreasonable search and seizure within the Fourth Amendment. A stealthy entrance in such cir-

cumstances became the equivalent to an entry by force. There was actual entrance into the private quarters of defendant and the taking away of something tangible. Here we have testimony only of voluntary conversations secretly overheard.

The Amendment itself shows that the search is to be of material things—the person, the house, his papers or his effects. The description of the warrant necessary to make the proceeding lawful, is that it must specify the place to be searched and the person or *things* to be seized.

It is urged that the language of Mr. Justice Field in *Ex parte Jackson,* already quoted, offers an analogy to the interpretation of the Fourth Amendment in respect of wire tapping. But the analogy fails. The Fourth Amendment may have proper application to a sealed letter in the mail because of the constitutional provision for the Postoffice Department and the relations between the Government and those who pay to secure protection of their sealed letters. See Revised Statutes, §§ 3978 to 3988, whereby Congress monopolizes the carriage of letters and excludes from that business everyone else, and § 3929 which forbids any postmaster or other person to open any letter not addressed to himself. It is plainly within the words of the Amendment to say that the unlawful rifling by a government agent of a sealed letter is a search and seizure of the sender's papers or effects. The letter is a paper, an effect, and in the custody of a Government that forbids carriage except under its protection.

The United States takes no such care of telegraph or telephone messages as of mailed sealed letters. The Amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants.

By the invention of the telephone, fifty years ago, and its application for the purpose of extending communications, one can talk with another at a far distant place. The language of the Amendment can not be extended and expanded to include telephone wires reaching to the whole world from the defendant's house or office. The intervening wires are not part of his house or office any more than are the highways along which they are stretched.

This Court in *Carroll* v. *United States,* 267 U. S. 132, 149, declared:

"The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted and in a manner which will conserve public interests as well as the interests and rights of individual citizens."

Justice Bradley in the *Boyd* case, and Justice Clark in the *Gouled* case, said that the Fifth Amendment and the Fourth Amendment were to be liberally construed to effect the purpose of the framers of the Constitution in the interest of liberty. But that can not justify enlargement of the language employed beyond the possible practical meaning of houses, persons, papers, and effects, or so to apply the words search and seizure as to forbid hearing or sight.

Hester v. *United States,* 265 U. S. 57, held that the testimony of two officers of the law who trespassed on the defendant's land, concealed themselves one hundred yards away from his house and saw him come out and hand a bottle of whiskey to another, was not inadmissible. While there was a trespass, there was no search of person, house, papers or effects. *United States* v. *Lee,* 274 U. S. 559, 563; *Eversole* v. *State,* 106 Tex. Cr. 567.

Congress may of course protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in federal criminal trials, by direct legislation,

and thus depart from the common law of evidence. But the courts may not adopt such a policy by attributing an enlarged and unusual meaning to the Fourth Amendment. The reasonable view is that one who installs in his house a telephone instrument with connecting wires intends to project his voice to those quite outside, and that the wires beyond his house and messages while passing over them are not within the protection of the Fourth Amendment. Here those who intercepted the projected voices were not in the house of either party to the conversation.

Neither the cases we have cited nor any of the many federal decisions brought to our attention hold the Fourth Amendment to have been violated as against a defendant unless there has been an official search and seizure of his person, or such a seizure of his papers or his tangible material effects, or an actual physical invasion of his house "or curtilage" for the purpose of making a seizure.

We think, therefore, that the wire tapping here disclosed did not amount to a search or seizure within the meaning of the Fourth Amendment.

What has been said disposes of the only question that comes within the terms of our order granting certiorari in these cases. But some of our number, departing from that order, have concluded that there is merit in the two-fold objection overruled in both courts below that evidence obtained through intercepting of telephone messages by government agents was inadmissible because the mode of obtaining it was unethical and a misdemeanor under the law of Washington. To avoid any misapprehension of our views of that objection we shall deal with it in both of its phases.

While a Territory, the English common law prevailed in Washington and thus continued after her admission in 1889. The rules of evidence in criminal cases in courts of the United States sitting there, consequently are those of the common law. *United States* v. *Reid,* 12 How. 361,

363, 366; *Logan* v. *United States,* 144 U. S. 263, 301; *Rosen* v. *United States,* 245 U. S. 467; *Withaup* v. *United States,* 127 Fed. 530, 534; *Robinson* v. *United States,* 292 Fed. 683, 685.

The common law rule is that the admissibility of evidence is not affected by the illegality of the means by which it was obtained. Professor Greenleaf in his work on evidence, vol. 1, 12th ed., by Redfield, § 254(a) says:

"It may be mentioned in this place, that though papers and other subjects of evidence may have been *illegally taken* from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility, if they are pertinent to the issue. The court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it form an issue, to determine that question."

Mr. Jones in his work on the same subject refers to Mr. Greenleaf's statement, and says:

"Where there is no violation of a constitutional guaranty, the verity of the above statement is absolute." Vol. 5, § 2075, note 3.

The rule is supported by many English and American cases cited by Jones in vol. 5, § 2075, note 3, and § 2076, note 6; and by Wigmore, vol. 4, § 2183. It is recognized by this Court in *Adams* v. *New York,* 192 U. S. 585. The *Weeks* case, announced an exception to the common law rule by excluding all evidence in the procuring of which government officials took part by methods forbidden by the Fourth and Fifth Amendments. Many state courts do not follow the *Weeks* case. *People* v. *Defore,* 242 N. Y. 13. But those who do, treat it as an exception to the general common law rule and required by constitutional limitations. *Hughes* v. *State,* 145 Tenn. 544, 551, 566; *State* v. *Wills,* 91 W. Va. 659, 677; *State* v. *Slamon,* 73 Vt. 212, 214, 215; *Gindrat* v. *People,* 138 Ill. 103, 111; *People* v. *Castree,* 311 Ill. 392, 396, 397; *State* v.

Gardner, 77 Mont. 8, 21; *State* v. *Fahn,* 53 N. Dak. 203, 210. The common law rule must apply in the case at bar.

Nor can we, without the sanction of congressional enactment, subscribe to the suggestion that the courts have a discretion to exclude evidence, the admission of which is not unconstitutional, because unethically secured. This would be at variance with the common law doctrine generally supported by authority. There is no case that sustains, nor any recognized text book that gives color to such a view. Our general experience shows that much evidence has always been receivable although not obtained by conformity to the highest ethics. The history of criminal trials shows numerous cases of prosecutions of oath-bound conspiracies for murder, robbery, and other crimes, where officers of the law have disguised themselves and joined the organizations, taken the oaths and given themselves every appearance of active members engaged in the promotion of crime, for the purpose of securing evidence. Evidence secured by such means has always been received.

A standard which would forbid the reception of evidence if obtained by other than nice ethical conduct by government officials would make society suffer and give criminals greater immunity than has been known heretofore. In the absence of controlling legislation by Congress, those who realize the difficulties in bringing offenders to justice may well deem it wise that the exclusion of evidence should be confined to cases where rights under the Constitution would be violated by admitting it.

The statute of Washington, adopted in 1909, provides (Remington Compiled Statutes, 1922, § 2656–18) that:

"Every person . . . who shall intercept, read or in any manner interrupt or delay the sending of a message over any telegraph or telephone line . . . shall be guilty of a misdemeanor."

This statute does not declare that evidence obtained by such interception shall be inadmissible, and by the common law, already referred to, it would not be. *People* v. *McDonald,* 177 App. Div. (N. Y.) 806. Whether the State of Washington may prosecute and punish federal officers violating this law and those whose messages were intercepted may sue them civilly is not before us. But clearly a statute, passed twenty years after the admission of the State into the Union can not affect the rules of evidence applicable in courts of the United States in criminal cases. Chief Justice Taney, in *United States* v. *Reid,* 12 How. 361, 363, construing the 34th section of the Judiciary Act, said:

"But it could not be supposed, without very plain words to show it, that Congress intended to give the states the power of prescribing the rules of evidence in trials for offenses against the United States. For this construction would place the criminal jurisprudence of one sovereignty under the control of another." See also *Withaup* v. *United States,* 127 Fed. 530, 534.

The judgments of the Circuit Court of Appeals are affirmed. The mandates will go down forthwith under Rule 31.

Affirmed.

MR. JUSTICE HOLMES:

My brother BRANDEIS has given this case so exhaustive an examination that I desire to add but a few words. While I do not deny it, I am not prepared to say that the penumbra of the Fourth and Fifth Amendments covers the defendant, although I fully agree that Courts are apt to err by sticking too closely to the words of a law where those words import a policy that goes beyond them. *Gooch* v. *Oregon Short Line R. R. Co.,* 258 U. S. 22, 24. But I think, as MR. JUSTICE BRANDEIS says, that apart from the Constitution the Government ought not to use

evidence obtained and only obtainable by a criminal act. There is no body of precedents by which we are bound, and which confines us to logical deduction from established rules. Therefore we must consider the two objects of desire, both of which we cannot have, and make up our minds which to choose. It is desirable that criminals should be detected, and to that end that all available evidence should be used. It also is desirable that the Government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. If it pays its officers for having got evidence by crime I do not see why it may not as well pay them for getting it in the same way, and I can attach no importance to protestations of disapproval if it knowingly accepts and pays and announces that in future it will pay for the fruits. We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part.

For those who agree with me, no distinction can be taken between the Government as prosecutor and the Government as judge. If the existing code does not permit district attorneys to have a hand in such dirty business it does not permit the judge to allow such iniquities to succeed. See *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385. And if all that I have said so far be accepted it makes no difference that in this case wire tapping is made a crime by the law of the State, not by the law of the United States. It is true that a State cannot make rules of evidence for Courts of the United States, but the State has authority over the conduct in question, and I hardly think that the United States would appear to greater advantage when paying for an odious crime against State law than when inciting to the disregard of its own. I am aware of the often repeated statement that in a criminal proceeding the Court will not take notice of the manner in which papers offered in evidence have been

obtained. But that somewhat rudimentary mode of disposing of the question has been overthrown by *Weeks* v. *United States,* 232 U. S. 383 and the cases that have followed it. I have said that we are free to choose between two principles of policy. But if we are to confine ourselves to precedent and logic the reason for excluding evidence obtained by violating the Constitution seems to me logically to lead to excluding evidence obtained by a crime of the officers of the law.

MR. JUSTICE BRANDEIS, dissenting.

The defendants were convicted of conspiring to violate the National Prohibition Act. Before any of the persons now charged had been arrested or indicted, the telephones by means of which they habitually communicated with one another and with others had been tapped by federal officers. To this end, a lineman of long experience in wire-tapping was employed, on behalf of the Government and at its expense. He tapped eight telephones, some in the homes of the persons charged, some in their offices. Acting on behalf of the Government and in their official capacity, at least six other prohibition agents listened over the tapped wires and reported the messages taken. Their operations extended over a period of nearly five months. The type-written record of the notes of conversations overheard occupies 775 typewritten pages. By objections seasonably made and persistently renewed, the defendants objected to the admission of the evidence obtained by wire-tapping, on the ground that the Government's wire-tapping constituted an unreasonable search and seizure, in violation of the Fourth Amendment; and that the use as evidence of the conversations overheard compelled the defendants to be witnesses against themselves, in violation of the Fifth Amendment.

The Government makes no attempt to defend the methods employed by its officers. Indeed, it concedes

that if wire-tapping can be deemed a search and seizure within the Fourth Amendment, such wire-tapping as was practiced in the case at bar was an unreasonable search and seizure, and that the evidence thus obtained was inadmissible. But it relies on the language of the Amendment; and it claims that the protection given thereby cannot properly be held to include a telephone conversation.

"We must never forget," said Mr. Chief Justice Marshall in *McCulloch* v. *Maryland,* 4 Wheat. 316, 407, "that it is a constitution we are expounding." Since then, this Court has repeatedly sustained the exercise of power by Congress, under various clauses of that instrument, over objects of which the Fathers could not have dreamed. See *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.,* 96 U. S. 1, 9; *Northern Pacific Ry. Co.* v. *North Dakota,* 250 U. S. 135; *Dakota Central Telephone Co.* v. *South Dakota,* 250 U. S. 163; *Brooks* v. *United States,* 267 U. S. 432. We have likewise held that general limitations on the powers of Government, like those embodied in the due process clauses of the Fifth and Fourteenth Amendments, do not forbid the United States or the States from meeting modern conditions by regulations which "a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive." *Village of Euclid* v. *Ambler Realty Co.,* 272 U. S. 365, 387; *Buck* v. *Bell,* 274 U. S. 200. Clauses guaranteeing to the individual protection against specific abuses of power, must have a similar capacity of adaptation to a changing world. It was with reference to such a clause that this Court said in *Weems* v. *United States,* 217 U. S. 349, 373: "Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions

and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall 'designed to approach immortality as nearly as human institutions can approach it.' The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality."

When the Fourth and Fifth Amendments were adopted, "the form that evil had theretofore taken," had been necessarily simple. Force and violence were then the only means known to man by which a Government could directly effect self-incrimination. It could compel the individual to testify—a compulsion effected, if need be, by torture. It could secure possession of his papers and other articles incident to his private life—a seizure effected, if need be, by breaking and entry. Protection against such invasion of "the sanctities of a man's home and the privacies of life" was provided in the Fourth and Fifth Amendments by specific language. *Boyd* v. *United States,* 116 U. S. 616, 630. But "time works changes, brings into existence new conditions and purposes." Subtler and more far-reaching means of invading privacy have become available to the Government. Discovery and invention have made it possible for the Government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet.

Moreover, "in the application of a constitution, our contemplation cannot be only of what has been but of what may be." The progress of science in furnishing the Government with means of espionage is not likely to stop with wire-tapping. Ways may some day be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions. "That places the liberty of every man in the hands of every petty officer" was said by James Otis of much lesser intrusions than these.[1] To Lord Camden, a far slighter intrusion seemed "subversive of all the comforts of society."[2] Can it be that the Constitution affords no protection against such invasions of individual security?

A sufficient answer is found in *Boyd* v. *United States,* 116 U. S. 616, 627–630, a case that will be remembered as long as civil liberty lives in the United States. This Court there reviewed the history that lay behind the Fourth and Fifth Amendments. We said with reference to Lord Camden's judgment in *Entick* v. *Carrington,* 19 Howell's State Trials, 1030: "The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case there before the court, with its adventitious circumstances; they apply to all invasions on the part of the Government and its employés of the sanctities of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal se-

[1] Otis' Argument against Writs of Assistance. See Tudor, James Otis, p. 66; John Adams, Works, Vol. II, p. 524; Minot, Continuation of the History of Massachusetts Bay, Vol. II, p. 95.

[2] *Entick* v. *Carrington,* 19 Howell's State Trials, 1030, 1066.

curity, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence of a crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other." [3]

In *Ex parte Jackson,* 96 U. S. 727, it was held that a sealed letter entrusted to the mail is protected by the Amendments. The mail is a public service furnished by the Government. The telephone is a public service furnished by its authority. There is, in essence, no difference between the sealed letter and the private telephone message. As Judge Rudkin said below: "True the one is visible, the other invisible; the one is tangible, the other intangible; the one is sealed and the other unsealed, but these are distinctions without a difference." The evil incident to invasion of the privacy of the telephone is far greater than that involved in tampering with the mails. Whenever a telephone line is tapped, the privacy of the persons at both ends of the line is invaded and all con-

[3] In *Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447, 479, the statement made in the *Boyd* case was repeated; and the Court quoted the statement of Mr. Justice Field in *In re Pacific Railway Commission,* 32 Fed. 241, 250: "Of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves, not merely protection of his person from assault, but exemption of his private affairs, books, and papers, from the inspection and scrutiny of others. Without the enjoyment of this right, all others would lose half their value." The *Boyd* case has been recently reaffirmed in *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, in *Gouled* v. *United States,* 255 U. S. 298, and in *Byars* v. *United States,* 273 U. S. 28.

versations between them upon any subject, and although proper, confidential and privileged, may be overheard. Moreover, the tapping of one man's telephone line involves the tapping of the telephone of every other person whom he may call or who may call him. As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire-tapping.

Time and again, this Court in giving effect to the principle underlying the Fourth Amendment, has refused to place an unduly literal construction upon it. This was notably illustrated in the *Boyd* case itself. Taking language in its ordinary meaning, there is no "search" or "seizure" when a defendant is required to produce a document in the orderly process of a court's procedure. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," would not be violated, under any ordinary construction of language, by compelling obedience to a subpoena. But this Court holds the evidence inadmissible simply because the information leading to the issue of the subpoena has been unlawfully secured. *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385. Literally, there is no "search" or "seizure" when a friendly visitor abstracts papers from an office; yet we held in *Gouled* v. *United States,* 255 U. S. 298, that evidence so obtained could not be used. No court which looked at the words of the Amendment rather than at its underlying purpose would hold, as this Court did in *Ex parte Jackson,* 96 U. S. 727, 733, that its protection extended to letters in the mails. The provision against self-incrimination in the Fifth Amendment has been given an equally broad construction. The language is: "No person . . . shall be compelled in any criminal case to be a witness against himself." Yet we have held, not only that the

protection of the Amendment extends to a witness before a grand jury, although he has not been charged with crime, *Counselman* v. *Hitchcock,* 142 U. S. 547, 562, 586, but that: "It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it. The privilege protects a mere witness as fully as it does one who is also a party defendant." *McCarthy* v. *Arndstein,* 266 U. S. 34, 40. The narrow language of the Amendment has been consistently construed in the light of its object, "to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard." *Counselman* v. *Hitchcock, supra,* p. 562.

Decisions of this Court applying the principle of the *Boyd* case have settled these things. Unjustified search and seizure violates the Fourth Amendment, whatever the character of the paper;[4] whether the paper when taken by the federal officers was in the home,[5] in an office[6] or elsewhere;[7] whether the taking was effected by force,[8] by

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[4] *Gouled* v. *United States,* 255 U. S. 298.

[5] *Weeks* v. *United States,* 232 U. S. 383; *Amos* v. *United States,* 255 U. S. 313; *Agnello* v. *United States,* 269 U. S. 20; *Byars* v. *United States,* 273 U. S. 28.

[6] *Boyd* v. *United States,* 116 U. S. 616; *Hale* v. *Henkel,* 201 U. S. 43, 70; *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385; *Gouled* v. *United States,* 255 U. S. 298; *Marron* v. *United States,* 275 U. S. 192.

[7] *Ex parte Jackson,* 96 U. S. 727, 733; *Carroll* v. *United States,* 267 U. S. 132, 156; *Gambino* v. *United States,* 275 U. S. 310.

[8] *Weeks* v. *United States,* 232 U. S. 383; *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385; *Amos* v. *United States,* 255 U. S. 313; *Carroll* v. *United States,* 267 U. S. 132, 156; *Agnello* v. *United States,* 269 U. S. 20; *Gambino* v. *United States,* 275 U. S. 310.

fraud,[9] or in the orderly process of a court's procedure.[10] From these decisions, it follows necessarily that the Amendment is violated by the officer's reading the paper without a physical seizure, without his even touching it; and that use, in any criminal proceeding, of the contents of the paper so examined—as where they are testified to by a federal officer who thus saw the document or where, through knowledge so obtained, a copy has been procured elsewhere[11]—any such use constitutes a violation of the Fifth Amendment.

The protection guaranteed by the Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence

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[9] *Gouled* v. *United States,* 255 U. S. 298.

[10] *Boyd* v. *United States,* 116 U. S. 616; *Hale* v. *Henkel,* 201 U. S. 43, 70. See *Gouled* v. *United States,* 255 U. S. 298; *Byars* v. *United States,* 273 U S. 28; *Marron* v. *United States,* 275 U. S. 192.

[11] *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385. Compare *Gouled* v. *United States,* 255 U. S. 298, 307. In *Stroud* v. *United States,* 251 U. S. 15, and *Hester* v. *United States,* 265 U. S. 57, the letter and articles admitted were not obtained by unlawful search and seizure. They were voluntary dislosures by the defendant. Compare *Smith* v. *United States,* 2 F. (2d) 715; *United States* v. *Lee,* 274 U. S. 559.

in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.

Applying to the Fourth and Fifth Amendments the established rule of construction, the defendants' objections to the evidence obtained by wire-tapping must, in my opinion, be sustained. It is, of course, immaterial where the physical connection with the telephone wires leading into the defendants' premises was made. And it is also immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.[12]

Independently of the constitutional question, I am of opinion that the judgment should be reversed. By the laws of Washington, wire-tapping is a crime.[13] Pierce's

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[12] The point is thus stated by counsel for the telephone companies, who have filed a brief as *amici curiae*: "Criminals will not escape detection and conviction merely because evidence obtained by tapping wires of a public telephone system is inadmissible, if it should be so held; but, in any event, it is better that a few criminals escape than that the privacies of life of all the people be exposed to the agents of the government, who will act at their own discretion, the honest and the dishonest, unauthorized and unrestrained by the courts. Legislation making wire tapping a crime will not suffice if the courts nevertheless hold the evidence to be lawful."

[13] In the following states it is a criminal offense to intercept a message sent by telegraph and/or telephone: Alabama, Code, 1923, § 5256; Arizona, Revised Statutes, 1913, Penal Code, § 692; Arkansas, Crawford & Moses Digest, 1921, § 10246; California, Deering's Penal Code, 1927, § 640; Colorado, Compiled Laws, 1921, § 6969; Connecticut, General Statutes, 1918, § 6292; Idaho, Compiled Statutes, 1919, §§ 8574, 8586; Illinois, Revised Statutes, 1927, c. 134, § 21; Iowa, Code, 1927, § 13121; Kansas, Revised Statutes, 1923, c. 17, § 1908; Michigan, Compiled Laws, 1915, § 15403; Montana, Penal

Code, 1921, § 8976(18). To prove its case, the Government was obliged to lay bare the crimes committed by its officers on its behalf. A federal court should not permit such a prosecution to continue. Compare *Harkin* v. *Brundage*, 276 U. S. 36, *id.* 604.

Code, 1921, § 11518; Nebraska, Compiled Statutes, 1922, § 7115; Nevada, Revised Laws, 1912, §§ 4608, 6572(18); New York, Consolidated Laws, c. 40, § 1423(6); North Dakota, Compiled Laws, 1913, § 10231; Ohio, Page's General Code, 1926, § 13402; Oklahoma, Session Laws, 1923, c. 46; Oregon, Olson's Laws, 1920, § 2265; South Dakota, Revised Code, 1919, § 4312; Tennessee, Shannon's Code, 1919, §§ 1839, 1840; Utah, Compiled Laws, 1917, § 8433; Virginia, Code, 1924, § 4477(2), (3); Washington, Pierce's Code, 1921, § 8976(18); Wisconsin, Statutes, 1927, § 348.37; Wyoming, Compiled Statutes, 1920, § 7148. Compare *State* v. *Behringer*, 19 Ariz. 502; *State* v. *Nordskog*, 76 Wash. 472.

In the following states it is a criminal offense for a company engaged in the transmission of messages by telegraph and/or telephone, or its employees, or, in many instances, persons conniving with them, to disclose or to assist in the disclosure of any message: Alabama, Code, 1923, §§ 5543, 5545; Arizona, Revised Statutes, 1913, Penal Code, §§ 621, 623, 691; Arkansas, Crawford & Moses Digest, 1921, § 10250; California, Deering's Penal Code, 1927, §§ 619, 621, 639, 641; Colorado, Compiled Laws, 1921, §§ 6966, 6968, 6970; Connecticut, General Statutes, 1918, § 6292; Florida, Revised General Statutes, 1920, §§ 5754, 5755; Idaho, Compiled Statutes, 1919, §§ 8568, 8570; Illinois, Revised Statutes, 1927, c. 134, §§ 7, 7a; Indiana, Burns' Revised Statutes, 1926, § 2862; Iowa, Code, 1924, § 8305; Louisiana, Acts, 1918, c. 134, p. 228; Maine, Revised Statutes, 1916, c. 60, § 24; Maryland, Bagby's Code, 1926, § 489; Michigan, Compiled Statutes, 1915, § 15104; Minnesota, General Statutes, 1923, §§ 10423, 10424; Mississippi, Hemingway's Code, 1927, § 1174; Missouri, Revised Statutes, 1919, § 3605; Montana, Penal Code, 1921, § 11494; Nebraska, Compiled Statutes, 1922, § 7088; Nevada, Revised Laws, 1912, §§ 4603, 4605, 4609, 4631; New Jersey, Compiled Statutes, 1910, p. 5319; New York, Consolidated Laws, c. 40, §§ 552, 553; North Carolina, Consolidated Statutes, 1919, §§ 4497, 4498, 4499; North Dakota, Compiled Laws, 1913, § 10078; Ohio, Page's General Code, 1926, §§ 13388, 13419; Oklahoma, Session Laws, 1923, c. 46; Oregon, Olson's Laws, 1920, §§ 2260, 2262, 2266; Pennsylvania, Statutes, 1920, §§ 6306,

The situation in the case at bar differs widely from that presented in *Burdeau* v. *McDowell,* 256 U. S. 465. There, only a single lot of papers was involved. They had been obtained by a private detective while acting on behalf of a private party; without the knowledge of any federal official; long before anyone had thought of instituting a

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6308, 6309; Rhode Island, General Laws, 1923, § 6104; South Dakota, Revised Code, 1919, §§ 4346, 9801; Tennessee, Shannon's Code, 1919, §§ 1837, 1838; Utah, Compiled Laws, 1917, §§ 8403, 8405, 8434; Washington, Pierce's Code, 1921, §§ 8982, 8983, Wisconsin, Statutes, 1927, § 348.36.

The Alaskan Penal Code, Act of March 3, 1899, c. 429, 30 Stat. 1253, 1278, provides that "if any officer, agent, operator, clerk, or employee of any telegraph company, or any other person, shall wilfully divulge to any other person than the party from whom the same was received, or to whom the same was addressed, or his agent or attorney, any message received or sent, or intended to be sent, over any telegraph line, or the contents, substance, purport, effect, or meaning of such message, or any part thereof, . . . the person so offending shall be deemed guilty of a misdemeanor, and shall be punished by a fine not to exceed one thousand dollars or imprisonment not to exceed one year, or by both such fine and imprisonment, in the discretion of the court."

The Act of October 29, 1918, c. 197, 40 Stat. 1017, provided: "That whoever during the period of governmental operation of the telephone and telegraph systems of the United States . . . shall, without authority and without the knowledge and consent of the other users thereof, except as may be necessary for operation of the service, tap any telegraph or telephone line, or wilfully interfere with the operation of such telephone and telegraph systems or with the transmission of any telephone or telegraph message, or with the delivery of any such message, or whoever being employed in any such telephone or telegraph service shall divulge the contents of any such telephone or telegraph message to any person not duly authorized to receive the same, shall be fined not exceeding $1,000 or imprisoned for not more than one year, or both."

The Radio Act, February 23, 1927, c. 169, § 27, 44 Stat. 1162, 1172, provides that "no person not being authorized by the sender shall intercept any message and divulge or publish the contents, substance, purport, effect, or meaning of such intercepted message to any person."

federal prosecution. Here, the evidence obtained by crime was obtained at the Government's expense, by its officers, while acting on its behalf; the officers who committed these crimes are the same officers who were charged with the enforcement of the Prohibition Act; the crimes of these officers were committed for the purpose of securing evidence with which to obtain an indictment and to secure a conviction. The evidence so obtained constitutes the warp and woof of the Government's case. The aggregate of the Government evidence occupies 306 pages of the printed record. More than 210 of them are filled by recitals of the details of the wire-tapping and of facts ascertained thereby.[14] There is literally no other evidence of guilt on the part of some of the defendants except that illegally obtained by these officers. As to nearly all the defendants (except those who admitted guilt), the evidence relied upon to secure a conviction consisted mainly of that which these officers had so obtained by violating the state law.

As Judge Rudkin said below: "Here we are concerned with neither eavesdroppers nor thieves. Nor are we concerned with the acts of private individuals. . . . We are concerned only with the acts of federal agents whose powers are limited and controlled by the Constitution of the United States." The Eighteenth Amendment has not in terms empowered Congress to authorize anyone to violate the criminal laws of a State. And Congress has never purported to do so. Compare *Maryland* v. *Soper,* 270 U. S. 9. The terms of appointment of federal prohibition agents do not purport to confer upon them authority to violate any criminal law. Their superior officer, the Secretary of the Treasury, has not instructed them to commit

[14] The above figures relate to Case No. 493. In Nos. 532–533, the Government evidence fills 278 pages, of which 140 are recitals of the evidence obtained by wire-tapping.

crime on behalf of the United States. It may be assumed that the Attorney General of the United States did not give any such instruction.[15]

When these unlawful acts were committed, they were crimes only of the officers individually. The Government was innocent, in legal contemplation; for no federal official is authorized to commit a crime on its behalf. When the Government, having full knowledge, sought, through the Department of Justice, to avail itself of the fruits of these acts in order to accomplish its own ends, it assumed moral responsibility for the officers' crimes. Compare *The Paquete Habana,* 189 U. S. 453, 465; *O'Reilly deCamara* v. *Brooke,* 209 U. S. 45, 52; *Dodge* v. *United States,* 272 U. S. 530, 532; *Gambino* v. *United States,* 275 U. S. 310. And if this Court should permit the Government, by means of its officers' crimes, to effect its purpose of punishing the defendants, there would seem to be present all the elements of a ratification. If so, the Government itself would become a lawbreaker.

Will this Court by sustaining the judgment below sanction such conduct on the part of the Executive? The governing principle has long been settled. It is that a court will not redress a wrong when he who invokes its aid has unclean hands.[16] The maxim of unclean hands comes

[15] According to the Government's brief, p. 41, "The Prohibition Unit of the Treasury disclaims it [wire-tapping] and the Department of Justice has frowned on it." See also "Prohibition Enforcement," 69th Congress, 2d Session, Senate Doc. No. 198, pp. IV, V, 13, 15, referred to Committee, January 25, 1927; also Same, Part 2.

[16] See *Hannay* v. *Eve,* 3 Cranch, 242, 247; *Bank of the United States* v. *Owens,* 2 Pet. 527, 538; *Bartle* v. *Coleman,* 4 Pet. 184, 188; *Kennett* v. *Chambers,* 14 How. 38, 52; *Marshall* v. *Baltimore & Ohio R. R. Co.,* 16 How. 314, 334; *Tool Co.* v. *Norris,* 2 Wall 45, 54; *The Ouachita Cotton,* 6 Wall. 521, 532; *Coppell* v. *Hall,* 7 Wall. 542; *Forsyth* v. *Woods,* 11 Wall. 484, 486; *Hanauer* v. *Doane,* 12 Wall. 342, 349; *Trist* v. *Child,* 21 Wall. 441, 448; *Meguire* v. *Corwine,* 101 U. S. 108, 111; *Oscanyan* v. *Arms Co.,* 103 U. S. 261; *Irwin* v. *Williar,* 110

from courts of equity.[17] But the principle prevails also in courts of law. Its common application is in civil actions between private parties. Where the Government is the actor, the reasons for applying it are even more persuasive. Where the remedies invoked are those of the criminal law, the reasons are compelling.[18]

The door of a court is not barred because the plaintiff has committed a crime. The confirmed criminal is as much entitled to redress as his most virtuous fellow citizen; no record of crime, however long, makes one an outlaw. The court's aid is denied only when he who seeks it has violated the law in connection with the very transaction as to which he seeks legal redress.[19] Then aid is denied despite the defendant's wrong. It is denied in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination. The rule is one, not of action, but of inaction. It is sometimes

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U. S. 499, 510; *Woodstock Iron Co.* v. *Richmond & Danville Extension Co.*, 129 U. S. 643; *Gibbs* v. *Consolidated Gas Co.*, 130 U. S. 396, 411; *Embrey* v. *Jemison*, 131 U. S. 336, 348; *West* v. *Camden*, 135 U. S. 507, 521; *McMullen* v. *Hoffman*, 174 U. S. 639, 654; *Hazelton* v. *Sheckells*, 202 U. S. 71; *Crocker* v. *United States*, 240 U. S. 74, 78. Compare *Holman* v. *Johnson*, 1 Cowp. 341.

[17] See *Creath's Administrator* v. *Sims*, 5 How. 192, 204; *Kennett* v. *Chambers*, 14 How. 38, 49; *Randall* v. *Howard*, 2 Black, 585, 586; *Wheeler* v. *Sage*, 1 Wall. 518, 530; *Dent* v. *Ferguson*, 132 U. S. 50, 64; *Pope Manufacturing Co.* v. *Gormully*, 144 U. S. 224, 236; *Miller* v. *Ammon*, 145 U. S. 421, 425; *Hazelton* v. *Sheckells*, 202 U. S. 71, 79. Compare *International News Service* v. *Associated Press*, 248 U. S. 215, 245.

[18] Compare *State* v. *Simmons*, 39 Kan. 262, 264–265; *State* v. *Miller*, 44 Mo. App. 159, 163–164; *In re Robinson*, 29 Neb. 135; *Harris* v. *State*, 15 Tex. App. 629, 634–635, 639.

[19] See *Armstrong* v. *Toler*, 11 Wheat. 258; *Brooks* v. *Martin*, 2 Wall. 70; *Planters' Bank* v. *Union Bank*, 16 Wall. 483, 499–500; *Houston & Texas Central R. R. Co.* v. *Texas*, 177 U. S. 66, 99; *Bothwell* v. *Buckbee, Mears Co.*, 275 U. S. 274.

spoken of as a rule of substantive law. But it extends to matters of procedure as well.[20] A defense may be waived. It is waived when not pleaded. But the objection that the plaintiff comes with unclean hands will be taken by the court itself.[21] It will be taken despite the wish to the contrary of all the parties to the litigation. The court protects itself.

Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

MR. JUSTICE BUTLER, dissenting.

I sincerely regret that I cannot support the opinion and judgments of the Court in these cases.

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[20] See *Lutton* v. *Benin,* 11 Mod. 50; *Barlow* v. *Hall,* 2 Anst. 461; *Wells* v. *Gurney,* 8 Barn. & Cress. 769; *Ilsley* v. *Nichols,* 12 Pick. 270; *Carpenter* v. *Spooner,* 2 Sandf. 717; *Metcalf* v. *Clark,* 41 Barb. 45; *Williams* ads. *Reed,* 29 N. J. L. 385; *Hill* v. *Goodrich,* 32 Conn. 588; *Townsend* v. *Smith,* 47 Wis. 623; *Blandin* v. *Ostrander,* 239 Fed. 700; *Harkin* v. *Brundage,* 276 U. S. 36, *id.,* 604.

[21] *Coppell* v. *Hall,* 7 Wall. 542, 558; *Oscanyan* v. *Arms Co.,* 103 U. S. 261, 267; *Higgins* v. *McCrea,* 116 U. S. 671, 685. Compare *Evans* v. *Richardson,* 3 Mer. 469; *Norman* v. *Cole,* 3 Esp. 253; *Northwestern Salt Co.* v. *Electrolytic Alkali Co.,* [1913] 3 K. B. 422.

The order allowing the writs of certiorari operated to limit arguments of counsel to the constitutional question. I do not participate in the controversy that has arisen here as to whether the evidence was inadmissible because the mode of obtaining it was unethical and a misdemeanor under state law. I prefer to say nothing concerning those questions because they are not within the jurisdiction taken by the order.

The Court is required to construe the provision of the Fourth Amendment that declares: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated." The Fifth Amendment prevents the use of evidence obtained through searches and seizures in violation of the rights of the accused protected by the Fourth Amendment.

The single question for consideration is this: May the Government, consistently with that clause, have its officers whenever they see fit, tap wires, listen to, take down and report, the private messages and conversations transmitted by telephones?

The United States maintains that "The 'wire tapping' operations of the federal prohibition agents were not a 'search and seizure' in violation of the security of the 'persons, houses, papers and effects' of the petitioners in the constitutional sense or within the intendment of the Fourth Amendment." The Court, adhering to and reiterating the principles laid down and applied in prior decisions * construing the search and seizure clause, in substance adopts the contention of the Government.

The question at issue depends upon a just appreciation of the facts.

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* *Ex parte Jackson*, 96 U. S. 727. *Boyd* v. *United States*, 116 U. S. 616. *Weeks* v. *United States*, 232 U. S. 383. *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385. *Gouled* v. *United States*, 255 U. S. 298. *Amos* v. *United States*, 255 U. S. 313.

Telephones are used generally for transmission of messages concerning official, social, business and personal affairs including communications that are private and privileged—those between physician and patient, lawyer and client, parent and child, husband and wife. The contracts between telephone companies and users contemplate the private use of the facilities employed in the service. The communications belong to the parties between whom they pass. During their transmission the exclusive use of the wire belongs to the persons served by it. Wire tapping involves interference with the wire while being used. Tapping the wires and listening in by the officers literally constituted a search for evidence. As the communications passed, they were heard and taken down.

In *Boyd* v. *United States,* 116 U. S. 616, there was no "search or seizure" within the literal or ordinary meaning of the words, nor was Boyd—if these constitutional provisions were read strictly according to the letter—compelled in a "criminal case" to be a "witness" against himself. The statute, there held unconstitutional because repugnant to the search and seizure clause, merely authorized judgment for sums claimed by the Government on account of revenue if the defendant failed to produce his books, invoices and papers. The principle of that case has been followed, developed and applied in this and many other courts. And it is in harmony with the rule of liberal construction that always has been applied to provisions of the Constitution safeguarding personal rights (*Byars* v. *United States,* 273 U. S. 28, 32), as well as to those granting governmental powers. *McCulloch* v. *Maryland,* 4 Wheat. 316, 404, 406, 407, 421. *Marbury* v. *Madison,* 1 Cranch 137, 153, 176. *Cohens* v. *Virginia,* 6 Wheat. 264. *Myers* v. *United States,* 272 U. S. 52.

This Court has always construed the Constitution in the light of the principles upon which it was founded.

The direct operation or literal meaning of the words used do not measure the purpose or scope of its provisions. Under the principles established and applied by this Court, the Fourth Amendment safeguards against all evils that are like and equivalent to those embraced within the ordinary meaning of its words. That construction is consonant with sound reason and in full accord with the course of decisions since *McCulloch* v. *Maryland*. That is the principle directly applied in the *Boyd* case.

When the facts in these cases are truly estimated, a fair application of that principle decides the constitutional question in favor of the petitioners. With great deference, I think they should be given a new trial.

MR. JUSTICE STONE, dissenting.

I concur in the opinions of MR. JUSTICE HOLMES and MR. JUSTICE BRANDEIS. I agree also with that of MR. JUSTICE BUTLER so far as it deals with the merits. The effect of the order granting certiorari was to limit the argument to a single question, but I do not understand that it restrains the Court from a consideration of any question which we find to be presented by the record, for, under Jud. Code, § 240(a), this Court determines a case here on certiorari "with the same power and authority, and with like effect, as if the cause had been brought [here] by unrestricted writ of error or appeal."

KINNEY-COASTAL OIL COMPANY ET AL. *v.* KIEFFER ET AL.

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

No. 64. Argued October 25, 1927.—Decided June 4, 1928.

1. The Acts of July 17, 1914, 38 Stat. 509, and February 25, 1920, 41 Stat. 437, read together, disclose an intention to divide public oil and gas lands affected into two estates for the purposes of dis-

posal, viz., a dominant estate including the underlying oil and gas deposits, and a servient estate, including the surface. P. 504.

2. Where one person has a homestead patent and another an oil and gas lease covering the same land and both drafted in keeping with these Acts, the lessee has the right to extract and remove the oil and gas, and the appurtenant right to use the surface so far as may be necessary to that end; these rights are excepted and reserved from the estate granted by the homestead patent; their exercise involves no taking of anything granted thereby; the owner of the surface is not entitled to compensation for the minerals taken or the use of the surface pursuant to the lease, and, though he may rightfully demand compensation for the damages caused by the mining operations to his crops and agricultural improvements, he cannot include improvements placed on the land after the mining operations are under way, for purposes plainly incompatible with the right of the lessee to proceed, with due care, until the oil and gas are exhausted. P. 504.
3. *Semble* that the lessee would be liable for any damage to the surface estate caused by negligence in conducting mining operations. P. 505.
4. Lessees under the Act of 1920, *supra,* of a tract within the producing structure of an oil field, entered, drilled a producing well, and were preparing to continue and extend operations under the lease, necessitating use of practically the entire surface, all with the knowledge and acquiescence of the owner of the surface under the Act of 1914, *supra,* when the surface-owner platted part of the land as a town-site and began selling lots to purchasers who erected dwellings for residential and business purposes, and, was contemplating like action as to the other part. Interference with the mining operations and irreparable damage to the lessees was thus threatened. *Held:* That the lessees were entitled to an injunction to prevent the threatened occupancy and use of the premises for purposes incompatible with their right to continue mining and their necessary use of the surface. P. 505.
5. The condition imposed by the Act of 1914, *supra,* that the mining lessee shall pay the damages to crops and agricultural improvements of the surface-owner, caused by the lessee's entry, occupancy of surface and mining, or shall give a bond therefor in an action instituted in any competent court to ascertain and fix such damages, is not satisfied by the bond approved by the Secretary of the Interior at the issuance of the lease, but may be complied with by giving bond and ascertainment and settlement of damages in the

injunction suit. A separate action at law to assess such damages is not necessary. P. 506.

6. A court of equity, in a suit of which it has taken cognizance, may administer complete relief, even though this involve determination of legal rights not otherwise within the range of its authority; and in awarding relief to one party, may impose conditions protecting and giving effect to correlative rights of the other. P. 507.

9 F. (2d) 260, reversed; 1 F. (2d) 795, modified.

This case presents a controversy over the relative rights conferred by an oil and gas lease and by a homestead patent for the same lands—both issued by the United States and each containing a reservation of the rights conferred by the other.

The lands in question are two adjoining forty-acre tracts within the Salt Creek oil field, in Natrona County, Wyoming, which became a producing field, widely known as such, before any step was taken to secure either the lease or the patent.

By executive order issued July 2, 1910, under the act of June 25, 1910, c. 421, 36 Stat. 847, these lands—being then public lands of the United States—were withdrawn from settlement, location, sale or entry under the existing public land laws and were reserved as being valuable for oil to await further legislation respecting the disposal of lands of that character. The contemplated legislation came in part in the Act of July 17, 1914, c. 142, 38 Stat. 509, and in part in the act of February 25, 1920, c. 85, 41 Stat. 437.

The act of 1914 looks to the severance and separate disposal of the surface and the underlying minerals. It provides that lands of the United States withdrawn, classified or reported as valuable for oil, gas or other designated mineral deposits shall be subject to disposal under the non-mineral land laws, but that the disposal shall be with "a reservation to the United States of the deposits on account of which the lands were withdrawn or classified or reported as valuable, together with the right to prospect

for, mine and remove the same," and that such deposits shall be "subject to disposal by the United States only as shall be hereafter expressly directed by law." The act further provides:

"Any person qualified to acquire the reserved deposits may enter upon said lands with a view of prospecting for the same upon the approval by the Secretary of the Interior of a bond or undertaking to be filed with him as security for the payment of all damages to the crops and improvements on such lands by reason of such prospecting, the measure of any such damage to be fixed by agreement of parties or by a court of competent jurisdiction. Any person who has acquired from the United States the title to or the right to mine and remove the reserved deposits, should the United States dispose of the mineral deposits in lands, may reënter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining and removal of the minerals therefrom, and mine and remove such minerals, upon payment of damages caused thereby to the owner of the land, or upon giving a good and sufficient bond or undertaking therefor in an action instituted in any competent court to ascertain and fix said damages."

The act of 1920 relates particularly to the disposal of oil, gas and other designated mineral deposits in the lands of the United States, including those specified in the act of 1914. In the main it provides that the disposal of such deposits shall be through leases entitling the lessees to extract and remove the deposits and to make such use of the surface as may be necessary for that purpose, and requiring the lessees to pay fixed royalties, and in some instances a further compensation, to the United States. The parts of the act having a present bearing are as follows:

"Sec. 17. That all unappropriated deposits of oil or gas situated within the known geologic structure of a pro-

ducing oil or gas field . . . , not subject to preferential lease, may be leased by the Secretary of the Interior to the highest responsible bidder by competitive bidding . . . , such leases to be conditioned upon the payment by the lessee of such bonus as may be accepted and of such royalty as may be fixed in the lease, . . . Leases shall be for a period of twenty years with the preferential right in the lessee to renew the same for successive periods of ten years upon such reasonable terms and conditions as may be prescribed by the Secretary of the Interior, unless otherwise provided by law at the time of the expiration of such periods. . . .

"SEC. 29. . . . . *Provided,* That said Secretary, in his discretion, in making any lease under this Act, may reserve to the United States the right to lease, sell, or otherwise dispose of the surface of the lands embraced within such lease under existing law or laws hereafter enacted, in so far as said surface is not necessary for use of the lessee in extracting and removing the deposits therein: *Provided further,* That if such reservation is made it shall be so determined before the offering of such lease: . . .

"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 purpose of this act, also to fix and determine the boundary lines of any structure, or oil or gas field, for the purposes of this act: . . .

"Sec. 34. That the provisions of this act shall also apply to all deposits of coal, phosphate, sodium, oil, oil shale, or gas in the lands of the United States, which lands may have been or may be disposed of under laws reserving to the United States such deposits, with the right to prospect for, mine, and remove the same, subject to such conditions as are or may hereafter be provided by such laws reserving such deposits."

April 2, 1920, the Secretary of the Interior, pursuant to § 32 of the act of 1920, determined the boundary lines of the known oil structure or deposit in the Salt Creek field. The lines so determined included the two forty-acre tracts in question.

December 29, 1921, as a result of competitive bidding invited under § 17 of that act, and in consideration of a bonus of $51,750 paid to the United States, the Secretary of the Interior, conformably to existing regulations,[1] awarded and issued to Oscar W. Rohn a lease of the oil and gas in these tracts and in another forty-acre tract in the same field. The lease was given for a term of twenty years, with a conditional privilege of renewal under § 17, and granted to the lessee the exclusive right to drill for, extract and remove the oil and gas deposits in the three tracts, together with the right to construct and maintain on the surface "all works, buildings, plants, waterways, roads, telegraph or telephone lines, pipe lines, reservoirs, tanks, pumping stations or other structures" needed in such mining operations. It required the lessee to exercise reasonable diligence in drilling and operating wells for oil and gas and to pay to the United States a royalty of 25% on the oil produced and a royalty varying from 12½% to 16⅔% on the gas; and it reserved to the United States the right to dispose of "the surface of the lands" under existing or future laws "in so far as said surface is not necessary for the the use of the lessee in the extraction and removal of the oil and gas." It also required the lessee—

"To comply with all statutory requirements and regulations thereunder, if the lands embraced herein have been or shall hereafter be disposed of under the laws reserving to the United States the deposits of oil and gas therein, subject to such conditions as are or may hereafter be provided by the laws reserving such oil or gas."

[1] Regulations of March 11, 1920, §§ 13–17, 47 L. D. 446.

At the time the lease was issued the lessee, pursuant to the existing regulations,[2] executed, with approved surety, a bond to the United States in the amount of $5,000—"for the use and benefit of the United States and of any entryman or patentee of any portion of the land . . . heretofore entered or patented with a reservation of the oil and gas deposits to the United States"—conditioned on the lessee's faithful compliance with "all the provisions" of the lease.

August 9, 1922, that lease was consolidated with others into a new lease of like character and tenor issued by the Secretary of the Interior to the Kinney-Coastal Oil Company, and a bond like that above described was given by the company, with approved security, to secure its faithful compliance with all the provisions of the consolidated lease.

In 1918 Michael F. Kieffer made application at the local land office to make a preliminary homestead entry of the two forty-acre tracts in question and other contiguous lands. He knew the lands were within the executive withdrawal of July 2, 1910, and the Salt Creek oil field; and he assented that if his application was granted the oil and gas deposits should be reserved by the United States for disposal under future laws as contemplated in the act of 1914. The preliminary homestead entry was allowed with that reservation (see Regulations of March 20, 1915, paragraphs 5–8, 44 L. D. 32, 34) and in due course was carried to a final entry, on which a homestead patent was issued to Kieffer October 12, 1923. The patent was for 320 acres, including the two forty-acre tracts in question, and contained the following exception and reservation:

"Also excepting and reserving to the United States all the oil and gas in the lands so patented, and to it, or persons authorized by it, the right to prospect for, mine

[2] Regulations of March 11, 1920, §§ 16, 17, 47 L. D. 447, 451.

and remove such deposits from the same upon compliance with the conditions and subject to the provisions and limitations of the act of July 17, 1914."

After his preliminary homestead entry was allowed, Kieffer constructed a residence and several outbuildings on part of the lands included therein other than the tracts in question, and resided there with his family. He enclosed the tracts in question with a barbed wire fence and in each of two years planted and harvested about seven acres of oats thereon, but in no other way did he improve or cultivate these tracts.

The Kinney-Coastal Oil Company, soon after receiving its lease, entered on one of the tracts in question, stored thereon equipment and supplies required in operations under the lease, erected buildings needed for its employees and began drilling for oil and gas. Kieffer knew of the lease and acquiesced in these operations under it. One well was completed in the latter part of 1923 at a cost of $32,152.66, and oil and gas were produced therefrom in paying quantities. The company proceeded with the extraction of oil and gas from that well, and also made preparation for drilling others. Stakes were driven marking places for eight more distributed over the tract in accordance with applicable regulations.

In January, 1924, Kieffer, without any concurrence by the United States or by the company, platted that tract as a townsite—with blocks, lots, streets and alleys—and caused the plat to be filed and recorded in the office of the clerk of the county. Although knowing of the producing well and that the company was intending to proceed with further drilling and operations under the lease, Kieffer began selling and contracting to sell lots in the townsite and encouraging purchasers to build thereon. Several lots were sold or contracted to be sold and the purchasers began hastily to place buildings thereon for residential and business purposes.

Thereupon the lessee company and another company which had acquired an interest in the lease—one a corporate citizen of Maine and the other of Colorado—brought a suit in the federal district court for Wyoming against Kieffer and others—all citizens of that State—to prevent the sale and use for townsite purposes of the tract on which operations under the lease were proceeding, to prevent a contemplated platting and disposal of the other tract as a townsite, and to enforce the plaintiffs' right to use all the surface of both tracts in the operations under the lease—the use of all being alleged to be necessary. There was also a prayer for general relief. The prayers for specific relief were limited to the term of the lease.

The defendants answered jointly. The material portions of the answer were to the effect (a) that the court was without jurisdiction, in that the value of the matter in controversy was less than the jurisdictional requisite; (b) that the bill was without equity, in that there was an adequate if not exclusive remedy at law; (c) that a large portion of the lands in question was without oil or gas content; (d) that the platting, sale and use of the lands for townsite purposes would not interfere with the full enjoyment of the plaintiffs' rights or operations under the lease; and (e) that the defendants "have at all times been ready and willing that plaintiffs have the full, beneficial use of their lease upon their complying with the law, and defendants are now ready and willing to enter into negotiations with plaintiffs with the view of fixing the amount of damages which may be done by plaintiffs to defendants' improvements, or submit said question to a court of competent jurisdiction as provided in the Act of July 17, 1914."

The district court, after a full hearing on the issues, gave a decree awarding the plaintiffs, by way of injunction, most of the relief sought in their bill. 1 F. (2d)

795. The court found, as recited in the decree, that the value of the matter in controversy was in excess of the jurisdictional requisite; that the lands in question "are practically all within the producing structure of the Salt Creek oil field"; that use of "practically the entire surface" is necessary "for the full development" of the underlying oil and gas deposits and for "reasonably economical, efficient operations" under the lease; that the buildings constructed and intended to be constructed as part of the townsite venture will "take up space required by plaintiffs in their lawful operations"; that the occupancy and use of the lands as a townsite will interfere with such operations, will increase the expense of conducting them, and will enhance the danger of explosion and fire which otherwise attends the production of oil and gas, and that the plaintiffs will thus be subjected to continuing and irreparable injury and damage.

On an appeal by the defendants the circuit court of appeals said:

"There is substantial evidence in support of the court's finding that the tract is within the producing structure of the oil fields, and that the entire surface will be necessary for the use of plaintiffs in its development and in the production and removal of the oil and gas that will be found. There was testimony to the contrary, but the court's findings of fact have ample support. It had better opportunity to weigh the evidence than we have, and we accept those findings."

Then coming to the equitable remedy invoked by the plaintiffs that court held that the act of 1914 prescribes a mode of procedure for enforcing the lessee's right to use the surface; that this procedure is intended to be exclusive and in the nature of a condemnation proceeding, which is regarded as a proceeding at law rather than in equity; and that by the course taken in the district court Kieffer

and his grantees were denied a constitutional right to have the issues tried by a jury. Accordingly the decree was reversed with a direction to dismiss the bill and leave the plaintiffs to their statutory remedy. 9 F. (2d) 260.

Mr. Edward M. Freeman, with whom *Mr. Paul P. Prosser* was on the brief, for petitioners.

The remedy provided by the Act of 1914 is not a legal action in the nature of condemnation proceedings by the oil and gas lessee against the surface owner to condemn the surface required for mineral exploitation; on the contrary, it is an action by the surface owner against the lessee (and his surety on the bond required) to recover judgment for the damages caused by the mineral exploitation to the crops and improvements of the surface owner. The remedy is for the sole benefit of the surface owner and is not available to the lessee. The lessee may take possession of the surface to the extent from time to time required, and the surface owner may then avail himself of this remedy against the lessee.

Under the construction of the Circuit Court of Appeals the lessee would be prevented from taking possession until the damages, if any, to be caused the surface owner by the mineral exploitation had been ascertained. Such a scheme would work great injury not only to the lessee but also to the United States, as the owner of the oil and gas, because of its royalty interest, and to the State, because of its share of the royalty. The oil might be lost meanwhile through drainage.

Again, the procedure indicated by the Circuit Court of Appeals is highly objectionable in that a jury would be asked to speculate upon damages which had not yet occurred, and the ascertainment of which would rest largely, if not entirely, upon conjecture. Moreover, it is possible that the surface owner might not be entitled to recover any damages whatsoever. No one would seri-

ously argue that the lessee would have to pay him for the mineral content; apparently the only damages recoverable would be for injury to crops and improvements. There might be no crops or improvements.

The suggestion that the United States or its lessee must purchase the surface or pay the surface owner compensation for its use is wholly untenable.

Upon the exhaustion of the oil and gas in the leased land, the estate of the United States and its lessees will terminate, including their incidental estate in the surface, since their only interest in that relates to the mining of the oil and gas. *Chartiers Block Coal Co.* v. *Mellon,* 152 Pa. 286; *Moore* v. *Indian Camp Coal Co.,* 75 Oh. St. 493.

Upon the grant or reservation of the mineral rights in land, even in the absence of an express provision, the owner of the mining right is entitled, as an appurtenant to such grant or reservation, to the use of the surface reasonably necessary to extract and remove the minerals. 2, Snyder on Mines, 848 et seq.; Mills-Willingham, Law of Oil and Gas, 250; 40 C. J., 984; *Marvin* v. *Brewster Iron Mining Co.,* 55 N. Y. 538; *Chartiers Block Coal Co.* v. *Mellon, supra; Porter* v. *Mack Mfg. Co.,* 65 W. Va. 636; *Lovelace* v. *Southwestern Petroleum Co.,* 267 Fed. 513. Congress was merely acting from abundance of caution in expressly providing for the use of the surface.

The Department of the Interior has followed this construction. Compare the procedure prescribed by the Stockraising Homestead Act, 39 Stat. 862.

The conduct of the respondents was wrongful and in violation of petitioners' rights; the petitioners had no plain, adequate and complete remedy at law; the alleged statutory remedy provided by the Act of 1914 was doubtful; therefore, the District Court, sitting as a court of equity, had jurisdiction and its decree was proper.

Mr. C. D. Murane, with whom *Messrs. G. R. Hagens* and *R. H. Nichols* were on the brief, for respondents.

A person cannot be enjoined from doing a lawful act unless the act is being done unnecessarily and maliciously to vex, annoy and injure another. There can be no contention that the respondents were acting maliciously or otherwise than in the honest belief that they were exercising a legal right. They own the fee simple to this land, they have a right to cultivate it, build houses upon it, sell it as a whole or in part; the only restriction placed upon them by their patent is that others shall have the right to occupy so much of the surface as is actually necessary to prospect for, mine and remove the oil and gas "upon payment of damages caused thereby to the owner of the land." The Court will not, by its injunction, deprive respondents of any of the beneficial rights granted to them by their patent.

An injunction will not be granted when a greater injury will be done thereby to defendant than would be done to the plaintiff by denying it. The statutes provide for an action at law in cases of this character; the mine lease owner must pay the damage caused; and if the parties cannot agree upon the amount of damages, then the matter should be tried by a jury in a court of law, competent to ascertain and fix them.

If we were to assume that petitioners had the right to this land without compensation, they offered no evidence to show that they had ever made a demand for possession of any portion of it and been refused. Respondents, moreover, proved that possession was never denied and that respondents never had any intention of denying it—their only intention being to require petitioners to pay such reasonable damage as they may cause to respondents' lands and improvements. A court of equity will not interpose to protect a person from a groundless fear.

There are two distinct situations contemplated in the Act of July 17, 1914, and the Leasing Act of February 25, 1920, was enacted with those two conditions in mind. The first condition is where a prospecting permit is issued upon lands patented with the oil rights reserved to the Government. This permit is issued for a period of two years and is temporary in character. It was not contemplated that, under it, actual appropriation of any of the land would be necessary but only a temporary possession for the drilling of one or two wells, and that just compensation to the owner of the surface would be made for the damage done to crops or improvements by the holder of the permit. The other situation contemplated a lease which was to extend for a period of twenty years, and subject to renewal for ten-year periods. The possession would be for so long a time that it amounted to an appropriation of the amount of land actually necessary for drilling operations, production, and the removal of oil and gas. Therefore, the oil and gas lessee is required to pay for the actual damage done to the owner of the land.

He has an election, after his discovery, as to whether it will be to his advantage to mine and remove the oil, and pay the damages caused to the surface owner, or the "owner of the land," as said in the statute, or abandon his oil and gas lease. The owner of the land has no election except that he may require the lessee to designate what portion of his land will be necessary for the use of the oil lessee in mining and removing, and to pay him all such damages as he may sustain, before he will be permitted to use the surface. In both of these cases an adequate means is provided for ascertaining the damage.

If the injunction were reinstated as granted by the trial court, Kieffer's patent would be a "scrap of paper," conferring no beneficial rights, despite payments to the Government for the lands and his outlay for improvements. So far as these lands are concerned, under this decree, re-

spondents' only right is the privilege of paying county and state taxes for the next twenty years.

Petitioners' contention during the trial of the cause, and the findings of the court, were to the effect that respondents can only use the land for agricultural purposes. They introduced testimony to show that they needed all of the surface for their drilling, development and production of oil, and the court made a finding that all was necessary for that purpose. If this be true, no part of the land would be available for crops; the entire tract would be appropriated by petitioners, and the exclusive possession, without any compensation whatsoever to the owner of the fee.

How can the surface owner be advised of the amount of land required for drilling and production purposes? Must he stand by for the twenty-year period with the pleasure of paying the taxes upon the land, to ascertain the needs of the lessee? A more reasonable interpretation of the statute is that the lessee must negotiate with the surface owner as to the value of the land, quantity required, and quantity required for drilling, etc., and that if they cannot agree, then the lessee must bring his action as indicated in the law of 1914, alleging the quantity of land which he requires, and asking a court of competent jurisdiction to call a jury to assess the damage that the surface owner will sustain.

By the decree which petitioners desire to have reinstated a Bank has been enjoined from receiving payments upon contracts of sales of portions of this land, the County Clerk has been enjoined from receiving deeds, town plats or other conveyances or evidences of title, a Utilities Company has been enjoined from laying pipe lines, with the permission of Kieffer, over his land for the purpose of conducting water and gas. In what way do these acts hinder or prevent drilling for the production of oil? The Utilities Company is even commanded to remove its pipe lines already laid, and there is not one

word of testimony that it has in any way interfered with operations of the petitioners. Cf. *Brookshire Oil Co.* v. *Casmalia Ranch and Oil Development Co.,* 156 Cal. 211; Lindley, Mines, 3d. ed., § § 814, 827; *Chartier's Block Coal Co.* v. *Mellon,* 152 Pa. 286; *Williams* v. *South Penn Oil Co.,* 52 W. Va. 181; *Globe Newspaper Co.* v. *Walker,* 210 U. S. 356; *Haycraft* v. *United States,* 22 Wall. 81; *The Harrisburg,* 119 U. S. 199; *Van Norton* v. *Morton,* 99 U. S. 378; *New Orleans* v. *Construction Co.,* 129 U. S. 45.

The right of Kieffer to have his damages determined by a jury and paid or secured as the statute directs, is a legal right given him by the Act of July 17, 1914. If the parties cannot agree, the surface owner in possession has a constitutional right to a trial by jury before his possession could be disturbed. *Singer Sewing Machine Co.* v. *Benedict,* 229 U. S. 481; *Travelers Protective Ass'n* v. *Gilbert,* 111 Fed. 269; *Union Pacific R. R. Co.* v. *Board of Comm'rs,* 222 Fed. 651; *Traction Co.* v. *Mining Co.,* 196 U. S. 239; *Kohl* v. *United States,* 91 U. S. 367; *Filbin* v. *United States,* 265 Fed. 354.

A court of equity has no jurisdiction where a "plain, adequate and complete remedy may be had at law." Rev. Stats., § 723; Comp. Stats., § 1244; *United States* v. *Bitter Root Co.,* 200 U. S. 451.

We desire to call the Court's attention to the specific provision of the statute which says "upon paying the damage caused to the owner." That is a condition precedent to his right to operate, and justly so. *Courtright* v. *Deeds,* 37 Ia. 503; *Sands* v. *McClelan* (N. Y.) 6 Cow. 582; *Little* v. *Wilcox,* 119 Pa. St. 439; *Appeal of Conrow* (Pa.) 3 Atl. 13.

Mr. Justice Van Devanter, after making the foregoing statement of the case, delivered the opinion of the Court.

The findings of fact by the district court before described have such support in the evidence that they should

be accepted by us. Two were accepted by the circuit court of appeals, as shown in the quotation before made from its opinion, and the others were not considered. Those not considered are equally well supported.

The chief question presented is whether the act of 1914 prescribes an exclusive remedy at law applicable to the situation disclosed and thus prevents the plaintiffs from suing in equity, as held by the circuit court of appeals.

The acts of 1914 and 1920 are to be read together—each as the complement of the other. So read they disclose an intention to divide oil and gas lands into two estates for the purposes of disposal—one including the underlying oil and gas deposits and the other the surface—and to make the latter servient to the former, which naturally would be suggested by their physical relation and relative values. The act of 1914, in providing for the disposal of the surface, directs that there be a reservation of the oil and gas deposits, " together with the right to prospect for, mine and remove the same," meaning, of course, the right to use so much of the surface as may be necessary for such operations. And the act of 1920, in providing for the leasing of the oil and gas deposits, provides (§ 29) for a reservation of the surface " in so far as said surface is not necessary for the use of the lessee in extracting and removing the deposits." In effect therefore a servitude is laid on the surface estate for the benefit of the mineral estate to the end, as the acts otherwise show, that the United States may realize, through the separate leasing, a proper return from the extraction and removal of the minerals.

The lease held by the plaintiffs and the homestead patent issued to Kieffer were drafted in keeping with the acts thus understood. In both the required reservations are plainly expressed. Under the lease the plaintiffs have the right to extract and remove the oil and gas, as also the appurtenant right to use the surface so far as may

be necessary. In the homestead patent these rights are distinctly excepted and reserved from the estate thereby granted. Their exercise involves no taking of anything granted by the patent. Nor is the one who under the patent owns the surface, with those rights reserved, entitled to compensation for the minerals taken or the use made of the surface. The only compensation which he rightfully may demand is, as the act of 1914 says, for "damages caused" by the mining operations. The sentence next preceeding that in which these words occur makes it fairly plain that they refer to damages to "crops and improvements," and the title to the act, coupled with the reference to "crops" shows that "agricultural" improvements are the kind intended. Certainly it is not intended to include improvements placed on the land, after the mining operations are under way, for purposes plainly incompatible with the right to proceed with those operations until the oil and gas are exhausted. It well may be that, if the operations are negligently conducted and damage is done thereby to the surface estate, there will be liability therefor. But such liability will ensue, not from admissible mining operations and use of the surface, but from the inadmissible negligence causing the damage.

By this suit the plaintiffs are not seeking to acquire a right to use the surface but to protect from wrongful obstruction and impairment the right which they already have. Nor are they seeking to enforce their right to enter and begin mining operations. More than a year before the suit was begun they entered, took in mining equipment and supplies, erected houses for their workmen, began drilling for oil and gas and at large cost completed a producing well—all with the knowledge and acquiescence of Kieffer, then the sole surface claimant. After their operations were thus under way, Kieffer platted as a townsite the forty acres where they were operating and began

actively to sell and contract to sell the lots as platted; and the purchasers began to erect buildings thereon for residential and business purposes. Kieffer was also contemplating taking like action as to the other forty acres. It was then that the suit was begun. It is directed chiefly against the sale and use of the surface for townsite purposes and is based on the theory—sustained by the findings made on the proofs submitted at the trial—that practically the whole eighty acres is within the producing structure of the oil field, that use of practically the entire surface is necessary for conducting reasonably efficient operations under the lease and that the sale and occupancy of the surface for townsite purposes will seriously interfere with the plaintiffs' right to use the same in their mining operations and will obstruct and impede the further prosecution of those operations and thereby subject the plaintiffs to continuing and irreparable injury.

With this understanding of the situation and of the chief object of the suit, we think it plain that the plaintiffs were entitled to the interposition and aid of a court of equity to prevent the threatened occupancy and use of the surface for purposes incompatible with their right to continue the mining operations under the lease and to make any necessary use of the surface. Certainly they were without the plain, adequate and complete remedy at law which under § 267 of the Judicial Code precludes resort to a suit in equity.

The circuit court of appeals based its decision on the part of the act of 1914 which—after directing that the patent for the surface estate shall contain a reservation of the underlying oil and gas deposits, with the right to prospect for, mine and remove the same—provides that lessees of the United States may enter, occupy so much of the surface as may be required, and mine and remove the minerals, "upon payment of damages caused thereby to the owner of the land, or upon giving a good and suffi-

cient bond or undertaking therefor in an action instituted in any competent court to ascertain and fix said damages."

The plaintiffs take the position that the bond given by the lessee and approved by the Secretary of the Interior when the lease was issued satisfied that provision. In this the plain words of the provision are neglected. They call for a bond to be given in a judicial proceeding wherein the damages may be ascertained and fixed. The circuit court of appeals so regarded them.

But we are unable to agree with that court's ruling that the provision requires that the bond be given and the damages assessed only in an action at law. The words of the provision are " an action instituted in any competent court;" and we think the matter is one which the district court was and is competent to deal with in this suit.

It is a general rule that a court of equity, in a suit of which it has and takes cognizance, may administer complete relief between the parties even though this involves the determination of legal rights which otherwise would not be within the range of its authority, *Camp* v. *Boyd,* 229 U. S. 530, 552; *McGowan* v. *Parish,* 237 U. S. 285, 296; *United States* v. *Union Pacific Ry. Co.,* 160 U. S. 1, 50, *et seq.* And under that rule a court of equity in awarding relief to one party may impose conditions protecting and giving effect to correlative rights of the other. *Walden* v. *Bodley,* 14 Pet. 156, 164; *Lynch* v. *Burt,* 132 Fed. 417, 432; *Burnes* v. *Burnes,* 137 Fed. 781, 791.

So, while the provision on which the decision of the circuit court of appeals rests cannot be held to be an obstacle to the maintenance of this suit in a court of equity, we think it shows a need for modifying the decree of the district court by providing therein for an ascertainment in this suit of any damages which the plaintiffs' entry and operations under the lease may have caused to the agricultural improvements or crops of the owner of the surface estate, and also by conditioning the relief awarded

the plaintiffs upon their giving a good and sufficient bond or undertaking to pay such damages within a limited time after the same are ascertained.

The evidence appears not to have been taken with a view to an ascertainment of the damages, but there is testimony tending to show that the owner of the surface is asserting a claim for damages done at the time the plaintiffs entered or soon thereafter. It of course is admissible to fix the damages by agreement. But if this be not done there will be need for a hearing on that question.

We conclude that the decree of the circuit court of appeals should be reversed and that the cause should be remanded to the district court with directions to modify its decree in accordance with what is said in this opinion.

Decree of circuit court of appeals reversed.
Decree of district court modified.

NATIONAL LIFE INSURANCE COMPANY *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 228. Argued April 12, 1928.—Decided June 4, 1928.

The Revenue Act of 1921 provides that the gross income of a life insurance company shall be the gross amount of income received during the taxable year from interest, dividends, and rents, and that the net income upon which its income tax is to be assessed shall be the gross income less specified deductions, among which are (1) the amount of interest received during the taxable year from tax-exempt securities, and (2) an amount equal to 4% of the company's mean reserve funds, diminished, however, by the amount of the first deduction, the interest from tax-exempt securities. In the case at bar, the petitioner company, though allowed the first deduction, comprising the interest from its exempt state, municipal and United States bonds, was not advantaged thereby; for, since the same amount was subtracted in computing the second deduction,

its tax was the same as if all of its securities had been taxable, and higher than it would have been if those that were tax-free had not belonged to it. The Act (§ 213) expressly disavows any purpose to tax interest upon obligations of the United States, and provides (§ 1403) that if any of its provisions or the application thereof to any persons of circumstances be held invalid, the remainder of the Act, and the application of such provisions to other persons or circumstances, shall not be affected thereby. *Held:*

1. The effect of the statutory computation of deductions was to impose a direct tax on the income of the exempt securities, amounting to taxation of the securities themselves. Pp. 519, 521.
2. The tax, insofar as it affects state and municipal bonds, was unconstitutional. P. 521.
3. The tax, insofar as it affects the United States bonds, was contrary to the manifest general purpose of the statute, which (§ 213) expressly disavowed any purpose to tax interest on such obligations and did not intend to subject them to burdens which could not be imposed on state obligations. P. 521.
4. Considering this, and the saving clause, abatement of the 4% deduction by the amount of interest received from tax-exempt securities cannot be given effect against the petitioner, under the circumstances disclosed; and petitioner is entitled to recover taxes paid. P. 522.

63 Ct. Cls. 256, reversed.

CERTIORARI, 275 U. S. 734, to a judgment of the Court of Claims dismissing a claim for taxes alleged to have been illegally collected.

Messrs. Wm. Marshall Bullitt and *J. Harry Covington,* with whom *Mr. George B. Young* was on the brief, for petitioner.

The effect of the statute is to include all tax-exempt income in the "net income" on which the 10% tax is levied. [This was demonstrated by interesting algebraic methods.] Although the National Life derived nearly one-third of its entire gross income from tax-exempt securities, yet it had to pay exactly the same tax as it would have paid if its whole income were from taxable securities. As aptly said by Justice McReynolds in *Nichols* v.

Coolidge, 274 U. S. 531, 541, " Taxes are very real things and statutes imposing them are estimated by practical results."

The effect of the Act was to accomplish a purpose not to give the taxpayer any exemption on his tax-exempt bonds, by the simple expedient of first allowing the exemption, and then providing that any taxpayer, having such exemption, should have his authorized deductions *ipso facto* reduced by the exact amount of his tax-exemptions.

Of two companies, identic in size of assets, income and business, A, with a million dollars tax-exempt income, pays exactly the same tax as B, with no tax-exempt income; and so the practical effect of the Act is to tax A's tax-exempt income. While, with the same income subject to taxation, A pays vastly more than B solely because A has invested in U. S. bonds.

Or, stated from a slightly different angle, while B, having no tax-exempt securities, is allowed to deduct 4% of its reserve, A, solely because it owns tax-exempt securities, is allowed a deduction diminished in the precise amount of its tax-exempt income; so that A, solely because it owns tax-exempt securities, is taxed upon its other taxable income a greater tax than B, who does not own any tax-free bonds. The sole basis of classification between A and B, is A's ownership of tax-exempt securities; and that differentiation is made the basis of giving B a correspondingly greater reduction.

Section 245 (a) (2) is unconstitutional in so far as it reduces the 4% of Reserves exemption by the exact amount of the National Life's tax-exempt income; and this is so because its purpose and effect are to tax the income from tax-exempt bonds. Congress cannot tax (1) instrumentalities of the States, nor (2) the income from U. S. bonds which it has expressly exempted from taxation. The effect of § 245 (a) (2) is to tax the income

from tax-free securities. *Northwestern Mutual Life Ins. Co.* v. *Wisconsin,* 275 U. S. 136; *Evans* v. *Gore,* 253 U. S. 245; *Farmers Bank* v. *Minnesota,* 232 U. S. 516; *Miller* v. *Milwaukee,* 272 U. S. 713.

A chronological review of authorities condemns the plan embraced in § 245 (a) (2). *United States* v. *Ritchie,* Fed. Cas. 16,168; *People* v. *Commissioners,* 41 How. Pr. 459; *People* v. *Weaver,* 100 U. S. 539; *Farmers Bank* v. *Minnesota,* 232 U. S. 516; *Evans* v. *Gore,* 253 U. S. 245; *Miles* v. *Graham,* 268 U. S. 501.

Although *Evans* v. *Gore* and *Miles* v. *Graham, supra,* are not as directly in point as others of the cases reviewed, they are important as establishing the doctrine that if income (whether judicial salary or interest from tax-free bonds) is exempt from diminution or seizure by governmental authority, it cannot be diminished or taken by the device of compelling its inclusion in "gross" income as the basis from which "net" income is ascertained. The exempted income must be, for purposes of taxation, treated as non-existent.

In the case at bar, the National Life insists that its interest from the state and federal bonds should be treated, for tax purposes, as being as completely non-existent as *Evans* v. *Gore* and *Miles* v. *Graham* held that a judicial salary should be treated as non-existent when it came to tax purposes.

Three cases are directly in point, viz., *City of Waco* v. *Amicable Life Ins. Co.* (Tex.), 230 S. W. 698; *id.,* 248 S. W. 332; *Motor Car Co.* v. *Detroit,* 232 Mich. 245; and *Miller* v. *Milwaukee,* 272 U. S. 713.

If the device of § 245 (a) (2) be sustained, then the door will be open wide for the States, by simple statutory amendments, to nullify many of this Court's most important rulings as to tax-exempt property, for example, *Evans* v. *Gore,* 253 U. S. 245; *People* v. *Weaver,* 100 U. S. 539; *L. & J. Ferry Co.* v. *Kentucky,* 188 U. S. 385; *Bank*

of California v. *Richardson,* 248 U. S. 476; *Frick* v. *Pennsylvania,* 268 U. S. 473; *Miller* v. *Milwaukee,* 272 U. S. 713; *Northwestern Mutual Life Ins. Co.* v. *Wisconsin,* 275 U. S. 136.

The power of Congress to grant or refuse deductions does not authorize "unconstitutional conditions" of deduction. *Federal Land Bank* v. *Crosland,* 261 U. S. 374; *Miller* v. *Milwaukee,* 272 U. S. 713; *Nichols* v. *Coolidge,* 274 U. S. 531.

Congress had the absolute power to grant, or to refuse to grant, deductions in the shape of a percentage of the Reserves. It could have made such deduction, if allowed at all, 1%, 2%, 3%, or any other per cent that, in its discretion, the equitable and economic necessities of the case required. But, it could not lawfully authorize a conditional deduction (1) where the full deduction was allowed, if a company held no tax-free securities; whereas (2) if a company held tax-free securities, the deduction was made smaller, in the exact amount of such tax-free securities,—so that the effect was to impose a tax upon tax-free securities, in the precise amount that they would have been taxed if a tax had been levied upon them *eo nomine.*

The whole point is that the ownership of tax-exempt securities, cannot be made the basis of a classification, whose sole purpose is to tax more heavily those who hold tax-exempt securities, than those who do not hold them.

The Government can tax anything it pleases, except tax-exempts; but it must deduct tax-exempts from anything on which it imposes taxes. It can give any further deductions that it pleases, and it can ascertain what that deduction shall be in almost any way it pleases.

It can make that deduction equivalent to the man's debts, or to his tangible property, or to his bank stocks, or to his agricultural products, or to any fraction of any of those, but the qualification is, that it cannot make the

ownership of tax-exempts in any way a factor in determining the amount of the deduction. In other words, it cannot use the ownership of tax-exempts in any way so that such ownership shall work out adversely to any citizen owning such tax-exempt securities. This is an implied and necessary limitation on the power to give a deduction that would otherwise be wholly within the discretion of the Legislature.

The State, in making any deduction or in granting any privilege, cannot make the ownership of tax-exempt securities result in the taxpayer getting a less benefit or privilege than he would have had if he had not owned them, because the minute you do that, you are putting a burden on the ownership of the tax-exempt securities. It cannot annex to the privilege of a deduction the surrender or subtraction of the constitutional privilege of tax exemption. *Terrall* v. *Burke,* 257 U. S. 529.

The Act purports to be something that it is not. While it is true the Government could tax the gross income, minus the tax-exempt income, yet it cannot tax gross income, minus 4% of Reserves, without giving the benefit of tax-exempt income. It is absurd to subtract the tax-exempt income and then add it back on. Regard must be had to the substance of what is done and not merely to the form. *Nichols* v. *Coolidge,* 274 U. S. 531; *Child Labor Tax Case,* 259 U. S. 20; *Hill* v. *Wallace,* 259 U. S. 44.

The tax cannot be sustained upon the theory that it is measured by income regardless of the tax-free character of such income. *Frick* v. *Pennsylvania,* 268 U. S. 473. *Evans* v. *Gore,* 253 U. S. 245; *Gillespie* v. *Oklahoma,* 257 U. S. 501; *Miller* v. *Milwaukee,* 272 U. S. 713; *Nichols* v. *Coolidge,* 274 U. S. 531; *Northwestern Mutual Ins. Co.* v. *Wisconsin,* 275 U. S. 136, established the doctrine that where the principal, as here, is absolutely immune from taxation, even net income partially derived

therefrom cannot be taxed; and that inquiry will be permitted into the income taxed, for the purpose of ascertaining whether it comes from a source which is itself untaxable.

The tax is an income tax and not an excise tax. Distinguishing *Flint* v. *Stone Tracy Co.,* 220 U. S. 107; *Stanton* v. *Baltic Mining Co.,* 240 U. S. 103; *Stratton's Independence* v. *Howbert,* 231 U. S. 399; and *Brushaber* v. *Union Pacific,* 240 U. S. 1.

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

Petitioner has not been taxed upon any part of its income from tax-exempt securities, and the law does not impose any tax thereon. If the gross income of a life insurance company consisted wholly of interest from such securities, it would all be deducted, no matter how much it might be. The exemption is absolute and unqualified. The misconception underlying the petitioner's argument is that for some unexplained reason a life insurance company is entitled as of right to a further deduction of 4% of its legal reserve without reference to the amount of that reserve or of the securities in which it is invested.

Conceding that Congress has no power to tax income from state and municipal bonds, and has power to tax income from rents, stock dividends, railroad bonds, and mortgages, it is obvious that it could exempt income from any one or all of these forms of investment without thereby infringing upon the immunity of the state and municipal bonds from taxation. The immunity of one class of security from taxation does not impose upon Congress an obligation to tax all other forms of investment.

Neither the Bill upon its face nor what was said of it by the committees having it in charge justifies the accusation that Congress was attempting by subterfuge to

override its constitutional limitations or to impose an unrighteous system of taxation upon these companies.

No complaint may fairly be made because the statute does not permit petitioner to deduct the same income twice. The single fact of importance is that the tax-exempt income of the companies is given complete exemption from taxation under any and all circumstances.

Petitioner had no inherent right to the deduction of any amount based upon its reserves. Deductions are a matter of legislative discretion and authority for all deductions must be found in the statute. *New Creek Co.* v. *Lederer,* 295 Fed. 433; *People ex rel. Bijur* v. *Barker,* 155 N. Y. 330; *Smalley* v. *Burlington,* 63 Vt. 443.

Upon constitutional grounds no complaint could have been made by any company had Congress omitted entirely the deductions specified in § 245 (a) (2). The fact that an insurance company holding no tax-exempt securities will under certain circumstances pay no greater tax than will another company having tax-exempt securities, is not discriminatory in a legal sense. Cf. *Brushaber* v. *Union Pacific R. R. Co.,* 240 U. S. 1. It is not discrimination against tax-exempt securities to give exemption to other securities which could lawfully be taxed, and no corporation holding securities which may not constitutionally be taxed has a right to insist that its neighbor, owning securities which are within the taxing power, shall be taxed. The uniformity required by Art. I, § 8, cl. 1 of the Constitution, means geographical uniformity. *Knowlton* v. *Moore,* 178 U. S. 41; *Patton* v. *Brady,* 184 U. S. 608; *Barclay & Co.* v. *Edwards,* 267 U. S. 442.

Congress has authority to adjust its income taxes according to its discretion within the bounds of geographical uniformity. The Revenue Act of 1921 treats all insurance corporations alike, and if in its application a

tax in particular instances may seem to bear upon one corporation more than another, this is due to differences in their circumstances, not to lack of uniformity in the tax imposed. *LaBelle Iron Works* v. *United States,* 256 U. S. 377.

No company under this statute can possibly be taxed by reason of its ownership of tax-exempt securities more heavily than those which do not hold them, other things being equal, and "tax-exempt securities" are under all conditions deducted from that upon which the taxes are imposed.

Mr. Charles Evans Hughes on behalf of The Metropolitan Life Insurance Company, The Mutual Benefit Life Insurance Company, and The Prudential Insurance Company, as *amici curiae,* filed a brief by special leave of court, sustaining the legislation in question.

Mr. Justice McReynolds delivered the opinion of the Court.

In 1921, departing from previous plans, Congress laid a tax on life insurance companies based upon the sum of all interests and dividends and rents received, less certain specified deductions—(1) interest derived from tax exempt securities, if any; (2) a sum equal to four per centum of the company's legal reserve diminished by the amount of the interest described in paragraph (1); (3) other miscellaneous items—seven—not presently important.

Petitioner maintains that, acting under this plan, the Collector illegally required it to pay taxes, for the year 1921, on federal, state and municipal bonds; and it seeks to recover the amount so exacted. The Court of Claims gave judgment for the United States.

The Revenue Act of 1921, approved November 23, 1921, Chap. 136, Title II, Income Tax (42 Stat. 227, 238, 252, 261) provides—

"Sec. 213. That for the purposes of this title (except as otherwise provided in section 233) [the exceptions not here important] the term 'gross income'—

(a) Includes gains, profits, and income . . .

(b) Does not include the following items, which shall be exempt from taxation under this title:

(1) (2) and (3) [not here important]

(4) Interest upon (a) the obligations of a State, Territory, or any political subdivision thereof, or the District of Columbia; or (b) securities issued under the provisions of the Federal Farm Loan Act of July 17, 1916; or (c) the obligations of the United States or its possessions; . . .

"Sec. 230. That, in lieu of the tax imposed by section 230 of the Revenue Act of 1918, there shall be levied, collected, and paid for each taxable year upon the net income of every corporation a tax at the following rates:

(a) For the calendar year 1921, 10 per centum of the amount of the net income in excess of the credits provided in section 236; and

(b) For each calendar year thereafter, 12½ per centum of such excess amount. . . .

"Sec. 243. That in lieu of the taxes imposed by sections 230 [general corporation tax] and 1,000 [special taxes on capital stock] and by Title III [war profits and excess profits taxes], there shall be levied, collected, and paid for the calendar year 1921 and for each taxable year thereafter upon the net income of every life insurance company a tax as follows:

(1) In the case of a domestic life insurance company, the same percentage of its net income as is imposed upon other corporations by section 230 [ten per cent for 1921, twelve and one-half thereafter];

(2) In the case of a foreign life insurance company, the same percentage of its net income from sources within the United States as is imposed upon the net income of other corporations by section 230. . . .

"Sec. 244. (a) That in the case of a life insurance company the term 'gross income' means the gross amount of income received during the taxable year from interest, dividends, and rents.

(b) The term 'reserve funds required by law' includes . . .

"Sec. 245. (a) That in the case of a life insurance company the term 'net income' means the gross income less—

(1) The amount of interest received during the taxable year which under paragraph (4) of subdivision (b) of section 213 is exempt from taxation under this title [interest on tax-exempt securities];

(2) An amount equal to the excess, if any, over the deduction specified in paragraph (1) of this subdivision of 4 per centum of the mean of the reserve funds required by law and held at the beginning and end of the taxable year, plus [certain other sums not here important] . . ."

(3) (4) (5) (6) (7) (8) and (9) grant other exemptions not now important.

The mean of petitioner's reserve funds for 1921 was $67,381,877.92. Four per centum of this is $2,695,279.12.

During 1921 interest derived from all sources amounted to $3,811,132.78; from dividends, nothing; from rents, $13,460.00. Total, $3,824,592.78. $1,125,788.26 of this interest came from tax exempt securities—$873,075.66 from state and municipal obligations, and $252,712.60 from those of the United States.

The Collector treated interest plus dividends plus rents, $3,824,592.78, as gross income, and allowed deductions amounting to $2,899,690.79, made up of the following items: $1,125,788.26, interest from tax exempt securities; $1,569,490.86, the difference between 4% of the reserve fund ($2,695,279.12) and ($1,125,788.26) interest received from exempt securities; miscellaneous items, not contested

and negligible here, $204,411.67. After deducting these from total receipts ($3,824,592.78—$2,899,690.79), there remained a balance of $924,901.99. This he regarded as net income and upon it exacted ten per centum, $92,490.20.

If all interest received by the Company had come from taxable securities, then, following the statute, there would have been deducted from the gross of $3,824,592.78—4% of the reserve, $2,695,279.12, plus the miscellaneous items $204,411.67—$2,899,690.79, and upon the balance of $924,901.99 the tax would have been $92,490.20. Thus it becomes apparent that petitioner was accorded no advantage by reason of ownership of tax exempt securities.

Petitioner maintains that the result of the Collector's action was unlawfully to discriminate against it and really to exact payment on account of its exempt securities, contrary to the Constitution and laws of the United States. Also that diminution of the ordinary deduction of 4% of the reserves because of interest received from tax exempt securities, in effect, defeated the exemption guaranteed to their owners.

The portion of petitioner's income from the three specified sources which Congress had power to tax—its taxable income—was the sum of these items less the interest derived from tax exempt securities. Because of the receipt of interest from such securities, and to its full extent, pursuing the plan of the statute, the Collector diminished the 4% deduction allowable to those holding no such securities. Thus, he required petitioner to pay more upon its taxable income than could have been demanded had this been derived solely from taxable securities. If permitted, this would destroy the guaranteed exemption. One may not be subjected to greater burdens upon his taxable property solely because he owns some that is free. No device or form of words can deprive him of the exemption for which he has lawfully contracted.

The suggestion that as Congress may or may not grant deductions from gross income at pleasure, it can deny to one and give to another is specious, but unsound. The burden from which federal and state obligations are free is the one laid upon other property. To determine what this burden is requires consideration of the mode of assessment, including, of course, deductions from gross values. What remains after subtracting all allowances is the thing really taxed.

United States v. *Ritchie* (1872) Fed. Cases 16,168.

Ritchie was the state's attorney for Frederick County, Md. The federal statute allowed an exemption of $1,000. The collector claimed that if Ritchie's salary was held free from taxation, one thousand dollars of it should be applied to the exemption clause. Giles, J., held: "The United States could not apply the compensation of a state officer to the satisfaction of the exemption alone, because that would, indirectly, make his income from such source liable to the taxation from which it is exempt; that to exhaust the exemption clause by taking the amount out of his official income, would be to make it, in effect, subject to the revenue law, and to deny to a state's officer the advantage of the state's exemption, and that therefore the official income of defendant was not to be taken into consideration in the assessment of the tax."

People, etc. v. *Commissioners* (1870) 41 How. Prac. Reports, 459.

Held:—That in determining the amount of personal property of an individual, by assessors or commissioners of taxes, for the purpose of taxation, stocks and bonds of the United States are to form no part of the estimate. They cannot be excluded or deducted from the amount of his assets, liable to taxation, for it is error to include them in such assets.

Packard Motor Car Co. v. *City of Detroit* (1925) 232 Mich. 245.

Held:—That tax exempt credits may not be taxed, directly or indirectly, and in levying a tax on property they must be treated as nonexistent. The provision of Act No. 297, Pub. Acts 1921, providing that if the person to be taxed "shall be the owner of credits that are exempt from taxation such proportion only of his indebtedness shall be deducted from debts due or to become due as is represented by the ratio between taxable credits and total credits owned, whether taxable or not," is void as an interference with the power of the United States Government to raise money by issuance of tax exempt obligations and is in conflict with the Constitution of the United States.

See also *City of Waco* v. *Amicable Life Ins. Co.* (Tex.) 230 S. W. 698; *id.*, 248 S. W. 332.

Miller, et al., Executors v. *Milwaukee,* 272 U. S. 713.

Held:—That where income from bonds of the United States which by Act of Congress is exempt from state taxation is reached purposely, in the case of corporation-owned bonds, by exempting the income therefrom in the hands of the corporations, and taxing only so much of the stockholder's dividends as corresponds to the corporate income not assessed, the tax is invalid.

It is settled doctrine that directly to tax the income from securities amounts to taxation of the securities themselves, *Northwestern Mutual Life Ins. Co.* v. *Wisconsin,* 275 U. S. 136. Also that the United States may not tax state or municipal obligations. *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514, 521.

How far the United States might repudiate their agreement not to tax we need not stop to consider. Counsel do not claim that here state obligations should have more favorable treatment than is accorded to those of the Federal Government. The Revenue Act of 1921 (Sec. 213) expressly disavows any purpose to tax interest upon the latter's obligations.

Section 1403 provides—

"That if any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances, shall not be affected thereby."

Congress had no power purposely and directly to tax state obligations by refusing to their owners deductions allowed to others. It had no purpose to subject obligations of the United States to burdens which could not be imposed upon those of a State.

Considering what has been said, together with the saving clause just quoted, and the manifest general purpose of the statute, we think that provision of the Act which undertook to abate the 4% deduction by the amount of interest received from tax exempt securities cannot be given effect as against petitioner under the circumstances here disclosed. It was unlawfully required to pay $92,490.20 and is entitled to recover.

The judgment of the Court of Claims must be reversed. If within ten days counsel can agree upon a decree for entry here, it may be presented. Otherwise, the cause will be remanded to the Court of Claims for further proceedings in conformity with this opinion.

Reversed.

MR. JUSTICE BRANDEIS, dissenting.

Ever since Corporation Tax Act, August 5, 1909, c. 6, § 38, 36 Stat. 11, 112, the United States has laid upon life insurance companies a special excise tax measured by net income. But the several revenue acts have varied as to the rate of the tax and also as to the method of computing the taxable income. That is, the items to be included in gross income and the items to be allowed as deductions have been changed from time to time. In the earliest act no deduction was made of interest on tax-exempt bonds. Until 1921, the gross income considered included premium

receipts.[1] See *New York Life Insurance Co.* v. *Edwards*, 271 U. S. 109; *McCoach* v. *Insurance Co. of North America*, 244 U. S. 585. Compare *Penn Mutual Life Insurance Co.* v. *Lederer*, 252 U. S. 523. The inclusion of premium receipts, with corresponding deductions, was found to be unsatisfactory. After much consideration, Congress, upon consultation with the life insurance companies and with the approval of at least most of them, substituted a new basis for computing the tax.[2] Act of November 23, 1921,

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[1] Act of August 5, 1909, c. 6, § 38, 36 Stat. 11, 112; Act of October 3, 1913, c. 16, 38 Stat. 114, 172–173; Act of September 8, 1916, c. 463, 39 Stat. 756, 765–768; Act of February 24, 1919, c. 18, 40 Stat. 1057, 1075–1079. Under all these acts the companies were allowed to deduct the amount paid on policies (except as dividends) and the amount required by law to be added to their reserves.

[2] In a memorandum filed with the Committee on Ways and Means of the House of Representatives at the time when the Revenue Bill of 1918 was being considered, the Association of Life Insurance Presidents stated: "Although only a minor proportion of the premiums received by the insurance companies constitutes true income, the greater part being the policyholders' contributions toward current losses and to permanent capital, the entire premium income is included in gross income under the income-tax law. This departure from principle is, however, rendered innocuous through deductions expressly allowed by the statute." Hearings before the Committee on Ways and Means, House of Representatives, 65th Cong., 2d Sess., on the Proposed Revenue Act of 1918, Pt. I, p. 811. The Senate Finance Committee recommended in 1918 the plan later included in the Act of 1921, namely, that the basis of the tax be changed so as to include only the investment income, and that the deductions should be similarly limited. Senate Report, 65th Cong., 3rd Sess., No. 617, p. 9. In presenting the bill Senator Simmons stated that it had been framed after consultation with many representatives of the life insurance companies. 57 Cong. Rec. 254. The plan was adopted by the Senate, but had to be abandoned in conference.

At the Annual Meeting of Life Insurance Presidents, December, 1920, it was stated that the basis of the income tax was unsatisfactory both to the companies and to the Government, and that a plan similar to that embodied in the Senate amendment to the 1918 bill should be adopted. Proceedings of the 14th Annual Meeting, pp.

c. 136, §§ 243–245, 42 Stat. 227, 261. The validity of that Act is now attacked by the National Life Insurance Company. Other companies have, as *amici curiae*, filed a brief in support of the legislation.

The gross income to be considered under the Act of 1921 is limited to that received "from interest, dividends, and rents." In order to ascertain the taxable income, this gross investment income is to be reduced by nine classes of deductions, so far as severally applicable. Only two of these are material here—the provisions in paragraphs (1) and (2) of § 245. Taken together, they provide for the deduction from the gross investment income of the interest from tax-exempt bonds or of an amount equal to 4 per cent of the mean insurance reserve, whichever sum is the greater. That is, paragraph (1) provides for a deduction of interest received from tax-exempt bonds; [3]

140–141, 143–145. The Revenue Bill of 1921, as introduced in the House, contained the plan of taxation which had been adopted by the Senate in 1918. House Report, 67th Cong., 1st Sess., No. 350, p. 14. It was stated to the Senate Finance Committee that "all the life insurance companies are behind that scheme and are satisfied with it." Hearings before the Senate Committee on Finance, 67th Cong., 1st Sess., on H. R. 8245, September 1–October 1, 1921, p. 84. See also Senate Report, 67th Cong., 1st Sess., No. 275, p. 20; Brief of *Amici Curiae*, p. 1.

[3] The scope of the deduction to be made on account of tax-exempt securities is defined by paragraph 4 of subdivision (b) of § 213 of the Act: "Interest upon (a) the obligations of a State, Territory, or any political subdivision thereof, or the District of Columbia; or (b) securities issued under the provisions of the Federal Farm Loan Act of July 17, 1916; or (c) the obligations of the United States or its possessions; or (d) bonds issued by the War Finance Corporation. In the case of obligations of the United States issued after September 1, 1917 (other than postal savings certificates of deposit) and in the case of bonds issued by the War Finance Corporation, the interest shall be exempt only if and to the extent provided in the respective Acts authorizing the issue thereof as amended and supplemented, and shall be excluded from gross income only if and to the extent it is wholly exempt to the taxpayer from income, war-profits and excess-profits taxes." 42 Stat. 227, 238.

and this deduction is to be made to the full extent, under all circumstances. Paragraph (2) provides that there shall be deducted such amount, if any, as is required to be added to the income from the tax-exempt securities, to equal 4 per cent of the mean insurance reserve. Thus, no deduction under paragraph (2) will be allowed, if the income from the tax-exempt securities equals or exceeds 4 per cent of the required reserve. And if the Company has any income from tax-exempt bonds, it will not receive the full deduction of 4 per cent of the required reserve, under paragraph (2). The reason for allowing the deduction of 4 per cent of the reserve is that a portion of the " interest, dividends, and rents " received have to be used each year in maintaining the reserve, *i. e.*, adding to it on the basis of a certain interest rate, varying from 3 per cent to 4 per cent according to the requirements of the statutes of the several States.

The National Life Insurance Company had, during the year 1921, gross investment income amounting to $3,824,-592.78. Of this income, $1,125,788.26 was interest on tax-exempt bonds. Four per cent of the Company's insurance reserve amounted to $2,695,279.12. As the interest received from tax-exempt bonds was less than 4 per cent upon its reserve, the Company was allowed under paragraph (2) the additional deduction of a sum equal to the difference between these two, namely $1,569,490.86. The aggregate of the deductions allowed under paragraphs (1) and (2) was thus no greater than the deduction would have been if all the Company's income had been derived from taxable securities.

That the return and the payment required of the Company was in exact accord with the Act is conceded. The contention is that the Act is unconstitutional, because as applied it renders the tax-exempt privilege of no value to the Company. The argument is that the tax burden from which such federal and state obligations are free is

the one laid upon other property; that a person may not be subjected to greater burdens upon his taxable property because he owns some that is free; that here the Company has been required to pay more upon its taxable income than could have been demanded under the statute had the income been derived solely from taxable securities; that to permit this to be done would destroy the guaranteed exemption for which the bondholder lawfully contracted, and would enable the Federal Government to burden the States; and that this cannot be done, whatever the device or form of words employed by Congress. The argument rests, I think, upon misconceptions.

Some of the tax-exempt bonds held by the Company were state (including county, district and municipal) bonds. Some were United States bonds which in terms provide for exemptions from federal taxes. With the holders of state bonds the United States has entered into no contract. Whatever rights the Company may have as to them must flow either directly from the terms of the federal act which provides for the deductions to be made in computing the net income, or must arise indirectly out of the Constitution. The objection made, and sustained by the Court, is that the Act is void because thereby Congress taxes the bonds, an instrumentality of the States, or that it discriminates against the holder. Compare *Collector* v. *Day,* 11 Wall. 113, 124; *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514, 521–524. As to the United States bonds, the claim is that the due process clause of the Fifth Amendment is violated, because the Act nullifies the provision in the bond that it shall be exempt from federal taxation.[4] On this contention the Court does not

[4] The precise terms of the exemption are not the same in all issues of United States bonds. Thus, bonds issued under the First Liberty Loan are declared to be "exempt, both as to principal and as to interest, from all taxation, except estate or inheritance taxes, imposed by authority of the United States, or its possessions, or by any State

pass. Compare *Brushaber* v. *Union Pacific R. R. Co.,* 240 U. S. 1, 25. But it holds, nevertheless, that there must be deducted the full 4 per cent of the reserve in addition to the tax-exempt interest from federal as well as from state securities. It interprets the will of Congress to be that such a deduction should be made, because otherwise federal obligations would have less favorable treatment than must be accorded state bonds.

As the tax imposed by the Act of 1921 is on net income, I should have supposed that it was settled by *Flint* v. *Stone-Tracy Co.,* 220 U. S. 107, 147, 162, that the inclusion in the computation of the interest on tax-exempt bonds, like the inclusion of the receipts from exports, *Peck* v. *Lowe,* 247 U. S. 165; *Barclay & Co.* v. *Edwards,* 267 U. S 442, 447, or the inclusion in a state tax of receipts from interstate commerce, *United States Glue Co.* v. *Oak Creek,* 247 U. S. 321, 326; *Shaffer* v. *Carter,* 252 U. S. 37, 57; *Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S. 113, 120, would not have rendered the tax objectionable. Compare *Interboro Rapid Transit Co.* v. *Sohmer,* 237 U. S. 276, 284. But here it is indisputable that no part of the income derived from tax-exempt bonds is taxed. For the statute requires that in computing the taxable income the full amount of the interest on tax-exempt securities should be deducted. The only question that can arise in any case is how much additional shall be allowed as a deduction under paragraph (2).

The only factual basis for complaint by the Company is that, although a holder of tax-exempt bonds, it is,

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or local taxing authority." In the Second and later loans the bonds are subject to "graduated additional income taxes, commonly known as surtaxes, and excess-profits and war-profits taxes, now or hereafter imposed by the United States," except that the interest on an amount not in excess of a certain figure is free from tax. All the bonds held by the petitioner were, by the statutes under which they were issued, exempt from the normal tax.

in respect to this particular tax, no better off than it would have been had it held only taxable bonds. Or, to put it in another way, the objection is not that the plaintiff is taxed on what is exempt, but that others, who do not hold tax-exempt securities, are not taxed more. But neither the Constitution, nor any Act of Congress, nor any contract of the United States, provides that, in respect to this tax, a holder of tax-exempt bonds, shall be better off than if he held only taxable securities. Nowhere can the requirement be found that those who do not hold tax-exempt securities shall, in respect to every tax, be subjected to a heavier burden than the owners of tax-exempt bonds.

It is true that the tax-exempt privilege is a feature always reflected in the market price of bonds. The investor pays for it. But the value of the tax-exempt feature, like the value of the bond itself, may fluctuate for many reasons. Its value may be lessened by changing, through legislation, the supply or the demand. It may be lessened by laws which have no relation to taxation, as was done when the Federal Reserve legislation changed the basis for securing notes of issue.[5] The recent successive reductions in federal surtaxes[6] lessened for many holders the relative value of tax-exempt bonds. The narrowing thereby of an existing use for the tax-exempt bonds was important enough to affect the market value. Some of the States lessened the value of United States bonds to many a holder, when they substituted a small tax

[5] For the effect of the pending Federal Reserve legislation and its enactment (December 23, 1913, c. 6, 38 Stat. 251), on the market value of United States bonds held to secure national bank circulation, see Commercial & Financial Chronicle, Vol. 97, pp. 91, 153, 271, 1083; Vol. 98, pp. 131, 200.

[6] Act of June 2, 1924, c. 234, 43 Stat. 253, 265; Act of February 26, 1926, c. 27, 44 Stat. 9, 21.

on intangibles, or an income tax, for the heavy general property tax to which all taxable bonds had theretofore been subject. The amendment of the state constitution involved in *Florida* v. *Mellon,* 273 U. S. 12, by which Florida prohibited its Legislature from imposing taxes on succession or on income, and offered to the rich a haven of tax immunity, reduced the potential demand for, and hence the value of, tax-exempt bonds. By all such legislation the relative advantage, with respect to some taxes, of tax-exempt over taxable bonds was lessened. With respect to other taxes the relative advantage was wholly removed. And the relative value of the tax-exempt bonds to the holder was thereby necessarily reduced. But obviously that lessening of relative advantage and of value did not impair any legal right possessed by the holder.

The holder of tax-exempt bonds often finds himself with respect to taxes imposed under legislation other than the Act of 1921, no better off than if he had owned only taxable bonds. But this Court has never held a statute invalid on that ground. A state inheritance or legacy tax is valid although the tax is as high when the estate transmitted consists in part of bonds of the United States as when none are held. *Plummer* v. *Coler,* 178 U. S. 115; *Orr* v. *Gilman,* 183 U. S. 278. Compare *Greiner* v. *Lewellyn,* 258 U. S. 384. This is true also of the tax upon Connecticut savings banks upheld in *Society for Savings* v. *Coite,* 6 Wall. 594; of that upon Massachusetts savings banks upheld in *Provident Institution* v. *Massachusetts,* 6 Wall. 611; of that upon Massachusetts manufacturing corporations, upheld in *Hamilton Co.* v. *Massachusetts,* 6 Wall. 632; of that upon insurance corporations, upheld in *Home Insurance Co.* v. *New York,* 134 U. S. 594. Under all of these statutes a corporation holding bonds of the United States was obliged to pay the same amount in taxes that it would have been required to pay if it had

not been a holder of United States bonds.[7] Similarly it has been held, in a long line of cases sustaining state laws taxing shares in a national bank to the shareholders, that no deduction need be made in the assessment on account of the United States bonds constituting a part of the assets of the bank by which the value of the shares is measured. *Van Allen* v. *Assessors,* 3 Wall. 573, 583; *People v. Commissioners,* 4 Wall. 244, 255; *Peoples National Bank of Kingfisher* v. *Board of Equalization,* 260 U. S. 702; *Des Moines National Bank* v. *Fairweather,* 263 U. S. 103, 114.

The mere fact that the National Life Insurance Company was not allowed a larger deduction than would have been available if it had held only taxable bonds, cannot, therefore, render the taxing provision void. Whether there is in the provision for deductions some element of discrimination which renders it unconstitutional, remains for consideration. It may be assumed—if the term is used with legal accuracy—that the United States may not discriminate against state bonds or against its own outstanding bonds. Discrimination is the act of treating differently two persons or things, under like circumstances. Compare *Merchants Bank* v. *Pennsylvania,* 167 U. S. 461, 463. Here the sole complaint is that the two, although the circumstances are unlike, are treated equally. The claim is not that the holder of tax-exempt bonds is denied a privilege enjoyed by others. It is that the holder of tax-exempt bonds should be given in respect to another matter a preferred status. The preference claimed is that it shall be allowed, in addition to tax exemption on its bonds, a deduction of 4 per cent of the reserve. The Constitution does not require the United States to hold out special inducements to invest in state bonds, compare *Florida* v. *Mellon,* 273 U. S. 12, 17, nor to give to holders

[7] Recently, these cases were cited with approval in *Flint* v. *Stone-Tracy Co.,* 220 U. S. 107, 165, and in *Kansas City, Fort Scott & Memphis Ry. Co.* v. *Botkin,* 240 U. S. 227, 232.

of its own bonds privileges not granted by its contract with them. As was stated by counsel for the *amici curiae*: "This allowance of a deduction of a fixed percentage, or 4 per cent of the mean of the reserve, itself points to the nature of the deduction, not as a right but as a favor. In granting this favor, in the interest of policyholders, Congress was entitled to consider the deduction already allowed for income on tax-exempt securities." [8]

There is no suggestion that, in fact, Congress discriminated against tax-exempt bonds, or against insurance companies as holders thereof.[9] In the Senate, it was

[8] The brief for the *amici curiae* states further: "The petitioner has neither constitutional nor statutory right to deduct from its income an amount equal to four per centum of the mean of its reserve or to deduct any percentage of its reserve funds, or to deduct any interest derived from the investment of its reserve funds [in addition to that from tax-exempt securities]. . . . Every life insurance company that has tax-exempt securities is treated exactly on the same basis. Companies that have tax-exempt securities are not entitled to a double deduction and those that have no tax-exempt securities still have reserves which they hold for the protection of their policy holders and Congress has fairly allowed a deduction of a percentage of those reserves." . . . "This was a mere question of policy which Congress was free to adopt as it chose." . . . "What the petitioner wants, is not simply to have its constitutional right protected, and to be immune from taxation on its investment in government securities, but to get a further advantage, to which it has no constitutional right, that is, to include its tax exempt income in figuring its deduction on its reserve. It seeks not freedom from taxation, but a preferred position in calculating its reserve. What is there in the Constitution which compels Congress to give such an advantage?" . . . "The petitioner has no constitutional right to gain an advantage from its investment in tax-exempt securities beyond the fact that it is not to be deprived in whole or in part of its investment and that the investment is not to be made a subject of taxation."

[9] The amount of the United States securities outstanding on June 30, 1921, was $23,748,292,000. See Annual Report of Secretary of the Treasury for 1921, p. 680–685. This figure does not include

stated that all the life insurance companies favored the measure.[10] There is no suggestion of a purpose in Congress to favor some companies at the expense of others. But even if the possibility of such discrimination appeared, the objection of inequality in operation (if it were applicable to federal legislation, *Brushaber* v. *Union Pacific R. R.,* 240 U. S. 1, 25; *La Belle Iron Works* v. *United States,* 256 U. S. 377, 392; *Barclay* v. *Edwards,* 267 U. S. 442, 450), would not be open here. For there is no finding of the Court of Claims that the National Life fares less well than some other company. See *Pullman Co.* v. *Knott,* 235 U. S. 23, 26; *Oliver Iron Co.* v. *Lord,* 262 U. S. 172, 180, 181.

I find nothing in the cases cited by the petitioner which lends support to the view that its rights have been violated. Directly to tax the gross income from securities amounts, of course, to taxing the securities themselves. *Northwestern Mutual Life Insurance Co.* v. *Wisconsin,* 275 U. S. 136. In *Miller* v. *Milwaukee,* 272 U. S. 713, as was stipulated, the dividends which this Court held could not be taxed by the State were directly declared from interest accruing from United States bonds. Thus the dividends from tax-exempt bonds were taxed while those from other sources were free from the tax. The tax challenged in *People* v. *Weaver,* 100 U. S. 539, in *Farmers & Mechanics Savings Bank* v. *Minnesota,* 232 U. S. 516, 521, and in

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Federal farm loan bonds, of which $420,763,315 were outstanding October 31, 1921, *ibid.,* p. 963, or the obligations of the insular possessions and the District of Columbia, of which there were $52,970,750 outstanding on June 30, 1921. *Ibid.,* pp. 750, 754. The estimated total of tax-free securities, issued by States, counties, etc., outstanding January 1, 1922, was $8,142,000,000. Memorandum of the Government Actuary, Hearings before the Committee on Ways and Means, House of Representatives, 67th Cong., 2d Sess., on Tax Exempt Securities, p. 21.

[10] See note 2.

each of the cases from the state courts cited, was a direct property tax imposed upon federal obligations.[11]

To hold that Congress may not legislate so that the tax upon an insurance company shall be the same whether it holds tax-exempt bonds or does not, would, in effect, be to read into the Constitution a provision that Congress must adapt its legislation so as to give to state securities, not merely tax exemption, but additional privileges; and to read into the contract of the United States with its own bondholders a promise that it will, so long as the bonds are outstanding, so frame its system of taxation that its tax-exempt bonds shall, in respect to all taxes imposed, entitle the holder to greater privileges than are enjoyed by holders of taxable bonds. But no rule is better settled than that provisions for tax exemption, constitutional or contractual, are to be strictly construed. Compare *Tucker* v. *Ferguson,* 22 Wall. 527, 575; *Wilmington & Weldon R. R.* v. *Alsbrook,* 146 U. S. 279, 294; *Bank of Commerce* v. *Tennessee,* 161 U. S. 134, 146; *Ford* v. *Delta & Pine Land Co.,* 164 U. S. 662; *Chicago Theological Seminary* v. *Illinois,* 188 U. S. 662, 674; *People ex rel. Metropolitan Street Ry. Co.* v. *New York,* 199 U. S. 1, 36; *Jetton* v. *University of the South,* 208 U. S. 489, 499. The rule was acted upon as recently as *Millsaps College* v. *City of Jackson,* 275 U. S. 129.

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[11] In *Packard Motor Co.* v. *Detroit,* 232 Mich. 245, 247, 248, the decision was rested expressly upon that ground. In *City of Waco* v. *Amicable Life Insurance Co.,* 248 S. W. 332 (Commission of Appeals of Texas), 230 S. W. 698, 702 (the Court of Civil Appeals), the case was rested upon the construction of the state statute. The constitutional question was treated slightly and *obiter.* In *People* v. *Board of Commissioners of Taxes,* 41 How. Pr. 459, 474 (Supreme Court of New York, at General Term, 1871), there "was no written opinion, the decision being rendered on argument." It does not appear whether it was placed on the construction of the statutes or on a constitutional ground. This is also true of *United States* v. *Ritchie,* Fed. Cas. No. 16,168.

Moreover, even if the decision of the Court on the main question be accepted as the rule of substantive law, I am unable to see how the Company can be allowed to recover anything. The provision of § 245 is that there shall be deducted from the gross income: "(2) An amount equal to the excess, if any, over the deduction specified in paragraph (1) of this subdivision, [*i. e.*, the interest on tax-exempt securities] of 4 per centum of the mean of the reserve funds required by law." The Court has, of course, power to declare that the system of taxation established by Congress is unconstitutional. But I find no power in the Court to amend paragraph (2) of § 245 so as to allow the Company to deduct 4 per cent of its reserves, in addition to its income from tax-exempt securities. Congress was confessedly under no obligation to allow any deduction on account of the insurance reserves of any company. To expand the scope of the permitted deduction is legislation—and none the less so because the operation can be performed by striking out certain words of the act.

The power so to legislate is not conferred on this Court by § 1403 of the Act. That section declares: "That if any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances, shall not be affected thereby." The limited purpose and the narrow effect of such a clause was stated by this Court in *Hill* v. *Wallace,* 259 U. S. 44, 71. It "furnishes assurance to courts that they may properly sustain separate sections or provisions of a partly invalid act without hesitation or doubt as to whether they would have been adopted, even if the legislature had been advised of the invalidity of part. But it does not give the court power to amend the act."

Even if such a clause could ever permit a court to enlarge the scope of a deduction allowed by a taxing statute, the present case would be wholly inappropriate for the

exercise of such a power. Here the asserted unconstitutionality can be cured as readily by striking out the whole of paragraph (2) as by enlarging it. Section 1403 gives no light as to which course Congress would prefer. So far as there are indications elsewhere, they would point to the former course. The new method of taxation was intended by Congress to procure additional revenue from the insurance companies. House Report, 67th Congress, 1st Session, No. 350, p. 14. And the deduction permitted by paragraph (2) was a concession which Congress need not have made. Whether, in view of these facts, a court could properly save the Act by striking out paragraph (2), or whether the alleged unconstitutionality necessarily renders invalid the whole scheme of taxation—thus leaving in force the tax on insurance companies contained in the Act of 1918,[12] there is no need to consider. Compare *Springfield Gas & Electric Co.* v. *Springfield,* 257 U. S. 66, 69; *Dorchy* v. *Kansas,* 264 U. S. 286, 290. On either view there can, in my opinion, be no recovery on the findings here.

MR. JUSTICE HOLMES and MR. JUSTICE STONE join in this dissent.

MR. JUSTICE STONE, dissenting.

While it may be conceded that the petitioner has been discriminated against, the discrimination occurs only in respect of an act of bounty. Petitioner's only complaint is that Congress has not granted it as large an exemption—purely a matter of grace—as it has accorded to others owning no tax-exempt securities.

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[12] That tax was repealed by § 1400(a) of the Act of 1921. But section 1400(b) provides: "In the case of any tax imposed by any part of the Revenue Act of 1918 repealed by this Act, if there is a tax imposed by this Act in lieu thereof, the provision imposing such tax shall remain in force until the corresponding tax under this Act shall take effect under the provisions of this Act." 42 Stat. 227, 321.

In granting a bounty of any sort Congress had a particular purpose: the generous protection of insurance reserves in the interest of the policy holders. For that purpose an exemption of 4% of the reserves was considered sufficient. In the case of companies already entitled to an exemption of 4%, a further act of bounty was of course unnecessary to accomplish the end in view. Unless established principles require it, I do not think we should hold that Congress was powerless to act as generously as was necessary to achieve its useful purpose without granting additional and unnecessary bounties to insurance companies fortuitously in possession of tax-exempt bonds.

There is a distinction between imposing a burden and withholding a favor. By the Constitution or by contract the holders of tax-exempt securities are protected from burdens; but from neither source do they derive an affirmative claim to favors. If Congress voted to subsidize all insurance companies except those holding tax-exempt bonds, whatever other objections might be made to such a course I do not think petitioner could complain because it had not been made the recipient of a gift. For the same reason I believe that its present contention is insubstantial.

But even though the result now reached were to be deemed a logical implication of the doctrine announced in *The Collector* v. *Day,* 11 Wall. 113, that neither national nor state governments may tax the instrumentalities of the other, still, as this Court has often held, that rule may not be pressed to the logical extreme of forbidding legislation which affects only remotely or indirectly the holders of the other's securities. See *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514, 523. As Mr. Justice BRANDEIS has just pointed out, "a state inheritance or legacy tax is valid although the tax is as high when the estate transmitted consists in part of bonds of the United States as when none are held"; and this Court has sustained statutes under which "a corporation holding bonds of the United

States was obliged to pay the same amount in taxes that it would have been required to pay if it had not been a holder of United States bonds." Not all income earned in the employment of a state is exempt from federal taxation, *Metcalf & Eddy* v. *Mitchell, supra;* instrumentalities affecting indirectly or remotely the functions of one government may nevertheless be taxed by the other, *Gromer* v. *Standard Dredging Co.,* 224 U. S. 362; *Baltimore Shipbuilding Co.* v. *Baltimore,* 195 U. S. 375; *Fidelity & Deposit Co.* v. *Pennsylvania,* 240 U. S. 319.

Now, the rule which, under the decisions of this Court, has been thus narrowly limited, is extended into a new field; and the Government is forbidden to grant any benefit or immunity to a tax-payer unless it be extended in addition to the immunity already assured by reason of his possession of tax-exempt securities. Here, too, the remedy is not the cancellation of the benefits to others of which petitioner complains, but the grant to it of an added bounty which Congress has not authorized and which the Constitution, it seems to me, neither requires Congress nor permits this Court to give.

MR. JUSTICE HOLMES and MR. JUSTICE BRANDEIS join in this dissent.

HEMPHILL *v.* ORLOFF

ERROR TO THE SUPREME COURT OF MICHIGAN.

No. 343. Argued March 7, 8, 1928.—Decided June 4, 1928.

1. A business association of the kind commonly known as "Massachusetts trusts" or "common law trusts" which, under its organic instrument and the law of the State where it was formed, is a legal entity with other attributes like those of corporations, including exemption of its shareholders and trustees from personal liability for the acts and engagements of the association, cannot carry on local business in another State without that State's express or implied permission. P. 548.

2. As in the case of a corporation, and for the same general reasons, such an association cannot claim for itself in that regard, the privileges and immunities guaranteed to the associates as individuals by Art. IV, § 2 of the Constitution. P. 550.
3. Whether a given association be called a corporation, partnership or trust, is not the essential factor in determining whether a State may forbid or condition the doing of local business; the real nature of the organization must be considered; if clothed with the ordinary functions and attributes of a corporation, it is subject to similar treatment. P. 550.
4. Where such an association was unable to enforce a promissory note in the courts of a foreign State because it had not complied with statutes conditioning its right to do business there,—*held* that the statutes did not deprive the association, its trustees or members of property without due process of law. P. 551.
5. An investment trust organized in one State was not engaged in interstate commerce when dealing in negotiable notes within another State. P. 550.

238 Mich. 508, affirmed.

ERROR to a judgment of the Supreme Court of Michigan which affirmed a judgment on a verdict directed for the defendant, in an action brought by Hemphill on a promissory note drawn payable to the order of a Massachusetts investment trust, for which he was acting.

Mr. Charles A. Wagner, with whom *Mr. Thomas G. Long* was on the brief, for plaintiff in error.

The citizen of a State has the right to accept a trust created and conferred by agreement by a natural person, act as trustee and conduct the affairs thereof. This is one of the privileges and immunities guaranteed by § 2, of Art. IV of the Constitution. The citizen has the same right to go into each of the several States and there do business, including the making of contracts and the buying and selling of property, as trustee, as in his individual capacity. *Slaughter-House Cases,* 16 Wall. 36; *Ward* v. *Maryland,* 12 Wall. 418; *Corfield* v. *Coryell,* 4 Wash. C. C. 380; *Hess* v. *Pawloski,* 274 U. S. 352; *Farmers Loan*

& Trust Co. v. *Chicago & A. Ry. Co.,* 27 Fed. 146; *Roby* v. *Smith,* 131 Ind. 344

The statute contravenes that section, and also the due process clause of the Fourteenth Amendment. *Barnes* v. *People,* 168 Ill. 425; *Hoadley* v. *Insurance Comm'n,* 37 Fla. 564; *Travis* v. *Yale & Towne Mfg. Co.,* 252 U. S. 60; *In re Schecther,* 63 Fed. 695; *Maynard* v. *Granite State Provident Ass'n,* 92 Fed. 435.

The trust instrument created a true trust. There is no substantial difference in respect of trusts between the law of Massachusetts and that of Michigan. *Penny* v. *Croul,* 76 Mich. 471; *Taylor* v. *Davis,* 110 U. S. 330; *Packard* v. *Kingman,* 109 Mich. 497; *Feldman* v. *Preston,* 194 Mich. 352; *Betts* v. *Hackathorn,* 159 Ark. 621; *Neville* v. *Gifford,* 242 Mass. 124; *Rand* v. *Morse,* 289 Fed. 339; *McCarthy* v. *Parker,* 243 Mass. 465; *Rand* v. *Farquhar,* 226 Mass. 91; *Hardee* v. *Adams Oil Ass'n* (*Tex.*), 254 S. W. 602; 3 Kent's Comm., 27; Story, Partnership, 6th ed., § 164; Lindley, Partnership, 9th ed., § 268; *Hallett* v. *Dowdall,* 18 Q. B. 12; *Imperial Shale Brick Co.* v. *Jewett,* 169 N. Y. 143; *Greenwoods Case,* 3 De G. M. & G., 459; *Mayo* v. *Moritz,* 151 Mass. 481; *Williams* v. *Boston,* 208 Mass. 497; *Williams* v. *Milton,* 215 Mass. 1; *Frost* v. *Thompson,* 219 Mass. 360; Wrightinton, Unincorporated Ass'n and Business Trust, § 14.

There is not a single power or provision in the trust instrument that could not properly have been put in the will of a person who had been conducting such a business and desired it to be continued. This in and of itself is determinative of the character of the relation created by the instrument. See *Schumann-Heink* v. *Folsom,* 328 Ill. 321; *Baker* v. *Stern,* 194 Wis. 233.

It is clear that the reason why a State may exclude or impose conditions on a corporation of another State is that a corporation is a person in itself, an artificial person,

a mere creature of the law. *Dartmouth College case,* 4 Wheat. 636; *Bank of Augusta* v. *Earle,* 13 Pet. 519; *Paul* v. *Virginia,* 8 Wall. 168; *Louisville R. R. Co.* v. *Leston,* 2 How. 497; *Marshall* v. *B. & O. R. R.,* 16 How. 314. It is to be observed that in each of the first three cases the corporation had been created by special act of the sovereign power.

The modern method of granting charters under general laws to such persons as shall comply with prescribed formalities has not changed the nature of the organization thus formed.

The decisions of this Court as to the application of the different revenue laws to these trusts clearly show that they are not corporations. *Eliot* v. *Freeman,* 220 U. S. 178; *Crocker* v. *Malley,* 249 U. S. 223; *Hecht* v. *Malley,* 265 U. S. 144; *Burk-Waggoner Oil Ass'n* v. *Hopkins,* 269 U. S. 110.

In *Great Southern Fireproof Hotel Co.* v. *Jones,* 177 U. S. 449, it was held that the right of a partnership association limited organized under the laws of Pennsylvania to sue in the federal court was dependent upon the citizenship of its shareholders. This organization possessed far more of the characteristics of a corporation than the trust here in question.

The contract here sued upon was made in the course of interstate commerce and is entitled to recognition and enforcement by Michigan under the Commerce Clause. The note was given by the defendant in error for the assignment to her of certain notes for automobile trucks which had been sold by the Orloff Company to the Trust and the delivery to her of five of the six trucks covered by the paper. The Commercial Investment Trust at no time rented an office in Michigan; it never had a bank account, furniture, equipment, etc., of any kind in the

State. It commenced to purchase Michigan automobile paper in May 1919.

Not only did the instructions themselves require that the notes, contracts, etc., be sent to New York for acceptance or rejection, but all of these documents and papers contained in the record show that this practice was invariably followed. Every transaction between the Orloff Company and the Trust was examined, and without exception the papers were sent with accompanying letter from the Orloff Company to the Trust at New York; after investigation and acceptance the payments in the form of drafts on a New York bank or trust company were sent from the Trust there to the Orloff Company at Detroit. The only deviation from this course was that on one occasion, on Orloff's request for expedition, the Trust, after passing on the papers, sent payment by telegraph from New York to the Orloff Company's bank at Detroit.

The essence of the trust dealing then was that automobile dealers, and later a discount company in Michigan, sent certain automobile paper to the Trust at New York, offering it for sale. There it was either purchased or rejected; if purchased a New York draft was sent from New York to Michigan in payment.

"This Court will determine for itself whether what was done by plaintiff-in-error was interstate commerce and whether the state enactments as applied are repugnant to the commerce clause," *Kansas City Steel Co.* v. *Arkansas,* 269 U. S. 148, 150.

Commercial paper is a subject of interstate commerce. *Gibbons* v. *Ogden,* 9 Wheat. 1; *Passenger Cases,* 7 How. 283; *Henderson* v. *New York,* 92 U. S. 259; *Western Union* v. *Pendleton,* 122 U. S. 347; *Pensacola Tel. Co.* v. *Western Union,* 96 U. S. 1; *Telegraph Co.* v. *Texas,* 105

U. S. 460; *International Text Book Co.* v. *Pigg,* 217 U. S. 91; *Id.* v. *Lynch,* 218 U. S. 664; *Id.* v. *Peterson,* 218 U. S. 664.

We submit that the doctrine declaring traffic in commodities to be essential for interstate commerce has been wholly disproved. The sale and transmission of instruction is unquestionably commerce; the sale and transportation of commercial paper must be the same.

The furnishing of electricity, even though it be delivered only to the state line, is interstate commerce and beyond the control of the state public utilities commission. *Public Utilities Comm'n* v. *Attleboro Steam & Electric Co.,* 273 U. S. 83.

Likewise the transmission of information by wireless telegraphy, radio, etc., has been held to be commerce. *Marconi Wireless Telegraph Co.* v. *Commonwealth,* 218 Mass. 558.

The mere free ranging of cattle over a state boundary is interstate commerce. *Thornton* v. *United States,* 271 U. S. 414. Likewise, the sale of tickets for interstate or foreign transportation. *DiSanto* v. *Pennsylvania,* 273 U. S. 34; *Texas Transport Co.* v. *New Orleans,* 246 U. S. 150. *Nathan* v. *Louisiana,* 8 How. 73, distinguished.

That these notes are secured by chattel mortgages does not change the transaction from one in interstate commerce to a local transaction. *York Mfg. Co.* v. *Colley,* 247 U. S. 21; *Norfolk & Western Ry. Co.* v. *Sims,* 191 U. S. 441; *United States* v. *United Shoe Machinery Co.,* 258 U. S. 451; *Lyons* v. *Federal System of Bakeries,* 290 Fed. 793; *Vulcan Steam Shovel Co.* v. *Flanders,* 205 Fed. 102; *Houston Canning Co.* v. *Virginia Can Co.,* 211 Ala. 232; *Powell* v. *Rountree,* 157 Ark. 241; *Davis & Warrell* v. *General Motors Acceptance Corp'n,* 153 Ark. 626; *Jones* v. *General Motors Acceptance Corp'n,* 205 Ky. 227; *General Motors Acceptance Corp'n* v. *Shadyside Coal*

Co., 102 W. Va. 402; *General Motors Acceptance Corp'n* v. *Lund*, 60 Utah, 247.

This transaction being essentially one in interstate commerce, all instrumentalities and means having a natural relation to the transaction such as the solicitation of business, collection, etc., were available without State interference. *Atlantic Coast Line* v. *Standard Oil Co.*, 275 U. S. 257; *International Text Book Co.* v. *Pigg*, 217 U. S. 91; *Cheney Bros.* v. *Massachusetts*, 246 U. S. 147; *Alpha Portland Cement Co.* v. *Massachusetts*, 268 U. S. 203; *Robbins* v. *Taxing District*, 120 U. S. 489; *Brennan* v. *Titusville*, 153 U. S. 289; *Caldwell* v. *North Carolina*, 187 U. S. 622; *Dozier* v. *Alabama*, 218 U. S. 124; *Davis* v. *Virginia*, 236 U. S. 697; *Rearick* v. *Pennsylvania*, 203 U. S. 507; *Crenshaw* v. *Arkansas*, 227 U. S. 389; *Rogers* v. *Arkansas*, 227 U. S. 401; *Stewart* v. *Michigan*, 232 U. S. 665; *Penna. Ry. Co.* v. *Sonman Shaft Coal Co.*, 242 U. S. 120; *Dahnke-Walker Co.* v. *Bondurant*, 257 U. S. 282; *Sioux Remedy Co.* v. *Cope*, 235 U. S. 197; *York Mfg. Co.* v. *Colley*, 247 U. S. 21.

Mr. Isadore Levin, with whom *Mr. Henry M. Butzel* was on the brief, for defendant in error.

Mr. Justice McReynolds delivered the opinion of the Court.

Plaintiff in error, Vice-President of the payee and acting for it, sued Mrs. Orloff, in the Circuit Court, Wayne County, Michigan, on her promissory note payable to the Commercial Investment Trust, or order, executed at Detroit, Michigan, July 22, 1921. She defended upon the ground, among others, that the payee was a foreign corporation within the meaning of the Michigan statutes; that it had not complied therewith; and, consequently, could not maintain the action. Both

the trial and Supreme Court of the State sustained this defense.

Relevant provisions of the statutes follow—Mich. Compiled Laws, 1915:

"Sec. 9063. It shall be unlawful for any corporation organized under the laws of any state of the United States, except the state of Michigan, or of any foreign country, to carry on its business in this state, until it shall have procured from the secretary of state of this state a certificate of authority for that purpose. . . ."

"Sec. 9068. No foreign corporation, subject to the provisions of this act, shall be capable of making a valid contract in this state until it shall have fully complied with the requirements of this act, and at the time holds an unrevoked certificate to that effect from the secretary of state."

"Sec. 9071. The term 'corporations' as used in this act shall be construed to include all associations, partnership associations and joint stock companies having any of the powers or privileges of corporations, not possessed by individuals or partnerships, under whatever term or designation they may be defined and known in the state where organized."

The Commercial Investment Trust—hereinafter the Trust—is of the class commonly known as "Massachusetts Trusts" or "Common Law Trusts." The following statement sufficiently indicates the general features of the lengthy "Agreement and Declaration of Trust" under which it was organized at Boston, Mass., March 29, 1915.

The business of the association shall be conducted under the name specified for the trustees in their collective capacity—The Commercial Investment Trust. They may adopt another. Seven are designated; their successors shall be elected for terms of two years at annual shareholders' meetings, each share being entitled to one vote, which may be cast by proxy.

Wide powers are granted to the trustees to buy and sell stocks, bonds, negotiable securities, personal and real property, to loan money, etc., and generally to manage and conduct the trust as fully as if they were the absolute owners of the estate; also they shall have power, but without obligation on their part, to execute any and all instruments and to do any and all things not inconsistent with the provisions hereof, the execution or performance of which they may deem expedient. They may appoint and define the duties of officers and agents. "But the trustees shall not have any power or authority to borrow money on the credit or on behalf of the Shareholders or to make any contract on their behalf for repayment of any money raised by mortgage, pledge, charge or other incumbrances in pursuance of the provisions hereof, or to make any contract or incur any liability whatever on behalf of the Shareholders or binding them personally."

"Trustees shall hold the legal title to, and have the absolute and exclusive control of, all property at any time belonging to this trust subject only to the specific limitations herein contained; they shall have the absolute control, management and disposition thereof."

"The death or resignation of the trustees, or any of them, shall not operate to annul the trust or to revoke any existing agency created pursuant to the terms of this instrument."

"Every note, bond, contract, instrument, certificate, share or undertaking and every other act or thing whatsoever executed or done by the trustees or any of them in connection with the trust hereby created, shall be conclusively taken to have been executed or done only in their or his capacity of trustee or trustees under this agreement and such trustee or trustees shall not be personally liable thereon."

The trustees and shareholders are exempted from personal liability.*

Shareholders' meetings shall be held annually for the purpose of electing trustees. Interest in the estate shall be evidenced solely by certificates for participation shares, to be regarded as personal property. A shareholder's death shall not operate to determine the trust nor entitle the decedent's representative to an accounting or to take action in the courts or elsewhere, against the trustees. Shareholders shall have no title in the trust property or right to call for partition, division, or accounting. The

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* "No recourse shall at any time be had under or upon any note, bond, contract, instrument, certificate, undertaking, obligation, covenant, or agreement issued or executed by the trustees under or pursuant to the terms of this agreement or in managing the trust estate, or by the Executive Committee or any member thereof, or by any officer or agent of the Trustees, or by reason of anything done or omitted to be done by them or any of them against the trustees individually or against the members of the Committee or against any such officer or agent or against any shareholder, or the holder of any other security issued by the trustees, either directly or indirectly, by legal or equitable proceeding, or by virtue of any suit or otherwise, except only to compel the proper application or distribution of the trust estate, it being expressly understood and agreed that this agreement and all obligations and instruments executed thereunder are executed pursuant hereto by the trustees and any acts done or omitted to be done by them are solely the obligations, instruments, acts and omissions of or in respect of the trust estate and that all the obligations, instruments, liabilities, covenants and agreements, acts and omissions of the trustees as trustees shall be enforced against and be satisfied out of the trust estate only, or such part thereof as shall, under the terms and provisions of this agreement, be liable for or chargeable therewith, and all personal and individual liability of the trustees, except as above stated, and of the members of the Executive Committee, and all officers and agents, and of the shareholders and all beneficiaries of the trust, are hereby expressly waived and negatived. The trustees and their agents are not authorized to contract any debt or do anything which will charge the shareholders or bind them personally."

trustees shall have no power to call upon shareholders for any sum of money or assessment whatever, except such as they may agree to pay.

"The trustees, may, from time to time, distribute to the shareholders such receipts or other parts of the trust estate as they shall determine. The amount and conditions of such payments shall be determined by the trustees."

"For any of the purposes of the trust the number of shares may, from time to time, be increased or reduced by the trustees. In case the number of shares is increased, the additional shares shall be issued and disposed of upon such terms and in such manner as the trustees may determine."

The trust shall continue until the death of the last survivor of seven named individuals.

Concerning Voluntary Associations, ch. 182, General Laws of Massachusetts, 1921, Vol. 2, p. 2077, provides—

"Sec. 2. The Trustees of an association shall file a copy of the written instrument or declaration of trust creating it with the commissioner and with the clerk of every town where such association has a usual place of business. . . ."

"Sec. 6. An association may be sued in an action at law for debts and other obligations or liabilities contracted or incurred by the trustees, or by the duly authorized agents of such trustees, or by any duly authorized officer of the association, in the performance of their respective duties under such written instruments or declarations of trusts, and for any damages to persons or property resulting from the negligence of such trustees, agents or officers acting in the performance of their respective duties, and its property shall be subject to attachment and execution in like manner as if it were a corporation, and service of process upon one of the trustees shall be sufficient." Gen. Acts Mass., 1916, ch. 184.

The Massachusetts courts give effect to agreements like the one here described, recognize the entity of associations organized thereunder, and hold both trustees and shareholders exempt from personal liability. See *Hussey* v. *Arnold,* 185 Mass. 202; *Williams* v. *Milton,* 215 Mass. 1, and cases cited; *Frost* v. *Thompson,* 219 Mass. 360.

It was held by the court below that the Trust must be regarded as a corporation within intendment of the Michigan statutes which could not lawfully carry on local business within the State or make valid contracts in connection therewith without having complied with prescribed requirements. There was no attempt to comply therewith.

Plaintiff in error insists that, as construed by the Supreme Court, the statutes of Michigan deny to the trustees, collectively called "Commercial Investment Trust," the benefits of Section 2, Article IV, of the Constitution. "The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Also that they deprive the trustees of property without due process of law contrary to the Fourteenth Amendment and restrain interstate commerce.

It is settled doctrine that a corporation organized under the laws of one state may not carry on local business within another without the latter's permission, either express or implied. A corporation is not a mere collection of individuals capable of claiming all benefits assured them by Section 2, Article IV, of the Constitution. *Bank of Augusta* v. *Earle,* 13 Peters 519, 584, 586, 587; *Paul* v. *Virginia,* 8 Wall. 168; *Western Turf Association* v. *Greenberg,* 204 U. S. 359, 363. See also *Slaughter House Cases,* 16 Wall. 36, 77. In the first of the causes just cited, Chief Justice Taney, for the Court, said—

"It is true, that in the case referred to, [*United States Bank* v. *Deveaux,* 5 Cranch 61] this Court decided that in a question of jurisdiction they might look to the char-

acter of the persons composing a corporation; and if it appeared that they were citizens of another state, and the fact was set forth by proper averments, the corporation might sue in its corporate name in the courts of the United States. . . .

"But the principle has never been extended any farther than it was carried in that case; and has never been supposed to extend to contracts made by a corporation; especially in another sovereignty. If it were held to embrace contracts, and that the members of a corporation were to be regarded as individuals carrying on business in their corporate name, and therefore entitled to the privileges of citizens, in matters of contract, it is very clear that they must at the same time take upon themselves the liabilities of citizens, and be bound by their contracts in like manner. The result of this would be to make a corporation a mere partnership in business, in which each stockholder would be liable to the whole extent of his property for the debts of the corporation; and he might be sued for them, in any state in which he might happen to be found.

"The clause of the Constitution referred to certainly never intended to give to the citizens of each state the privileges of citizens in the several states, and at the same time to exempt them from the liabilities which the exercise of such privileges would bring upon individuals who were citizens of the state. This would be to give the citizens of other states far higher and greater privileges than are enjoyed by the citizens of the state itself. Besides, it would deprive every state of all control over the extent of corporate franchises proper to be granted in the state; and corporations would be chartered in one, to carry on their operations in another. It is impossible upon any sound principle to give such a construction to the article in question.

"Whenever a corporation makes a contract, it is the contract of the legal entity; of the artificial being created

by the charter; and not the contract of the individual members. The only rights it can claim are the rights which are given to it in that character, and not the rights which belong to its members as citizens of a state; and we now proceed to inquire what rights the plaintiffs in error, a corporation created by Georgia, could lawfully exercise in another state; and whether the purchase of the bill of exchange on which this suit is brought was a valid contract, and obligatory on the parties."

Obviously the Trust here involved, is a creature of local law which demands the privilege of carrying on business in Michigan as an association—an entity—clothed with peculiar rights and privileges under a deed of settlement undertaking to exempt all of the associates from personal liability. As in the case of a corporation, and for the same general reasons, it cannot rely upon rights guaranteed to the individuals.

Whether a given association is called a corporation, partnership, or trust, is not the essential factor in determining the powers of a state concerning it. The real nature of the organization must be considered. If clothed with the ordinary functions and attributes of a corporation, it is subject to similar treatment. This was distinctly pointed out in *Oliver* v. *The Liverpool & London Life & Fire Ins. Co.,* 100 Mass. 531, affirmed here *sub nom. Liverpool Ins. Co.* v. *Massachusetts,* 10 Wall. 566. See also *Flint* v. *Stone-Tracy Co.,* 220 U. S. 107, 162; *Hecht* v. *Malley,* 265 U. S. 144; *Burk-Waggoner Oil Assn.* v. *Hopkins,* 269 U. S. 110; *Hamilton* v. *Young,* 116 Kan. 128; *Weber Engine Co.* v. *Alter,* 120 Kan. 557; *State* v. *Hinkle,* 126 Wash. 581; *State* v. *Paine,* 137 Wash. 566.

Upon the facts disclosed, the court below held the Trust was carrying on the business of dealing in negotiable notes within the State of Michigan; and we find no reason for rejecting that conclusion. Such business is not interstate commerce. *Nathan* v. *Louisiana,* 8 How. 73; *Paul* v. *Vir-*

ginia, 8 Wall. 168; *Hatch* v. *Reardon,* 204 U. S. 152, 162; *Blumenstock Bros.* v. *Curtis Pub. Co.,* 252 U. S. 436, 443.

What we have already said shows plainly enough the insubstantial nature of the suggestion that the questioned statutes deprive the Trust, its trustees or members, of property without due process of law.

The judgment of the Court below must be affirmed.

Affirmed.

WILLIAMSPORT WIRE ROPE COMPANY *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 337. Argued April 24, 25, 1928.—Decided June 4, 1928.

1. The power of the Commissioner of Internal Revenue in determining whether a corporation is entitled, under § 327 (a) and (b) of the Revenue Act of 1918, to have its war and excess profits taxes fixed by a special assessment under § 328 by a comparison with the taxes of other, representative corporations engaged in a like or similar trade or business, is discretionary in character; and the power of the Board of Tax Appeals in reviewing such determination under the Revenue Act of 1924 is likewise discretionary, and executive, in character. Pp. 558, 562.
2. Under the Act of 1918, the Court of Claims, in a suit to recover taxes alleged to have been illegally collected, was without jurisdiction to review a determination of the Commissioner refusing a special assessment under §§ 327 and 328; nor was such jurisdiction conferred on that court as the result of the provision made in the Act of 1924 for review of the Commissioner's determination by the Board of Tax Appeals. Pp. 561, 562.

63 Ct. Cls. 463, affirmed.

CERTIORARI, 275 U. S. 520, to a judgment of the Court of Claims dismissing, for want of jurisdiction, a claim for the amount of an alleged overpayment of war and excess profits taxes.

Mr. James Walton, with whom *Mr. Clarence A. Miller* was on the brief, for petitioner.

The decision of this Court in *Blair* v. *Oesterlein Machine Co.,* 275 U. S. 220, is controlling in this case.

The only theory upon which there could be jurisdiction in the Board of Tax Appeals, and still no jurisdiction in the federal courts, would be that Congress vested in the Board some particular added judicial power not heretofore exercised by the courts. The statute discloses the exact contrary. The Board has the most limited jurisdiction and merely serves to give the taxpayer an additional hearing before he is compelled to pay. § 900 (k), Act of 1924. In the event the decision is against the taxpayer, he will be required to pay the tax according to the assessment and have recourse to the courts for the recovery thereof. If the decision is against the Government, it will likewise have recourse to the courts.

The Senate committee, in reporting the tax bill, recognized clearly that a case under §§ 327 and 328 can be taken to court after a Board of Tax Appeals decision. No additional statutory jurisdiction having been conferred on the courts respecting such cases, they must have had this jurisdiction before the Board was created.

The court must compute the correct tax in every case where overpayment is contended by the taxpayer. In *United States* v. *Emery,* 237 U. S. 28, and *Rock Island R. R.* v. *United States,* 254 U. S. 141, this Court stated, in substance, that it was the Commissioner's duty to determine, assess and levy the tax, but that does not mean that a federal court may not compute the tax correctly when the Commissioner refuses to do it. To say that a court is without jurisdiction to compute and determine the correct tax is simply to say, in effect, that a court is without jurisdiction to render a judgment for a refund.

It is well settled that there can be no remedy by mandamus. Nor can there be any remedy by injunction to restrain the Collector. *Graham* v. *du Pont,* 262 U. S. 234. If there be any possible way to test the legality or

correctness of the amount of an income tax exaction other than to pay the tax and sue to recover, what can it be?

Solicitor General Mitchell for the United States.

In *Blair* v. *Oesterlein Machine Co.*, 275 U. S. 220, it was held that the statutes giving the Board of Tax Appeals authority to review decisions of the Commissioner of Internal Revenue on determination of deficiencies were not subject to the limitation that the decisions of the Commissioner, making or refusing special assessments under §§ 327 and 328 of the Revenue Act of 1918, were not open to review.

The question here is whether the statutes giving to the Court of Claims jurisdiction to entertain suits to recover taxes erroneously or illegally assessed or collected, read in connection with §§ 327 and 328 of the Revenue Act of 1918, deny to the court the power to review the decisions of the Commissioner under those sections. We have been unable to find any ground for contending that the cases are distinguishable. If the statute giving the Board of Tax Appeals general jurisdiction to review the decisions of the Commissioner on deficiencies was not subject to any qualification as to special assessments, we see no reason why the general jurisdiction of the Court of Claims to award judgment for taxes illegally or erroneously assessed or collected should be so limited.

At present the decisions of the Board of Tax Appeals are reviewable in the Circuit Court of Appeals. If the decisions of the Commissioner under the special assessment sections are reviewable in the courts under that procedure, we see no reason why they should not be reviewable in the courts where the other course is followed and suit is commenced in the district court or the Court of Claims for the collection or the tax alleged to have been erroneously assessed.

Notwithstanding the decision in *Blair* v. *Oesterlein Machine Company,* the Court of Claims adheres to the

view that it has no jurisdiction in these special assessment cases, and it is necessary to submit the matter for the decision of this Court. The principal point seems to be that the Court of Claims cannot grant relief in such cases, because the determination of the true tax under §§ 327 and 328 involves an assessment of the tax. The Court of Claims also contends that its jurisdiction to award recovery for taxes illegally collected is limited to cases where the correct section of the Revenue Act has been applied by the Commissioner, but erroneously applied, and that where, as in this case, the Commissioner has applied § 301, which prescribes the general formula, and has refused to apply the special assessment sections, the Court of Claims may not itself determine what the true tax should have been under the special assessment sections.

Messrs. Adrian C. Humphreys and *Newton K. Fox* filed a brief as *amici curiae,* by special leave of Court.

Mr. Justice Brandeis delivered the opinion of the Court.

The Williamsport Wire Rope Company brought this action in the Court of Claims, on December 19, 1924, to recover the amount of an alleged overpayment of excess profits and war profits taxes for the calendar year 1918, laid under the Revenue Act of February 24, 1919, c. 18, 40 Stat. 1057. The petition alleged the following facts: The Company had conceded in its return, and had paid, a total tax of $306,381.77, for the year 1918. In April, 1920, the Commissioner of Internal Revenue levied upon it an additional assessment of $89,094.85, which the Company paid under protest. On June 10, 1924, a portion of the sum so paid was refunded. Four days later, the Company filed a claim for a further refund of $100,000. The claim alleged that for reasons there set forth, which are

repeated in the petition, the Company was entitled, under subdivisions (a) and (d) of § 327 of the Revenue Act of 1918, to have a special assessment made under § 328 of that Act.[1] The Commissioner having failed to make the

[1] Sec. 327. That in the following cases the tax shall be determined as provided in section 328:

(a) Where the Commissioner is unable to determine the invested capital as provided in section 326;

(b) In the case of a foreign corporation;

(c) Where a mixed aggregate of tangible property and intangible property has been paid in for stock or for stock and bonds and the Commissioner is unable satisfactorily to determine the respective values of the several classes of property at the time of payment, or to distinguish the classes of property paid in for stock and for bonds, respectively;

(d) Where upon application by the corporation the Commissioner finds and so declares of record that the tax if determined without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in section 328. . . .

Sec. 328 (a). In the cases specified in section 327 the tax shall be the amount which bears the same ratio to the net income of the taxpayer (in excess of the specific exemption of $3,000) for the taxable year, as the average tax of representative corporations engaged in a like or similar trade or business, bears to their average net income (in excess of the specific exemption of $3,000) for such year. In the case of a foreign corporation the tax shall be computed without deducting the specific exemption of $3,000 either for the taxpayer or the representative corporations.

In computing the tax under this section the Commissioner shall compare the taxpayer only with representative corporations whose invested capital can be satisfactorily determined under section 326 and which are, as nearly as may be, similarly circumstanced with respect to gross income, net income, profits per unit of business transacted and capital employed, the amount and rate of war profits or excess profits, and all other relevant facts and circumstances.

(b) For the purposes of subdivision (a) the ratios between the average tax and the average net income of representative corporations

refund within six months after demand, this suit was brought. The Government demurred to the petition on the ground that the Court of Claims was without jurisdiction to grant the relief sought, and the demurrer was sustained. 63 Ct. Cls. 463. The case is here on certiorari. 275 U. S. 520.

In its petition for a writ of certiorari, the Williamsport Company alleged that its rights would presumably be determined by the decision in *Blair* v. *Oesterlein Machine Co.*, a case then pending in this Court; and the Solicitor General, being of the same opinion, did not feel justified in opposing the granting of the writ. Decision on the petition was postponed pending decision of the *Oesterlein* case. That case, 275 U. S. 220, was decided November 21, 1927. We there held that the exercise of the judgment or discretion of the Commissioner to allow or deny the special assessment provided for in §§ 327 and 328 was subject to review by the Board of Tax Appeals; and that therefore the taxpayer was entitled to an order compelling the Commissioner to respond to the subpoena of the Board issued under § 900(i) of the Revenue Act of 1924, c. 234, 43 Stat. 253, 338, requiring him to answer interrogatories and to furnish information contained in the returns of other corporations. On November 28, the writ of certiorari in this case was granted. Thereupon, the Williamsport Company moved, presumably in analogy to motions to

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shall be determined by the Commissioner in accordance with regulations prescribed by him with the approval of the Secretary. . . .

(c) The Commissioner shall keep a record of all cases in which the tax is determined in the manner prescribed in subdivision (a), containing the name and address of each taxpayer, the business in which engaged, the amount of invested capital and net income shown by the return, and the amount of invested capital as determined under such subdivision. The Commissioner shall furnish a copy of such record and other detailed information with respect to such cases when required by resolution of either House of Congress, without regard to the restrictions contained in section 257.

affirm under Rule 6, that the judgment against it be reversed on the authority of the *Oesterlein* case. The Solicitor General, while not opposing the motion, advised us that the Court of Claims had, since the decision of the *Oesterlein* case, adhered to the view that it was without power to determine whether the Commissioner of Internal Revenue had erred in refusing to make a special assessment under §§ 327 and 328. We then assigned the case for oral argument, without passing on the motion to reverse and remand.

The contention here is that, since the Commissioner's action was made reviewable on appeal by the Board of Tax Appeals, it is and was always reviewable in an original proceeding before the Court of Claims. The argument is that Congress has conferred upon the Court of Claims jurisdiction over suits to recover taxes alleged to have been "erroneously or illegally assessed or collected;" [2] that here its jurisdiction is invoked to recover taxes claimed to have been assessed illegally, because assessed under § 301 instead of under §§ 327 and 328; that it must therefore have power to determine whether conditions existed which entitled the Company to the special assessment provided for by §§ 327 and 328; that if it finds that such condition did exist, it must also have power to determine the true amount of the tax computed as therein directed; and that if it appears that the tax actually paid exceeds that which would have been exacted under the special assessment, the Court may award judgment for the difference.

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[2] Recent statutes have used this phrase in describing the jurisdiction of the Court of Claims and the District Courts over suits by taxpayers to recover taxes. See Revenue Act of 1921, c. 136, §§ 1310(c), 1324(b), 42 Stat. 227, 311, 316; Revenue Act of 1924, c. 234, § 1020, 43 Stat. 253, 346. Compare Revenue Act of 1926, c. 27, §§ 284, 1111, 44 Stat. 9, 66, 114.

Sections 327 and 328 were intended to broaden the powers of relief first conferred by § 210 of the War Revenue Act of 1917, c. 63, 40 Stat. 300, 307.[3] It was "believed necessary to provide a special method of determining the tax for those cases in which the ordinary method of assessment would result in grave hardship or serious inequality." Senate Report, 65th Cong. 3d Sess., No. 617, p. 14. The special assessment is to be made under paragraph (a) when the Commissioner "is unable to determine the invested capital." It is to be made under paragraph (d) if he "finds and so declares of record that the tax if determined without the benefit of this section would . . . work . . . an exceptional hardship . . ." The task imposed on the Commissioner by §§ 327 and 328 was one that could only be performed by an official or a body having wide knowledge and experience with the class of problems concerned. For the requirement of a special assessment under paragraph (d) of § 327 and its computation in all cases, are dependent on "the average tax of representative corporations engaged in a like or similar trade or business."[4]

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[3] Section 210 was liberally construed by the Treasury. See Regulations 41, art. 52 (T. D. 2694).

[4] At the time of passing the 1918 act Congress had before it the Report of the Commissioner of Internal Revenue for 1918. The Commissioner said of the administration of § 210 of the Act of 1917: "Returns filed under section 210 presented even more difficult problems as to the amount of invested capital that could properly be set up as being equivalent to the invested capital of representative concerns engaged in 'a like or similar trade or business.' Consequently, it was necessary for the Bureau to assemble, as promptly as possible, returns filed under these sections of the law and analyze them in the light of the facts disclosed by normal returns. Thousands of cases were examined in detail and subjected to comprehensive statistical studies to determine normal percentages of income to invested capital in different lines of business under varying conditions and circum-

To perform that task, power discretionary in character was necessarily conferred.[5] Whether, as provided in paragraph (d) of § 327, there are "abnormal conditions;" whether, because of these conditions, computation under § 301 would work "exceptional hardship;" whether there would be "gross disproportion" between the tax computed under § 301 and "that computed by reference to the representative corporations specified in section 328;" what are "representative corporations engaged in a like or similar trade or business;" which corporations are "as nearly as may be, similarly circumstanced with respect to gross income, net income, profits per unit of business transacted and capital employed, the amount and rate of war profits or excess profits, and all other relevant facts and circumstances"—these are all questions of administrative discretion.

The soundness of the judgment exercised by the individual or body to whom the task was confided would depend largely upon the extent both of the knowledge of the special subject possessed and of the experience had in dealing with this particular class of problems. The conclusions reached would rest largely upon considerations not entirely susceptible of proof or disproof. Congress did not, by the Revenue Act of 1918, require the Commissioner to embody the results of his deliberation in findings of fact. The purpose of the meagre record prescribed by § 328(c) in case the Commissioner concludes to order a special assessment is apparently to protect the Treasury,

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stances in order that a mode of procedure might be defined for treatment of cases under sections 209 and 210." P. 12.

[5] See House Report, 65th Cong., 2d Sess., No. 767, p. 19; Senate Report, 65th Cong., 3d Sess., No. 617, p. 14; remarks of Mr. Kitchin presenting the conference report to the House, 57 Cong. Rec. 3008; remarks of Mr. Simmons presenting the conference report to the Senate, 57 Cong. Rec. 3134–3135.

not the taxpayer.[6] For if the Commissioner refuses to make the special assessment, he is not required to state the grounds of his refusal, or, indeed, even to record the fact of such refusal. Thus the aims which induced Congress to enact §§ 327 and 328, the nature of the task which it confided to the Commissioner, the methods of procedure prescribed, and the language employed to express the conditions under which the special assessment is required, all negative the right to a review of his determination by a court.

It is true that where the Commissioner's action is reviewable judicially, his findings of fact in making an assessment, as distinguished from his determinations involving administrative discretion, constitute only prima facie evidence; and that, in cases arising under the internal revenue laws, such findings are commonly reviewable by courts in appropriate proceedings in which the facts become an issue. *United States* v. *Rindskopf,* 105 U. S. 418, 422; *Wickwire* v. *Reinecke,* 275 U. S. 101, 105. It is also true that in reviewing the Commissioner's findings on such matters as value, compare *Castner, Curran & Bullitt, Inc.* v. *Lederer,* 275 Fed. 221; *Little Cahaba Coal Co.* v. *United States,* 15 F. (2d) 863; allowances for depreciation, compare *Cohen* v. *Lowe,* 234 Fed. 474; *Camp Bird, Ltd.* v. *Howbert,* 262 Fed. 114; or the accuracy with which a taxpayer's books reflect his income, compare *In re Sheinman,* 14 F. (2d) 323, courts may be confronted with problems requiring a high degree of technical knowledge for their solution. But such problems involve primarily the situation of a single taxpayer, and the controlling data can

[6] The Report of the Select Committee of the Senate on Investigation of the Bureau of Internal Revenue, Senate Report, 69th Cong., 1st Sess., No. 27, Pt. I, p. 221, contains a list of all refunds, credits and abatements exceeding $250,000 made through special assessments under § 210 of the Act of 1917 and § 328 of the Act of 1919. Compare Pt. II, pp. 273ff.

easily be made available to the court. Here, the considerations which demand special assessment under § 327 (d), and those which govern its computation in all cases, are facts concerning the situation of a large group of taxpayers which can only be known to an official or a body having wide experience in such matters and ready access to the means of information.

The jurisdiction of the Court of Claims, if any, rests on statutory provisions which long antedate the Revenue Act of 1918. Its jurisdiction over suits to recover taxes is based on the clause in the original Act of February 24, 1855, c. 122, 10 Stat. 612, empowering it to determine "all claims founded upon any law of Congress." *United States* v. *Kaufman,* 96 U. S. 567, 569; *Dooley* v. *United States,* 182 U. S. 222. Compare *United States* v. *Emery, Bird, Thayer Co.,* 237 U. S. 28. But we have held that the Court of Claims is without jurisdiction where the statute creating the claim expressly refers it for final determination to an executive department. *United States* v. *Babcock,* 250 U. S. 328, 331. And that it is equally without jurisdiction where from an examination of all the terms of the statute it appears that Congress intended to vest final authority in an administrative agency. *United States* v. *Atchison, Topeka & Santa Fe Ry. Co.,* 249 U. S. 451; *Silberschein* v. *United States,* 266 U. S. 221. Long ago Congress conferred final authority upon such an agency in the enforcement of the appraisal provisions by which the amounts payable under the customs laws are determined. Compare *Bartlett* v. *Kane,* 16 How. 263, 272; *Hilton* v. *Merritt,* 110 U. S. 97, 105; *Passavant* v. *United States,* 148 U. S. 214.

Moreover, whatever jurisdiction is possessed by the Court of Claims to review determinations under §§ 327 and 328, would be possessed also by the district courts in suits against collectors and in actions against the United States, under § 24(20) of the Judicial Code. Thus the

determinations of the Commissioner in this delicate and complex phase of revenue administration would be subjected to review by a large number of courts, none of which have ready access to the information necessary to enable them to arrive at a proper conclusion in revising his decisions; whose experience in passing upon questions of this character would be limited; and whose varying decisions would tend to defeat, rather than promote, that equality in the application of the revenue law which §§ 327 and 328 were designed to insure. We conclude that the determination whether the taxpayer is entitled to the special assessment was confided by Congress to the Commissioner, and could not, under the Revenue Act of 1918, be challenged in the courts—at least in the absence of fraud or other irregularities.

It remains to consider whether jurisdiction to review the Commissioner's action was conferred upon the Court of Claims as a result of the Revenue Act of June 2, 1924, c. 234, 43 Stat. 253, 336, which created the Board of Tax Appeals. There is nothing in that Act which purports to enlarge the jurisdiction of the Court of Claims or to extend the scope of judicial review over determinations of the Commissioner. The contention that it had this effect rests wholly on our decision in *Blair* v. *Oesterlein Machine Co.*, 275 U. S. 220. The contention fails to take account of the important differences between an appeal to the Board of Tax Appeals, on the one hand, and an original suit in the Court of Claims, or in a district court, on the other. The Board of Tax Appeals was created to perform the administrative functions theretofore discharged by the Committee on Appeals and Review, which the Commissioner of Internal Revenue had established in his office.[7] See House Report, 68th Cong. 1st Sess., No.

[7] The Revenue Act of 1918, c. 18, § 1301(d), 40 Stat. 1057, 1141, created an Advisory Tax Board to be appointed by the Commissioner with the approval of the Secretary of the Treasury. See House Re-

179, p. 7; Senate Report, 68th Cong. 1st Sess., No. 398, p. 8. The Committee had regularly reviewed determi-

port, 65th Cong., 2d Sess., No. 767, p. 38; Senate Report, 65th Cong., 3d Sess., No. 617, p. 58. The Commissioner might submit to the Board and on the request of a taxpayer must submit any question relating to the interpretation or administration of the income, war-profits or excess-profits tax. The functions of the Board were, in some degree, similar to those of the excess-profits tax advisers and reviewers who had aided the Commissioner in applying the 1917 act. See Report of the Commissioner of Internal Revenue, 1918, p. 13. Procedure as to the submission of questions and practice before the Board was established by Regulations 45, art. 1701 (T. D. 2831). The Board, which was organized on March 13, 1919, came to an end on October 1 of that year. Report, 1919, pp. 12–14.

The work that had been performed by the Advisory Tax Board was, however, immediately taken over by a committee of lawyers and accountants organized by the Commissioner in the Bureau. Report, 1919, p. 14. The procedure for taking appeals to this committee, which was known as the Committee on Appeals and Review, was laid down in O. D. 709, 3 C. B. 370. The nature of the work of this body is described in the Commissioner's Report for 1920, pp. 14–15, and for 1921, pp. 14–15.

Section 250(d) of the Revenue Act of 1921, c. 136, 42 Stat. 227, 265–266, provided that if on examination of a return under the Acts of 1916, 1917, 1918, or 1921, a tax or deficiency in tax should be discovered, the taxpayer should be notified and given a period of not less than 30 days in which to file an appeal. See House Report, 67th Cong., 1st Sess., No. 350, p. 14; Senate Report, 67th Cong., 1st Sess., No. 275, pp. 20–21. The procedure for perfecting appeals under this section was laid down by T. D. 3269; Regulations 62, art. 1006 (T. D. 3409); and T. D. 3492. Appeals under this section appear to have been commonly handled by the Committee on Appeals and Review. See Rules of Procedure before the Committee, A. R. M. 219, Int. Rev. Cum. Bull. III–1, 319; Reports of the Commissioner for 1922, p. 15, for 1923, pp. 8–9, and for 1924, pp. 10–12.

The Board of Tax Appeals was created by § 900 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 336. Section 1100 of the same act, 43 Stat. 253, 352, repealed § 250 of the Revenue Act of 1921. By T. D. 3616 (July 16, 1924), all cases pending before the Committee and the Special Committee on Appeals and Review were transferred to the Solicitor of Internal Revenue, and the Committees were abolished. See also Report of the Commissioner for 1924, p. 12.

nations granting or denying special assessment under §§ 327 and 328.[8] The granting of these powers of review to the Board of Tax Appeals did not change the character of the appeal. And it affords no reason to conclude that Congress intended that the Court of Claims and the district courts should also be authorized to reëxamine the decisions of the Commissioner on questions of the character here involved.

It is true that, unlike the Committee, the Board of Tax Appeals is not a part of the Bureau of Internal Revenue. The Board is an independent agency. But by specific provision of the Revenue Act of 1924, c. 234, § 900(k), 43 Stat. 253, 338, it was defined as an agency "in the executive branch of the Government." Compare *Goldsmith* v. *Board of Tax Appeals,* 270 U. S. 117, 121–122. Its sole function consists in reviewing, on appeal, determinations of the Commissioner under the revenue laws. The fact that the Commissioner is a party to all cases before it enables the Board, by rules of procedure which it has developed, to leave to the Commissioner the initial determination of many questions requiring the use of facts not in the record.[9] Its limited, specialized functions en-

[8] In the following cases the Advisory Tax Board or the Committee on Appeals and Review considered the question whether, under § 210 of the 1917 act or § 327 of the 1918 act, a special assessment ought to be made: T. B. M. 53, 1 C. B. 303; T. B. M. 58, 1 C. B. 304; A. R. R. 36, 2 C. B. 269; A. R. R. 70, 2 C. B. 287; A. R. M. 12, 2 C. B. 292; A. R. R. 19, 2 C. B. 298; A. R. R. 104, 2 C. B. 301; A. R. R. 110, 2 C. B. 303; A. R. R. 209, 3 C. B. 360; A. R. R. 332, 3 C. B. 362; A. R. R. 338, 3 C. B. 363; A. R. R. 363, 4 C. B. 14; A. R. R. 364, 4 C. B. 16; A. R. R. 464, 4 C. B. 17; A. R. R. 459, 4 C. B. 399; A. R. R. 518, 4 C. B. 401; A. R. R. 556, 5 C. B. 142; A. R. R. 538, 5 C. B. 301; A. R. R. 599, 5 C. B. 304.

[9] Rule 62, effective December 28, 1927, lays down the procedure in special assessment cases. By paragraph (b) it is provided that the hearing may, in the discretion of the Board, on motion, be limited to the question whether the petitioner is entitled to have its tax determined under § 328 (or § 210). Paragraph (c) provides that if the

able its members to acquire the extensive special knowledge and the specific experience essential to a sound exercise of judgment in dealing with questions arising under §§ 327 and 328.[10] As was said in the *Oesterlein* case, *supra,* at p. 226, there is no reason for thinking that Congress considered the Commissioner to be better qualified for making determinations under §§ 327 and 328 than this administrative agency specially established to review his decisions.

Affirmed.

EX PARTE COLLINS.

MOTION FOR LEAVE TO FILE PETITION FOR MANDAMUS.

No. — Original. Motion submitted April 30, 1928.—Decided June 4, 1928.

1. Leave to file a petition for mandamus to require a district judge to set aside an order refusing an interlocutory injunction and call

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Board decides that the petitioner is so entitled, the Commissioner shall file within 60 days after such decision, a proposed redetermination showing the basis and method of the computation. If, within 20 days after service by the Board upon the petitioner of a copy of such proposed redetermination, the parties are unable to agree on the amount of the tax, either party may move or the Board on its own motion may order that the case be placed on the calendar for further hearing. See also Rule 50, Settlement of Final Determination, as amended April 28, 1928.

[10] The administration of the special assessment sections by the Commissioner was being investigated by a Select Committee of the Senate at the very time when Congress had the Revenue Bill of 1924 under consideration. See Hearings before the Select Committee on Investigation of the Bureau of Internal Revenue, U. S. Senate, 68th Cong., 1st Sess., pursuant to S. Res. 168, p. 136. Compare the final report of the committee, Senate Report, 69th Cong., 1st Sess., No. 27, Pt. I, pp. 6, 214–223, Pt. II, pp. 247, 280. Congress plainly did not intend to remove altogether the right to a review of determinations under § 327 which, by virtue of § 1301(d) of the Act of 1918, § 250(d) of the Act of 1921, and the regulations of the Bureau, the taxpayer had theretofore enjoyed.

in two other judges under Jud. Code, § 266, will be denied if it be clear that the case is not within that section. P. 566.

2. A suit by an abutting property owner to enjoin a city and its contractor from proceeding under a resolution for the paving of a street, upon the ground that general statutes of the State, which provide that the cost of such improvements shall be assessed against abutting property, contravene the due process clause of the Fourteenth Amendment in not affording the plaintiff a proper hearing, is not a suit to restrain "the enforcement, operation, or execution of a statute of a State" within Jud. Code, § 266. P. 567.

Motion denied.

On a motion for leave to file a petition for a writ of mandamus requiring a district judge to set aside an order refusing an interlocutory injunction and to call in two additional judges, under § 266 of the Judicial Code, in a suit by an abutting property owner to enjoin execution of a resolution for the paving of a city street.

Messrs. John W. Ray, Joseph C. Niles, and *J. D. Collins,* pro se, were on the brief for petitioner.

Mr. Justice Brandeis delivered the opinion of the Court.

This is a motion for leave to file in this Court a petition for a writ of mandamus to be directed to District Judge Jacobs of the federal court for Arizona. In a suit pending before that court the petitioner Collins, having made application for an interlocutory injunction, and having notified the Governor and the Attorney General of the State, requested Judge Jacobs to call two additional judges to sit with him as provided in § 266 of the Judicial Code as amended. Judge Jacobs denied the request and, sitting alone, denied the interlocutory injunction. The petitioner thereupon filed this motion. In the accompanying petition, he prays that Judge Jacobs be directed to set aside his order denying the injunction, and to call two judges to sit with him at the hearing. Mandamus is the appropriate remedy. *Ex parte Metropolitan Water Co.,* 220 U. S. 539, 546; *Ex*

parte Williams, ante, p. 267. But as we deem it clear that the case is not within the scope of § 266, we deny leave to file the petition. Compare *Ex parte Buder,* 271 U. S. 461.

The defendants in the suit are the City of Phoenix, Arizona, and Schmidt-Hitchcock, Contractors, a private Arizona corporation. The purpose of the suit is to enjoin the city, its officers, and the contractor, from proceeding under a resolution adopted by the city directing the paving of a street on which the petitioner is an abutting owner. The improvement was to be made pursuant to a general statute of Arizona, Civil Code, 1913, Title VII, c. XIII, and the cost was to be defrayed by bonds issued pursuant to another general statute, Session Laws, 1919, c. 144. They provide that the cost of the improvement shall be assessed against abutting property according to the benefit received, and that a lien shall thereon arise for the amount assessed. The petitioner claims that the statutes make no proper provision for giving the property owner a hearing, and that therefore they contravene the due process clause of the Fourteenth Amendment to the Federal Constitution. Schmidt-Hitchcock objected to the calling of additional judges on the ground that the case did not fall within the purview of § 266, but was merely one in which it was sought to prevent a municipal corporation and its officers from proceeding with a municipal improvement.

The suit is not one to restrain " the enforcement, operation, or execution " of a statute of a State within the meaning of § 266. That section was intended to embrace a limited class of cases of special importance and requiring special treatment in the interest of the public.[1]

[1] Senator Burton said of the amendment to the Commerce Court Act which later became § 266: " It evidently recognizes the superior degree of consideration and sanction which should be given to a state statute, and prevents hasty interference with the action of a sovereign state." 45 Cong. Rec. 7253.

The lower courts have held with substantial unanimity that the section does not govern all suits in which it is sought to restrain the enforcement of legislative action, but only those in which the object of the suit is to restrain the enforcement of a statute of general application or the order of a state board or commission. Thus, the section has long been held inapplicable to suits seeking to enjoin the execution of municipal ordinances,[2] or the orders of a city board.[3] And likewise it has been held that the section does not apply where, as here, although the constitutionality of a statute is challenged, the defendants are local officers and the suit involves matters of interest only to the particular municipality or district involved.[4] Despite the generality of the language, we think the section must be so construed.

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[2] *Sperry & Hutchinson Co.* v. *City of Tacoma,* 190 Fed. 682; *Cumberland Telephone & Telegraph Co.* v. *City of Memphis,* 198 Fed. 955; *Birmingham Water Works Co.* v. *City of Birmingham,* 211 Fed. 497, affirmed, 213 Fed. 450; *Calhoun* v. *City of Seattle,* 215 Fed. 226; *City of Des Moines* v. *Des Moines Gas Co.,* 264 Fed. 506. See also *Land Development Co.* v. *City of New Orleans,* 13 F. (2d) 898, reversed on the merits, 17 F. (2d) 1016.

[3] *City of Dallas* v. *Dallas Telephone Co.,* 272 Fed. 410.

[4] *Connor* v. *Board of Commissioners,* 12 F. (2d) 789. In *Silvey* v. *Commissioners of Montgomery County,* 273 Fed. 202, 207, the court of three judges stated that "they had a serious doubt whether the conservancy district officers are state officers in such a sense as to justify a hearing under section 266, Judicial Code." Temporary injunctions were granted or denied by a single judge in *Bush* v. *Branson,* 248 Fed. 377, 385, 251 U. S. 182; *Thomas* v. *Kansas City Southern Ry. Co.,* 277 Fed. 708, 261 U. S. 481 (see original papers); *Cole* v. *Norborne Land District,* 270 U. S. 45 (see original papers); and *Missouri Pacific R. R. Co.* v. *Road Improvement District,* 288 Fed. 502. While there was a hearing before three judges in *Orr* v. *Allen,* 245 Fed. 486, 248 U. S. 35; *Lancaster* v. *Police Jury,* 254 Fed. 179, 180; *Columbia Investment Co.* v. *Long Branch Road District,* 281 Fed. 342; *St. Louis & Southwestern Ry. Co.* v. *Nattin, ante,* p. 157; and *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Risty,* 276 U. S. 567,

Congress realized that in requiring the presence of three judges, of whom one must be a Justice of this Court or a circuit judge, it was imposing a severe burden upon the federal courts.[5] The burden was imposed because Congress deemed it unseemly that a single district judge should have power to suspend legislation enacted by a State. That the section was intended to apply only to cases of general importance is shown by the provision that notice of the hearing must be given to the Governor and the Attorney General—a precaution which would scarcely be deemed necessary in a suit of interest only to a single locality. Support for that view is found also in the provision for a stay of the suit in case there shall have been brought in a court of the State a suit to enforce the statute or order. That the provisions of § 266 applied to cases of unusual gravity was recognized by Congress in 1925, when, in limiting the right of direct appeal from the District Court to this Court, it carefully preserved that right in cases falling within the section. Cases like the present are not of that character. If the temporary injunction had been issued, the result would have been merely to delay a municipal improvement. Though here the alleged unconstitutionality rests in the enabling statute, the case does not differ substantially from one where the sole claim is that a city ordinance is invalid. Moreover, the enabling act is not itself being enforced within the meaning of § 266. That act merely authorizes further legislative action to be taken by the city, as by the resolution here in question. It is that municipal action, not the statute of a State, whose "enforcement, operation, or execution" the petitioner seeks to enjoin.

Motion denied.

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it does not appear that the propriety of such a hearing was considered. See also *Browning* v. *Hooper,* 3 F. (2d) 160, 161; *Smith* v. *Wilson,* 273 U. S. 388.

[5] See 45 Cong. Rec. 7254–7257.

DECISIONS PER CURIAM, FROM APRIL 10, 1928, TO AND INCLUDING JUNE 5, 1928, OTHER THAN DECISIONS ON PETITIONS FOR WRITS OF CERTIORARI.

No. 866. HAWTHORNE *v.* TEXAS AND NEW ORLEANS R. R. Co. Error to the Court of Civil Appeals, First Supreme Judicial District, State of Texas. April 16, 1928. *Per Curiam:* The motion for leave to proceed further herein *in forma pauperis* is denied for the reason that the Court, upon examination of the unprinted record, finds that this is not a case in which 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 the State of Texas, 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. The writ of error is therefore dismissed on the authority of § 237 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936, 937, for lack of jurisdiction. *Jett Bros. Distilling Co.* v. *City of Carrollton,* 252 U. S. 1, 5, 6. Treating the writ of error as an application for certiorari, the certiorari is denied.

The costs already incurred herein shall, by direction of the Court, be paid by the clerk from the special fund in his custody, as provided in the order of October 29, 1926. *Mr. Charles A. Murphy* for plaintiff in error. No appearance for defendant in error.

No. 748. DAVIS *v.* STATE OF OHIO. Error to the Supreme Court of the State of Ohio. Argued April 10, 1928. Decided April 16, 1928. *Per Curiam:* Dismissed for want of jurisdiction, for the reason that the federal

question is 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; *Seaboard Air Line* v. *Padgett,* 236 U. S. 68, 671; *Quong Ham Wah Co.* v. *Industrial Commission,* 255 U. S. 445, 448, 449. *Mr. Joseph L. Stern,* with whom *Mr. John A. Cline* was on the brief, for plaintiff in error. *Messrs. Edward C. Turner* and *Carl F. Shuler* were on the brief for defendant in error.

No. 696. RICKETTS *v.* ALLEN. Error to the Supreme Court of the State of Ohio. Motion to dismiss submitted April 16, 1928. Decided April 23, 1928. *Per Curiam:* The motion to dismiss is granted for the reason that no federal question is presented, on the authority of *Cuyahoga Power Co.* v. *Northern Realty Co.,* 244 U. S. 300, 303; *California Powder Works* v. *Davis,* 151 U. S. 389, 393; *Yazoo & Mississippi Valley R. R. Co.* v. *Brewer,* 231 U. S. 245, 249; *Municipal Securities Corporation* v. *Kansas City,* 246 U. S. 63, 69. *Messrs. A. McL. Marshall* and *Byron B. Harlan* for the defendant in error, in support of the motion. *Mr. Leonidas B. McIlhenny* for plaintiff in error, in opposition thereto.

No. 455. WHITE RIVER GARDENS, INC., ET AL. *v.* STATE OF WASHINGTON ET AL. Error to the Supreme Court of the State of Washington. Argued April 13, 16, 1928. Decided April 23, 1928. *Per Curiam:* Affirmed, on the authority of *Terrace* v. *Thompson,* 263 U. S. 197, 217, 223; *Frick* v. *Webb,* 263 U. S. 326, 332, 334; *Webb* v. *O'Brien,* 263 U. S. 313, 322. *Mr. Frederic E. Fuller* for plaintiffs in error. *Mr. Howard A. Hanson* for defendants in error.

No. 463. MONTGOMERY WARD AND CO. *v.* EMMERSON, AS SECRETARY OF STATE OF THE STATE OF ILLINOIS, ET AL.; and

No. 464. VICTOR CHEMICAL WORKS *v.* EMMERSON, AS SECRETARY OF STATE OF THE STATE OF ILLINOIS, ET AL. Appeals from the District Court of the United States for the Southern District of Illinois. Argued April 16, 17, 1928. Decided April 23, 1928. *Per Curiam:* Affirmed, on the authority of *Cream of Wheat Co.* v. *Grand Forks,* 253 U. S. 325, 328, 330; *Roberts & Schaefer Co.* v. *Emmerson,* 271 U. S. 50, 53, 54. *Mr. Paul O'Donnell,* with whom *Mr. Silas H. Strawn* was on the brief, for appellant in No. 463. *Mr. Fletcher Lewis,* with whom *Mr. Paul O'Donnell* was on the brief, for appellant in No. 464. *Mr. Bayard L. Catron,* with whom *Mr. Oscar E. Carlstrom* was on the brief, for appellees.

No. 496. THE CARTER OIL CO. ET AL. *v.* ELI ET AL. On writ of certiorari to the Supreme Court of the State of Oklahoma. Argued April 18, 19, 1928. Decided April 23, 1928. *Per Curiam:* Dismissed for want of a federal question, in that the decision of the State Supreme Court could be sustained and was sustained on non-federal grounds. *Hammond* v. *Johnston,* 142 U. S. 73, 78; *Eustis* v. *Bolles,* 150 U. S. 361, 366, 370; *Bilby* v. *Stewart,* 246 U. S. 255, 257; *New York ex rel. Doyle* v. *Atwell,* 261 U. S. 590, 592; *Richardson Machinery Co.* v. *Scott,* 276 U. S. 128. *Messrs. George S. Ramsey* and *Chester I. Long,* with whom *Messrs. George E. Chamberlain, Peter Q. Nyce, James A. Veasey, Gibbs L. Baker,* and *L. G. Owen* were on the brief, for petitioners. *Mr. Daniel H. Linebaugh,* with whom *Mr. Paul Pinson* was on the brief, for respondents.

No. 552. CITY OF NEW YORK *v.* CAMPBELL. Error to the Supreme Court of the State of New York. Argued

April 19, 1928. Decided April 23, 1928. *Per Curiam:* Dismissed, on the authority of *Pawhuska* v. *Pawhuska Oil Co.,* 250 U. S. 394, 397, 399; *Trenton* v. *State of New Jersey,* 262 U. S. 182, 188, 192; *Risty* v. *Chicago, Rock Island & Pacific R. R. Co.,* 270 U. S. 378, 390. *Mr. Elliot S. Benedict,* with whom *Messrs. George P. Nicholson, J. Joseph Lilly,* and *George W. Cowie* were on the brief, for plaintiff in error. *Mr. H. Winship Wheatley* for defendant in error.

No. 579. Cliffs Chemical Co. *v.* Wisconsin Tax Commission. Error to the Supreme Court of the State of Wisconsin. Argued April 20, 1928. Decided April 23, 1928. *Per Curiam:* Dismissed for want of a substantial 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. Wm. P. Belden,* with whom *Mr. E. H. Jaynes* was on the brief, for plaintiff in error. *Messrs. John W. Reynolds* and *Franklin E. Bump* submitted for defendant in error.

No. 589. P. J. McGowan & Sons, Inc. *v.* Van Winkle, Attorney General of the State of Oregon, et al. Appeal from the District Court of the United States for the District of Oregon. Argued April 20, 1928. Decided April 23, 1928. *Per Curiam:* Affirmed, on the authority of *Olin* v. *Kitzmiller,* 259 U. S. 260, 263. *Mr. E. S. McCord,* with whom *Mr. John H. Dunbar* was on the brief, for appellant. *Messrs. Alfred E. Clark, I. H. Van Winkle,* and *Willis S. Moore* were on the brief for appellees.

No. 922. Figueroa *v.* Saldana. On petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit. May 14, 1928. *Per Curiam:* The motion for

leave to proceed further herein *in forma pauperis* is denied for the reason that the Court, upon examination of the record herein submitted, finds that there are no grounds upon which certiorari can be issued, application for which is therefore also denied. The costs already incurred herein shall, by direction of the Court, be paid by the clerk from the special fund in his custody as provided by the order of October 29, 1926. *Mr. Cataline Figueroa,* pro se. No appearance for respondent.

No. 746. TAZEWELL, PRESIDING JUDGE OF THE CIRCUIT COURT OF THE STATE OF OREGON FOR MULTNOMAH COUNTY, *v.* STATE OF OREGON, EX REL. SULLIVAN. On writ of certiorari to the Supreme Court of the State of Oregon. May 14, 1928. *Per Curiam:* The Court, having considered the showing made upon the rule, and the concessions made by the respondent, finds that the case is moot, and accordingly vacates the judgment of the Supreme Court of the State of Oregon with directions to dismiss the case without prejudice and without costs, on the authority of *Brownlow* v. *Schwartz,* 261 U. S. 216, 218, 219; *Board of Public Utility Commisioners* v. *Compania General,* 249 U. S. 425, 426; *Berry* v. *Davis,* 242 U. S. 468, 470; *Commercial Cable Co.* v. *Burleson,* 250 U. S. 360, 363. *Mr. Erskine Wood* for petitioner. *Mr. Wallace McCamant* for respondent.

No. 912. SALTIS *v.* THE PEOPLE OF THE STATE OF ILLINOIS. Appeal from the Supreme Court of the State of Illinois. Submitted April 23, 1928. Decided May 14, 1928. *Per Curiam:* The motion to dismiss the appeal is granted for want of jurisdiction in this Court for the reason that the federal questions sought to be presented are frivolous, on the authority of *Farrell* v. *O'Brien,* 199

U. S. 89, 100; *Toup* 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; *Quong Ham Wah Co.* v. *Industrial Commission*, 255 U. S. 445, 448, 449. Proceeding under Rule 31, as amended April 2, 1927 (274 U. S. 766), it is ordered that the mandate be issued forthwith to the Supreme Court of the State of Illinois for further proceedings. *Mr. Louis Greenberg* for appellant. *Mr. Oscar E. Carlstrom* for appellee.

No. 877. WYSONG *v.* THE PEOPLE OF THE STATE OF CALIFORNIA. On petition for writ of certiorari to the District Court of Appeals, Second Appellate District, State of California. May 14, 1928. *Per Curiam:* Upon the answer of the petitioner to the order to show cause why the application for certiorari should not be denied, the Court denies the certiorari because of the lack of a substantial federal question shown in the record giving this Court jurisdiction. *Shulthis* v. *McDougal*, 225 U. S. 561, 569; *Hull* v. *Burr*, 234 U. S. 712, 720; *Norton* v. *Whiteside*, 239 U. S. 144, 147. Under Rule 31, as amended May 2, 1927 (274 U. S. 766), the Court directs that the mandate and notice of the ruling herein be issued forthwith to the District Court of Appeals of the State of California, Second Appellate District, Division Two, for further proceedings. *Mr. James E. Fenton* for petitioner. No appearance for respondent.

No. —. RAARUP *v.* UNITED STATES. May 21, 1928. *Per Curiam:* The motion for leave to proceed further herein *in forma pauperis* is denied for the reason that the Court, upon examination of the papers herein submitted, includ-

ing a copy of the record, finds that there are no grounds upon which certiorari can be issued, application for which is therefore also denied. The costs already incurred herein shall, by direction of the Court, be paid by the clerk from the special fund in his custody as provided by the order of October 29, 1926. *Mr. George B. Smart* for petitioner. No appearance for the United States.

No. 965. SARBER *v.* AETNA LIFE INSURANCE CO. On petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit. May 21, 1928. *Per Curiam:* The motion for leave to proceed further herein *in forma pauperis* is denied for the reason that the Court, upon examination of the unprinted record herein submitted, finds that there are no grounds upon which certiorari can be issued, application for which is therefore also denied. The costs already incurred herein shall, by direction of the Court, be paid by the clerk from the special fund in his custody as provided by the order of October 29, 1926. *Mr. Morris Bien* for petitioner. No appearance for respondent.

No. —, original. EX PARTE: IN THE MATTER OF STEIDLE, ADMINISTRATOR. May 28, 1928. The motion of John Steidle for leave to file a petition for a writ of mandamus directed to the Hon. William Clark, Judge of the District Court of the United States for the District of New Jersey, and to the District Court of the United States for the District of New Jersey; and the further motion that a rule be entered and issued directed to Hon. William Clark, Judge of the District Court, and to the District Court, to show cause why a writ of mandamus should not issue against them, are denied. *Mr. John Steidle,* pro se.

No. 941. GRIGG *v.* UNITED STATES; and
No. 953. SLIGH *v.* UNITED STATES. See *post*, p. 582.

No. 782. CHIPPIANNOCK CEMETERY ASS'N *v.* CITY OF ROCK ISLAND. June 4, 1928. Error to the Supreme Court of the State of Illinois. *Per Curiam:* The petition for certiorari ancillary to the writ of error in this case is denied, for the reason that the writ of error must be, and is hereby, dismissed for want of a substantial 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. *Messrs. Merritt Starr, Albert L. Hopkins,* and *Richard S. Doyle* for plaintiff in error. *Mr. Ben T. Reidy* for defendant in error.

PETITIONS FOR CERTIORARI GRANTED, FROM APRIL 10, 1928, TO AND INCLUDING JUNE 5, 1928.

No. 789. UNADILLA VALLEY RAILWAY CO. *v.* CALDINE, ADMINISTRATOR. April 16, 1928. Petition for writ of certiorari to the Court of Appeals of the State of New York granted. *Messrs. Benjamin S. Minor, H. Prescott Gatley, Arthur P. Drury,* and *Wirt Howe,* for petitioner. *Mr. Thomas B. Kattell* for respondent.

No. 807. UNITED STATES *v.* CARVER ET AL. April 23, 1928. Petition for writ of certiorari to the Court of Claims granted. *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Mr. J. Frank Staley* for the United States. *Mr. Frank E. Scott* for respondents.

No. 833. COGEN *v.* UNITED STATES. April 23, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Sanford H. Cohen* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Mabel Walker Willebrandt,* and *Mr. John J. Byrne* for the United States.

No. 836. REINECKE, COLLECTOR OF INTERNAL REVENUE, *v.* THE NORTHERN TRUST CO., EXECUTOR. April 23, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit granted. *Solicitor General Mitchell,* and *Messrs. Clarence M. Charest* and *T. H. Lewis* for petitioner. *Mr. J. F. Dammann, Jr.,* for respondent.

No. 837. PRELA, TRADING AS SELWELL BLOUSE CO., *v.* HUBSHMAN, TRUSTEE. April 23, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Archibald Palmer* and *Max L. Rosenstein* for petitioner. *Mr. George L. Cohen* for respondent.

No. 838. ORIEL ET AL. *v.* RUSSELL, TRUSTEE. April 23, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Hugo Levy* for petitioners. *Mr. William E. Russell,* pro se.

No. 842. SEABOARD AIR LINE RY. CO. *v.* JOHNSON. April 23, 1928. Petition for writ of certiorari to the Supreme Court of the State of Alabama granted. *Messrs. Robert E. Steiner, Benjamin P. Crum,* and *Leon Weil* for petitioner. *Messrs. Wm. W. Hill* and *Richard T. Rives* for respondent.

No. 851. THE NEW YORK, CHICAGO AND ST. LOUIS R. R. Co. *v.* GRANFELL. April 23, 1928. Petition for writ of certiorari to the Court of Appeals for the Eighth Judicial District, State of Ohio, granted. *Mr. W. T. Kinder* for petitioner. *Mr. R. B. Newcomb* for respondent.

No. 852. THE STATE HIGHWAY COMMISSION OF WYOMING ET AL. *v.* UTAH CONSTRUCTION Co. April 23, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Mr. Wm. O. Wilson* for petitioners. *Messrs. John W. Lacey* and *Herbert Lacey* for respondent.

No. 894. UNITED STATES *v.* WILLIAMS. May 14, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Solicitor General Mitchell* and *Assistant Attorney General Galloway* for the United States. *Mr. William Kaufman* for respondent.

No. 449. JORDAN, SECRETARY OF STATE, ET AL. *v.* TASHIRO ET AL. May 14, 1928. Petition for writ of certiorari to the Supreme Court of the State of California granted. *Mr. U. S. Webb* for petitioners. *Mr. J. Marion Wright* for respondents.

No. 865. WRIGHT, ADMINISTRATOR, *v.* GRAND TRUNK RAILROAD Co. May 14, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit granted. *Mr. Thomas A. E. Weadock* for petitioner. No appearance for respondent.

No. 876. EMPIRE GAS & FUEL Co. ET AL. *v.* SAUNDERS ET AL. May 21, 1928. Petition for a writ of certiorari

to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. David B. Trammell, J. W. Finley,* and *Warren T. Spies* for petitioners. No appearance for respondents.

No. 858. LASH'S PRODUCTS CO. *v.* UNITED STATES. May 28, 1928. Petition for writ of certiorari to the Court of Claims granted. *Messrs. A. R. Serven* and *Richard D. Daniels* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Galloway* for the United States.

No. 907. STATE TRUST & SAVINGS BANK *v.* DUNN, TRUSTEE. May 28, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Mr. W. J. Rutledge, Jr.,* for petitioner. No appearance for respondent.

No. 945. MCDONALD *v.* UNITED STATES. May 28, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Messrs. Wm. K. Jackson* and *J. Harry Covington* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 946. MICHIGAN CENTRAL R. R. CO. *v.* MIX ET AL. May 28, 1928. Petition for writ of certiorari to the Supreme Court of the State of Missouri granted. *Messrs. Charles A. Houts* and *J. W. Dohany* for petitioner. No appearance for respondents.

No. 949. FAUNTLEROY, FORMER COLLECTOR, ETC. *v.* ELMER CANDY CO., INC. May 28, 1928. Petition for

writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Solicitor General Mitchell, Assistant Attorney General Mabel Walker Willebrandt,* and *Messrs. J. Louis Monarch, Clarence M. Charest,* and *Frank J. Ready, Jr.,* for petitioner. No appearance for respondent.

No. 941. GRIGG *v.* UNITED STATES; and

No: 953. SLIGH *v.* UNITED STATES. On petitions for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit. June 4, 1928. These are applications for certiorari in actions instituted in the United States District Court for the District of Arizona to recover on policies of war-risk insurance. There being then no applicable federal statute of limitations, the United States, among other defenses, pleaded the statute of limitations of the State of Arizona. Judgments were entered in the District Court for the plaintiffs. The United States sued out writs of error to the Circuit Court of Appeals. That court held the state statute of limitations was applicable and barred the actions and reversed the judgments of the District Court.

On May 29, 1928, there was passed and approved an act of Congress entitled "An act to amend the world war veterans act, 1924" (H. R. 13039, 70th Cong., 1st sess.). That act amends section 19 of the world war veterans act and allows suit to be brought on policies of war-risk insurance within six years after the right accrues or within one year from the date of the approval of the amendatory act. It provides also:

"Judgments heretofore rendered against the person or persons claiming under the contract of war-risk insurance on the grounds that the claim was barred by the statute of limitations shall not be a bar to the institution of another suit on the same claim. No State or other statute

of limitations shall be applicable to suits filed under this section. This section shall apply to all suits now pending against the United States under the provisions of this section."

As a result of this legislation, the defense of the statute of limitations of Arizona is no longer available to the United States in these two cases. In each case the assignments of error in the Circuit Court of Appeals passed only on the defense of the statute of limitations and did not find it necessary to consider the other questions.

The United States now consents that writs of certiorari may be issued forthwith in these cases, that the judgments entered in the United States Circuit Court of Appeals for the Ninth Circuit be vacated and set aside, and that the cases be remanded to the United States Circuit Court of Appeals for the Ninth Circuit for further proceedings and that the mandates issue forthwith.

The Court enters the order accordingly. *Mr. Loy J. Molumby* for petitioners. *Solicitor General Mitchell* and *Assistant Attorney General Farnum* for the United States.

No. 930. NIELSEN, ADMINISTRATOR, *v.* JOHNSON, TREASURER OF STATE. June 4, 1928. Petition for writ of certiorari to the Supreme Court of the State of Arkansas granted. *Mr. Nelson Miller* for petitioner. *Mr. John Fletcher* for respondent.

No. 1007. LOVELAND, EXECUTOR, ET AL. *v.* UNITED STATES. June 4, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted. *Messrs. Shelton Pitney* and *John R. Hardin, Jr.,* for petitioners. *Solicitor General Mitchell* and *Assistant Attorney General Farnum* for the United States.

PETITIONS FOR CERTIORARI DENIED OR DISMISSED FROM APRIL 10, 1928, TO AND INCLUDING JUNE 5, 1928.

No. 866. HAWTHORNE *v.* TEXAS AND NEW ORLEANS R. R. Co. See *ante*, p. 571.

No. 753. UNITED STATES *v.* NICHOLS AND NICHOLS, EXECUTORS. April 16, 1928. Petition for writ of certiorari to the Court of Claims denied. *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Mr. T. H. Lewis* for the United States. *Mr. Henry A. Stickney* for respondents.

No. 757. KOHLMAN, TRUSTEE, *v.* UNITED STATES. April 16, 1928. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Levi H. David, Harold J. Pack, Wm. F. Kimber,* and *David W. Kahn,* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Galloway* for the United States.

No. 758. LUCKENBACH STEAMSHIP CO. ET AL. *v.* UNITED STATES. April 16, 1928. Petition for writ of certiorari to the Court of Claims denied. *Messrs. George A. King, William B. King,* and *George R. Shields,* for petitioners. *Solicitor General Mitchell* and *Assistant Attorney General Galloway* for the United States.

No. 759. OCEAN STEAMSHIP CO. *v.* UNITED STATES. April 16, 1928. Petition for writ of certiorari to the Court of Claims denied. *Messrs. T. M. Cunningham, Jr., William B. King,* and *George A. King* for petitioner. *Solici-*

tor General Mitchell and *Assistant Attorney General Galloway* for the United States.

No. 781. CHEVROLET MOTOR CO. *v.* UNITED STATES. April 16, 1928. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Melville Church, John Thomas Smith,* and *Frank A. Gaynor,* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Mr. Fred K. Dyar,* for the United States.

No. 791. OXFORD OIL CO. ET AL. *v.* ATLANTIC OIL PRODUCING CO. April 16, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. C. L. Bass* and *R. H. Ward* for petitioners. *Mr. John L. Young* for respondent.

No. 794. CANAVAN *v.* KITCHEN ET AL. April 16, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Sam G. Bratton* for petitioner. *Mr. E. W. Dobson* for respondents.

No. 798. COMPAGNIE GENERALE TRANSATLANTIQUE *v.* UNITED STATES. April 16, 1928. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Charles S. Haight, Harold S. Deming,* and *George A. King* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Galloway* for the United States.

No. 811. AMALGAMATED CLOTHING WORKERS ET AL. *v.* CURLEE CLOTHING CO. April 16, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the

Eighth Circuit denied. *Messrs. Luther Ely Smith* and *Elmer E. Pearey* for petitioners. *Mr. George M. Hagee* for respondent.

No. 812. Driscoll and Driscoll *v.* State Board of Land Commissioners of Colorado et al. April 16, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Edwin H. Park* for petitioners. *Messrs. Wm. L. Boatright, Charles Roach, Edw. M. Freeman,* and *Paul P. Prosser* for respondents.

No. 814. Cudahy Packing Co. *v.* Munson Steamship Line. April 16, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Gilbert H. Montague* for petitioner. *Mr. Cletus Keating* for respondent.

No. 816. Alman, Executrix, *v.* New York Life Insurance Co. April 16, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Harry H. Smith* for petitioner. *Mr. T. M. Stevens* for respondent.

No. 817. Morgan *v.* Riverside Mills Co. et al. April 16, 1928. Petition for writ of certiorari to the Supreme Court of the State of Tennessee denied. *Mr. James S. Pilcher* for petitioner. *Mr. K. T. McConnico* for respondents.

No. 818. Erie Railroad Co. et al. *v.* Hoyland Flour Mills Co. April 16, 1928. Petition for writ of certiorari to the Court of Appeals of Kansas City, Missouri, denied. *Messrs. Mitchell D. Follansbee, Leslie A. Welch,*

Thomas Hackney, Cyrus Crane, and *Clyde E. Shorey,* for petitioners. *Mr. E. R. Morrison* for respondent.

No. 819. NEW YORK LIFE INSURANCE CO. *v.* MARSHALL. April 16, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. R. B. Montgomery* and *Louis H. Cooke* for petitioner. *Mr. Harry P. Sneed* for respondent.

No. 820. DILLARD ET AL. *v.* HAL BROWN & CO. April 16, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Sam G. Bratton* for petitioners. No appearance for respondent.

No. 821. ST. LOUIS-SAN FRANCISCO RY. CO. *v.* OGLESBY, ADMINISTRATRIX. April 16, 1928. Petition for writ of certiorari to the Supreme Court of the State of Missouri denied. *Messrs. Edward T. Miller* and *Henry S. Conrad* for petitioner. *Mr. Mont T. Prewitt* for respondent.

No. 829. ROOS *v.* THE TEXAS CO. April 16, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. D. Basil O'Connor* for petitioner. *Mr. Harry T. Klein* for respondent.

No. 832. PRICE *v.* UNITED STATES. April 16, 1928. Petition for writ of certiorari to the Court of Claims denied. *Mr. John F. McCarron* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Messrs. Gardner P. Lloyd* and *Percy M. Cox,* for the United States.

No. 828. CITY OF CAPE MAY *v.* UNITED STATES. April 23, 1928. Petition for writ of certiorari to the Court of Claims denied. *Mr. Edmond C. Fletcher* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Galloway* for the United States.

No. 834. GENERAL INVESTMENT CO. *v.* THE NEW YORK CENTRAL RAILROAD CO. April 23, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Frederick A. Henry* for petitioner. *Mr. S. H. West* for respondent.

No. 835. ROTH *v.* BLAIR, COMMISSIONER OF INTERNAL REVENUE. April 23, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Edwin A. Meserve* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Mabel Walker Willebrandt,* and *Messrs. J. Louis Monarch, Clarence M. Charest,* and *T. H. Lewis* for respondent.

No. 839. WYATT ET AL. *v.* UNITED STATES. April 23, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. B. B. McGinnis* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Mabel Walker Willebrandt,* and *Louise Foster* for the United States.

No. 840. HOOD ET AL. *v.* UNITED STATES. April 23, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Warren K. Snyder* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 845. HOOKER *v.* UNITED STATES. April 23, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. W. B. Sorrells* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 847. GORDON *v.* UNITED STATES. April 23, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. M. H. Gordon,* pro se. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 848. THE INSURANCE COMPANY OF NORTH AMERICA *v.* STEAM TUG "BATHGATE," ETC., ET AL. April 23, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Francis S. Laws, John M. Woolsey,* and *Robert S. Erskine* for petitioner. *Messrs. J. Thruston Manning, Jr.,* and *Everett H. Brown, Jr.,* for respondents.

No. 849. FOX, DOING BUSINESS AS H. FOX & CO., *v.* MILLS, FEDERAL PROHIBITION ADMINISTRATOR, ET AL. April 23, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Lewis Landes* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Mabel Walker Willebrandt* and *Mr. Mahlon D. Kiefer* for respondents.

No. 850. CARANICA *v.* NAGLE, COMMISSIONER OF IMMIGRATION FOR THE PORT OF SAN FRANCISCO. April 23, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. B. B.*

Pettus and *James D. Meredith* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for respondent.

No. 856. HERMANOS ET AL. *v.* ROYAL EXCHANGE ASSURANCE CO. April 23, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. O. Walker Taylor* for petitioners. *Mr. Carroll G. Walter* for respondent.

No. 857. MURPHEY *v.* AMERICAN RAILWAY EXPRESS CO. ET AL. April 23, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Arthur E. Paige* for petitioner. *Messrs. T. Hart Anderson, H. S. Marx,* and *A. M. Hartung* for respondents.

No. 922. FIGUEROA *v.* SALDANA. See *ante,* p. 574.

No. 877. WYSONG *v.* THE PEOPLE OF THE STATE OF CALIFORNIA. See *ante,* p. 576.

No. 855. THE NEW YORK CENTRAL RAILROAD CO. *v.* BIELMEIER ET AL. May 14, 1928. Petition for writ of certiorari to the Supreme Court of the State of New York denied. *Mr. Robert E. Whalen* for petitioner. No appearance for respondents.

No. 859. FALTER ET AL. *v.* UNITED STATES. May 14, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Martin A. Schenck, Frederic C. Scofield, Nash Rockwood,* and

Harry S. Bandler for petitioners. *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Mr. Edwin G. Davis* for the United States.

No. 860. THE STATE OF MONTANA EX REL. INGERSOLL *v.* CLAPP ET AL. May 14, 1928. Petition for writ of certiorari to the Supreme Court of the State of Montana denied. *Mr. C. E. Pew* for petitioner. *Messrs. L. A. Foot* and *A. H. Angstman* for respondents.

No. 863. CHICAGO GREAT WESTERN RAILROAD CO. *v.* CROUCH, SPECIAL ADMINISTRATRIX. May 14, 1928. Petition for writ of certiorari to the Supreme Court of the State of Minnesota denied. *Mr. Montreville J. Brown* for petitioner. *Mr. Frederick M. Miner* for respondent.

No. 864. BELLE AYRE CONSERVATION CO. *v.* STATE OF NEW YORK. May 14, 1928. Petition for writ of certiorari to the Court of Claims of the State of New York denied. *Mr. J. Sheldon Frost* for petitioner. *Mr. Albert Ottinger* for respondent.

No. 868. CHAVEZ *v.* UNITED STATES. May 14, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Riley R. Cloud* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Mabel Walker Willebrandt,* and *Mr. John J. Byrne* for the United States.

No. 869. MIDLAND VALLEY RAILROAD CO. *v.* IMLER ET AL. May 14, 1928. Petition for writ of certiorari to the Su-

preme Court of the State of Oklahoma denied. *Mr. O. E. Swan* for petitioner. *Mr. Sumners Hardy* for respondents.

No. 872. G. L. WEBSTER CANNING CO., INC., *v.* THE HOGUE-KELLOGG CO., INC. May 14, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. James E. Heath* for petitioner. *Messrs. Ivor A. Page* and *Vivian L. Page* for respondent.

No. 853. RODMAN CHEMICAL CO. ET AL. *v.* UNITED STATES. May 14, 1928. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Robert A. Littleton* and *W. W. Spalding* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Mr. Charles F. Kincheloe* for the United States.

No. 862. WONG WEY EX REL. WONG CHEU DONG *v.* JOHNSON, COMMISSIONER OF IMMIGRATION. May 14, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Joseph F. O'Connell* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for respondent.

No. 870. HOUGHTON *v.* UNITED STATES. May 14, 1928. Petition for a writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Joseph W. Hazell* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Galloway* for the United States.

No. 873. LEWIS-HALL IRON WORKS *v.* BLAIR, COMMISSIONER OF INTERNAL REVENUE. May 14, 1928. Petition

for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Charles D. Hamel* and *Richard S. Doyle* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Mabel Walker Willebrandt,* and *Messrs. J. Louis Monarch* and *Clarence M. Charest* for respondent.

No. 874. WESTERN GRAIN CO. *v.* RALSTON PURINA CO. May 14, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Brenton K. Fisk* and *J. P. Mudd* for petitioner. *Mr. Edwin E. Huffman* for respondent.

No. 879. BAUM *v.* THE FIRST NATIONAL COMPANY OF SARASOTA. May 14, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Thomas McCall* for petitioner. *Mr. Daniel C. Donoghue* for respondent.

No. 880. DUSSOULAS, TRUSTEE, *v.* LANG. May 14, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Hiram B. Calkins* for petitioner. No appearance for respondent.

No. 881. SCHREIBER *v.* THE PUBLIC NATIONAL BANK & TRUST COMPANY OF NEW YORK. May 14, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Moses Cohen* for petitioner. *Mr. Henry B. Singer* for respondent.

No. 882. O'LEARY ET AL. *v.* N. & M. REALTY CORP'N ET AL. May 14, 1928. Petition for writ of certiorari to

the Circuit Court of Appeals for the Second Circuit denied. *Mr. John de R. Storey* for petitioners. *Mr. Emory R. Buckner* for respondents.

No. 883. GALVESTON, HARRISBURG & SAN ANTONIO RY. Co. *v.* WILSON. May 14, 1928. Petition for writ of certiorari to the Court of Civil Appeals, Eighth Supreme Judicial District, State of Texas, denied. *Messrs. Maury Kemp* and *J. H. Tallichet* for petitioner. No appearance for respondent.

No. 886. KEMSLEY, MILLBOURN & Co., LTD., *v.* BOWERS, COLLECTOR OF INTERNAL REVENUE FOR THE SECOND DISTRICT OF NEW YORK. May 14, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Franklin Grady* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Mabel Walker Willebrandt,* and *Mr. J. Louis Monarch* for respondent.

No. 888. MITCHELL ET AL. *v.* UNITED STATES. May 14, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. T. C. West* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 890. THE DECORATIVE STONE CO. *v.* BUILDING TRADE COUNCIL OF WESTCHESTER COUNTY ET AL. May 14, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Walter Gordon Merritt* and *Daniel Davenport* for petitioner. No appearance for respondents.

No. 891. OLSEN ET AL. *v.* THE STEAMER "THOMAS TRACY" ET AL. May 14, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Eugene E. Kelly* for petitioners. *Messrs. C. C. Calhoun* and *Wm. J. Martin* for respondents.

No. 892. UNION FERRY COMPANY OF NEW YORK AND BROOKLYN *v.* SARAH MOORE, ADMINISTRATRIX. May 14, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Horace L. Cheyney* and *Pierre M. Brown* for petitioner. *Mr. William E. Purdy* for respondent.

No. 896. MAGEN *v.* UNITED STATES. May 14, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Robert H. Elder* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. —. RAARUP *v.* UNITED STATES. See *ante,* p. 576.

No. 965. SARBER *v.* AETNA LIFE INSURANCE CO. See *ante,* p. 577.

No. 813. THE GOVERNMENT OF THE PHILIPPINE ISLANDS, ON RELATION OF THE ATTORNEY GENERAL, *v.* EL HOGAR FILIPINO. May 21, 1928. Petition for writ of certiorari to the Supreme Court of the Philippine Islands denied. *Mr. William Cattron Rigby* for petitioner. *Messrs. Clyde A. DeWitt* and *E. Arthur Perkins* for respondent.

No. 878. KLENGENBERG *v.* H. LIEBES & Co. May 21, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. S. Hasket Derby* and *Ernest Clewe* for petitioner. *Mr. W. M. Simmons* for respondent.

No. 885. JEWELL, RESIDUARY DEVISEE AND EXECUTOR, *v.* GRAHAM, ADMINISTRATOR. May 21, 1928. Petition for writ of certiorari to the Court of Appeals of the District of Columia denied. *Messrs. J. Wilmer Latimer, Walter C. Clephane,* and *George C. Gertman* for petitioner. *Messrs. George W. Offutt, Henry P. Blair,* and *Arthur Hellen* for respondent.

No. 887. SPIROU *v.* UNITED STATES. May 21, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Wilton J. Lambert* and *R. H. Yeatman* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 889. MEANS ET AL. *v.* TERRELL. May 21, 1928. Petition for writ of certiorari to the Supreme Court of the State of Oklahoma denied. *Mr. Elmer D. Means* for petitioners. No appearance for respondent.

No. 893. NEW ORLEANS & NORTHEASTERN R. R. Co. ET AL. *v.* SNELGROVE, ADMINISTRATRIX. May 21, 1928. Petition for writ of certiorari to the Supreme Court of the State of Mississippi denied. *Messrs. J. Blanc Monroe, Monte M. Lemann, Albert S. Bozeman,* and *Walter J. Suthon, Jr.,* for petitioners. *Mr. Marion W. Reily* for respondent.

No. 895. Rose *v.* Washington Times Co. May 21, 1928. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. George R. Sherriff* and *W. Cameron Burton* for petitioner. No appearance for respondent.

No. 900. Humane Stanchion Works *v.* Mitchell Mfg. Co. May 21, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Frank E. Dennett* and *Robert M. Rieser* for petitioner. *Mr. Arthur L. Morsell* for respondent.

No. 901. St. Paul Fire and Marine Insurance Co. *v.* American Food Products Co. May 21, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. D. Roger Englar, Thomas T. Fauntleroy, Wade H. Ellis,* and *Wm. J. Hughes* for petitioner. *Messrs. T. H. Caraway* and *John M. Lee* for respondent.

No. 902. Franc-Strohmenger & Cowan, Inc. *v.* Forchheimer, etc., et al. May 21, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Charles Neave, Frederick P. Fish, Clifford E. Dunn,* and *Charles J. Staples* for petitioner. *Mr. O. Ellery Edwards* for respondents.

No. 903. Swan *v.* United States. May 21, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. James F. X. O'Brien* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 904. TUCKER STEVEDORING CO. *v.* SOUTHWARK MFG. CO. May 21, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Curtis Tilton* for petitioner. *Mr. J. Thruston Manning, Jr.,* for respondent.

No. 905. THE BANK OF RULEVILLE *v.* MARYLAND CASUALTY CO. May 21, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. J. W. Cutrer* for petitioner. *Mr. Wm. H. Watkins* for respondent.

No. 906. BALME, TRADING AS B. PAUL, *v.* FEDERAL TRADE COMMISSION. May 21, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. T. Hart Anderson* for petitioner. *Solicitor General Mitchell* and *Mr. Adrien F. Busick* for respondent.

No. 909. ST. LOUIS-SAN FRANCISCO RY. CO. ET AL. *v.* MONTROSE OIL REFINING CO., INC. May 21, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. E. T. Miller, M. G. Roberts, W. E. Allen,* and *W. M. Odell* for petitioners. *Messrs. E. H. Ratcliff* and *Elias Goldstein* for respondent.

No. 913. BETTY *v.* DAY, COMMISSIONER OF IMMIGRATION AT THE PORT OF NEW YORK. May 21, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Alexander Holtzoff* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Messrs. Harry S. Ridgely* and *George C. Butte* for respondent.

No. 914. THE CONSOLIDATED IRON-STEEL MFG. CO. *v.* THE DUNBAR BROTHERS CO. May 21, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Jerome S. Hess* for petitioner. *Mr. Lucius F. Robinson* for respondent.

No. 915. GOLDSMITH, COUNTY TREASURER, ET AL. *v.* THE STANDARD CHEMICAL CO. May 21, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. John L. Stivers, Wm. L. Boatright,* and *Charles Roach* for petitioners. *Mr. George L. Nye* for respondent.

No. 916. LEFTWICH *v.* THE CITY OF ALBANY. May 21, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. E. W. Godbey* for petitioner. *Mr. A. J. Harris* for respondent.

No. 918. SPEAKMAN, TRUSTEE, *v.* BERNSTEIN ET AL. May 21, 1928. Petition for writ of certiorari to the Supreme Court of the State of Louisiana denied. *Mr. Allen McReynolds* for petitioner. *Mr. Robert A. Hunter* for respondents.

No. 919. LOGAN, ADMINISTRATRIX, *v.* GRAVEL PRODUCTS CORP'N. May 21, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Thomas C. Burke* for petitioner. *Mr. Laurence E. Coffey* for respondent.

No. 920. WILLIS, NOW ROGERS, *v.* WILLIS ET AL. May 21, 1928. Petition for writ of certiorari to the Supreme

Court of the State of Oklahoma denied. *Mr. H. A. Ledbetter* for petitioner. *Mr. W. F. Semple* for respondents.

No. 921. CHASE SECURITIES CORP'N ET AL. *v.* UNITED STATES. May 21, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Messrs. Robert G. Dodge* and *F. H. Nash* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Farnum,* and *Mr. Thomas E. Rhodes* for the United States.

No. 925. DRISKILL *v.* UNITED STATES. May 21, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Earl Anderson* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Mabel Walker Willebrandt,* and *Mr. John J. Byrne* for the United States.

No. 867. CORTEZ OIL CO. *v.* UNITED STATES. May 28, 1928. Petition for writ of certiorari to the Court of Claims denied. *Mr. Wayne Johnson* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Galloway* for the United States.

No. 923. GEORGOUSES ET AL. *v.* GILLEN, TRUSTEE. May 28, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Samuel White* for petitioners. *Mr. Thomas A. Flynn* for respondent.

No. 926. CHIN WAH KEE *v.* UNITED STATES. May 28, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Richard B.*

Montgomery for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 927. CHIN TOY *v.* UNITED STATES. May 28, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Richard B. Montgomery* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 928. MARYLAND CASUALTY CO. *v.* RAZOOK ET AL. May 28, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John G. McKay* for petitioner. *Mr. Robert L. Shipp* for respondents.

No. 931. AUTIN *v.* PISKE, TRUSTEE. May 28, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Alex. W. Swords* and *Loys Charbonnet* for petitioner. No appearance for respondent.

No. 932. TOM LUEY *v.* UNITED STATES. May 28, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. John E. Jackson* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 933. CHICAGO AND EASTERN ILLINOIS RY. CO. *v.* EMMERSON, SECRETARY OF STATE FOR THE STATE OF ILLINOIS, ET AL. May 28, 1928. Petition for writ of certio-

rari to the Supreme Court of the State of Illinois denied. *Messrs. H. T. Dick* and *George B. Gillespie* for petitioner. *Messrs. Oscar E. Carlstrom* and *Bayard L. Catron* for respondents.

No. 934. NEW YORK, SUSQUEHANNA & WESTERN R. R. Co. *v.* HENDERSHOT. May 28, 1928. Petition for writ of certiorari to the Court of Errors and Appeals of the State of New Jersey denied. *Mr. George S. Hobart* for petitioner. *Mr. Wm. C. Gebhardt* for respondent.

No. 936. NORRIS ET AL., ADMINISTRATORS, ETC. *v.* SUTHERLAND, ALIEN PROPERTY CUSTODIAN, ET AL. May 28, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. G. C. Ladner* and *Albert H. Ladner, Jr.,* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Thomas E. Rhodes* for respondents.

No. 937. WATKINS, ADMINISTRATOR C. T. A., *v.* MADISON COUNTY TRUST AND DEPOSIT CO. May 28, 1928. Petition for certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Amariah F. Freeman* for petitioner. *Mr. William F. Santry* for respondent.

No. 938. INGRASSIA *v.* A. C. W. MFG. CO. May 28, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. George M. Dowe, Emerson R. Newell,* and *H. Dorsey Spencer* for petitioner. *Mr. Irving M. Obrieght* for respondent.

No. 947. NIEMAN *v.* PLOUGH CHEMICAL CO. May 28, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. James N. Ramsey* for petitioner. No appearance for respondent.

No. 948. HILL, TRUSTEE, *v.* BERBER ET AL. May 28, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Maurice N. Rosen* for petitioner. *Mr. Israel Bernstein* for respondents.

No. 950. GENERAL FINANCE CORP'N *v.* PENN-NATIONAL HARDWARE MUTUAL ET AL. May 28, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. A. H. Culwell* and *Wm. H. Burges* for petitioner. *Mr. Thornton Hardie* for respondents.

No. 782. CHIPPIANNOCK CEMETERY ASS'N *v.* CITY OF ROCK ISLAND. See *ante*, p. 578.

No. 884. THE PORTSMOUTH HARBOR LAND & HOTEL CO. ET AL. *v.* UNITED STATES. June 4, 1928. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Chauncey Hackett* and *James H. Lowell* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Mr. Wm. W. Scott* for the United States.

No. 935. JOHNSTON *v.* HILLER ET AL. June 4, 1928. Petition for writ of certiorari to the Supreme Court of the State of Missouri denied. *Mr. Otto C. Hauschild* for petitioner. *Mr. T. L. Montgomery* for respondents.

No. 939. KASTEL *v.* UNITED STATES. June 4, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. W. J. Hughes, Jr.,* and *Wm. E. Leahy* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 940. LEATHER ET AL. *v.* UNITED STATES. June 4, 1928. Petition for writ of certiorari to the Court of Claims denied. *Mr. Oliver J. Cook* for petitioners. *Solicitor General Mitchell* and *Assistant Attorney General Galloway* for the United States.

No. 943. NORTH RIVER INSURANCE CO. *v.* WRIGHT. June 4, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. John W. Cutrer* and *R. L. McLaurin* for petitioner. *Mr. Cary C. Moody* for respondent.

No. 944. UNITED STATES EX REL. RIOS *v.* DAY, COMMISSIONER OF IMMIGRATION AT THE PORT OF NEW YORK. June 4, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Harold Van Riper* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for respondent.

No. 951. TALCOTT, EXECUTRIX, *v.* UNITED STATES. June 4, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. Guy Mason* and *John C. Altman* for petitioner. *Solicitor General Mitchell, Assistant Attorney General*

Mabel Walker Willebrandt, and *Mr. J. Louis Monarch* for the United States.

No. 955. BROWN *v.* RUDOLPH ET AL. June 4, 1928. Petition for writ of certiorari to the Court of Appeals for the District of Columbia denied. *Mr. George F. Curtis* for petitioner. *Mr. William W. Bride* for respondents.

No. 956. CADWELL ET AL. *v.* TEANEY ET AL. June 4, 1928. Petition for writ of certiorari to the Supreme Court of the State of Indiana denied. *Mr. Sol H. Esarey* for petitioners. *Mr. Cassius W. McMullen* for respondents.

No. 957. THE NEW YORK, CHICAGO & ST. LOUIS R. R. CO. *v.* SLATER, ADMINISTRATRIX. June 4, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Howard L. Townsend* for petitioner. *Mr. Harry F. Payer* for respondent.

No. 958. ILLINOIS NORTHERN RY. *v.* MIKULECKY, ADMINISTRATRIX. June 4, 1928. Petition for writ of certiorari to the Appellate Court for the First District, State of Illinois, denied. *Messrs. David A. Orebaugh* and *Wm. S. Elliott* for petitioner. *Mr. Charles C. Spencer* for respondent.

No. 959. ANDRES ET AL. *v.* STONE ET AL., RECEIVERS, ET AL. June 4, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Frank Davis, Jr.,* and *Frank H. Swan* for petitioners. *Messrs. H. Fred Mercer, George E. Alter,* and *Alex. J. Barron* for respondents.

No. 961. THE ELLAY CO. *v.* BOWERS, COLLECTOR OF INTERNAL REVENUE FOR THE SECOND DISTRICT OF NEW YORK. June 4, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Frank L. Weil* and *Joseph R. Little* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Mabel Walker Willebrandt,* and *Mr. J. Louis Monarch* for respondent.

No. 962. FAGIN ET AL. *v.* QUINN ET AL. June 4, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Nelson Phillips* and *W. D. Gordon* for petitioners. *Messrs. R. L. Batts, Beeman Strong,* and *Will E. Orgain* for respondents.

No. 963. CITY OF CHELSEA *v.* DOLAN, TRUSTEE. June 4, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Samuel R. Cutler* for petitioner. *Mr. John M. Maloney* for respondent.

No. 964. YOUNG *v.* UNITED STATES. June 4, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Thomas Mannix* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Mabel Walker Willebrandt,* and *Mr. Mahlon D. Kiefer* for the United States.

No. 967. NASHVILLE BUILDERS SUPPLY CO. ET AL. *v.* BELL. June 4, 1928. Petition for writ of certiorari to the Supreme Court of the State of Tennessee denied. *Mr. John B. Keeble* for petitioners. *Mr. Thomas J. Tyne* and *J. M. Peebles* for respondent.

No. 968. FARRIS ET AL. *v.* UNITED STATES. June 4, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Solon B. Clark* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Mabel Walker Willebrandt,* and *Mr. John J. Byrne* for the United States.

No. 970. THE YANKTON SIOUX TRIBE OF INDIANS *v.* UNITED STATES. June 4, 1928. Petition for writ of certiorari to the Court of Claims denied. *Mr. Jennings C. Wise* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Galloway,* and *Mr. George T. Stormont* for the United States.

No. 971. BELLAND ET AL. *v.* UNITED STATES. June 4, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Richard B. Montgomery* for petitioners. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 975. MISSOURI-KANSAS-TEXAS R. R. CO. *v.* O'CONNOR. June 4, 1928. Petition for writ of certiorari to the Court of Civil Appeals, Eighth Supreme Judicial District, State of Texas, denied. *Messrs. Charles C. Huff, Joseph M. Bryson,* and *A. H. McKnight* for petitioner. *Mr. S. P. Jones* for respondent.

No. 982. SMILER *v.* UNITED STATES. June 4, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. J. T. G. Crawford* for petitioner. *Solicitor General Mitchell, Assistant At-*

torney General Luhring, and *Mr. Harry S. Ridgely* for the United States.

No. 985. RALSTON *v.* HEINER, COLLECTOR OF INTERNAL REVENUE, TWENTY-THIRD DISTRICT OF PENNSYLVANIA. June 4, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. S. Leo Rushlander* and *George R. Beneman* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Mabel Walker Willebrandt* for respondent.

No. 988. RIECK *v.* HEINER, COLLECTOR OF INTERNAL REVENUE FOR THE TWENTY-THIRD DISTRICT OF PENNSYLVANIA. June 4, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. James Walton* and *Clarence A. Miller* for petitioner. *Solicitor General Mitchell* and *Assistant Attorney General Mabel Walker Willebrandt* for respondent.

No. 990. GEE WAH LEE *v.* UNITED STATES. June 4, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. W. J. Waquespack* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 1001. BOWRING *v.* BOWERS, COLLECTOR OF INTERNAL REVENUE FOR THE SECOND DISTRICT OF NEW YORK. June 4, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Julius Henry Cohen* and *Kenneth Dayton* for petitioner.

Solicitor General Mitchell, Assistant Attorney General Mabel Walker Willebrandt, and *Messrs. J. Louis Monarch, Clarence M. Charest,* and *John R. Wheeler* for respondent.

No. 1011. ECHOLS *v.* UNITED STATES. June 4, 1928. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Bart A. Riley* for petitioner. *Solicitor General Mitchell, Assistant Attorney General Luhring,* and *Mr. Harry S. Ridgely* for the United States.

No. 1006. EAGLES ET AL. *v.* UNITED STATES. June 5, 1928. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. Wm. J. Hughes, Jr., Wilton J. Lambert, R. H. Yeatman, May T. Bigelow, Hyman M. Goldstein,* and *Martin F. O'Donoghue* for petitioners. *Solicitor General Mitchell* waived the filing of a brief in opposition for the United States.

CASES DISPOSED OF WITHOUT CONSIDERATION BY THE COURT FROM APRIL 10, 1928, TO AND INCLUDING JUNE 5, 1928.

No. 6. ATLAS LINE STEAMSHIP CO. *v.* UNITED STATES. Appeal from the Court of Claims. April 16, 1928. Dismissed, on motion of *Messrs. Charles H. Le Fevre, Daniel Dunning,* and *Wm. B. Devoe* for appellant. *Solicitor General Mitchell* for the United States.

No. 7. NORTH GERMAN LLOYD *v.* UNITED STATES. Appeal from the Court of Claims. April 16, 1928. Dismissed, on motion of *Mr. Edgar W. Hunt* for appellant. *Solicitor General Mitchell* for the United States.

No. 8. NORTH GERMAN LLOYD *v.* UNITED STATES. April 16, 1928. Dismissed, on motion of *Mr. Edgar W. Hunt* for appellant. *Solicitor General Mitchell* for the United States.

No. 9. NORTH GERMAN LLOYD *v.* UNITED STATES. April 16, 1928. Dismissed, on motion of *Mr. Edgar W. Hunt* for appellant. *Solicitor General Mitchell* for the United States.

No. 10. HAMBURG-AMERIKANISCHE PAKETFAHRT AKTIEN-GESELLSCHAFT (ALSO KNOWN AS HAMBURG-AMERICAN LINE) *v.* UNITED STATES. Appeal from the Court of Claims. April 16, 1928. Dismissed, on motion of *Mr. Wm. B. Devoe* for appellant. *Solicitor General Mitchell* for the United States.

No. 11. HAMBURG-AMERIKANISCHE PAKETFAHRT AKTIEN-GESELLSCHAFT (ALSO KNOWN AS HAMBURG-AMERICAN LINE) *v.* UNITED STATES. Appeal from the Court of Claims. April 16, 1928. Dismissed, on motion of *Mr. Wm. B. Devoe* for appellant. *Solicitor General Mitchell* for the United States.

No. 12. DEUTSCH-AUSTRALISCHE DAMPFSCHIFFS-GESELLSCHAFT *v.* UNITED STATES. Appeal from the Court of Claims. April 16, 1928. Dismissed, on motion of *Mr. Otto C. Sommerich* for appellant. *Solicitor General Mitchell* for the United States.

No. 1. RHEDEREI M. JEBSEN COMPANY *v.* UNITED STATES. Appeal from the Court of Claims. April 23, 1928. Dismissed, on motion of *Messrs. T. T. Ansberry, Daniel N. Williams, Wm. F. Norman, James J. Lynch,*

and *H. H. McCormick* for appellant. *Solicitor General Mitchell* for the United States.

No. 2. THE FIRM OF M. JEBSEN, ETC., ET AL. *v.* UNITED STATES. Appeal from the Court of Claims. April 23, 1928. Dismissed, on motion of *Messrs. T. T. Ansberry* and *Daniel N. Williams* for appellants. *Solicitor General Mitchell* for the United States.

No. 952. TODD *v.* STATE OF WASHINGTON. Error to the Supreme Court of the State of Washington. April 30, 1928. Docketed and dismissed with costs, on motion of *Mr. Blaine Mallan* for defendant in error. No appearance for plaintiff in error.

No. 843. FAJARDO SUGAR CO. *v.* GALLARDO, TREASURER OF PORTO RICO. On petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit. April 30, 1928. Dismissed, on motion of *Mr. Karl Knox Gartner* for petitioner. No appearance for respondent.

No. 844. FAJARDO SUGAR CO. *v.* GALLARDO, TREASURER OF PORTO RICO. On petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit. April 30, 1928. Dismissed, on motion of *Mr. Karl Knox Gartner* for petitioner. No appearance for respondent.

No. 994. MARSH *v.* UNITED STATES. Appeal from the District Court of the United States for the Western District of New York. May 28, 1928. Dismissed, on motion of *Mr. Irving K. Baxter* for appellant. No appearance for the United States.

AMENDMENT OF RULES.

ORDER, JUNE 5, 1928.

The revision of the rules of this Court has been this day lodged with the clerk, and it is here ordered that the said rules shall become effective July 1, 1928, and be printed as an appendix to 275 U. S. The rules promulgated June 8, 1925, appearing in 266 U. S. Appendix, and all amendments thereof are rescinded, but this shall not affect any proper action taken under them before the rules hereby adopted become effective.

[The amended rules and jurisdictional acts will be found in 275 U. S. pp. 579 et seq.]

SUMMARY STATEMENT OF BUSINESS OF THE SUPREME COURT OF THE UNITED STATES FOR OCTOBER TERM, 1927.

Original Docket

Cases pending at beginning of term	12
New cases docketed during term	5
Cases finally disposed of	2
Cases not finally disposed of	15

Appellate Docket

Cases pending at beginning of term	283
New cases docketed during term	749
Cases finally disposed of	857
Cases not finally disposed of	175

The number of pending cases, original and appellate, was thus decreased by 105.

Interlocutory decisions, and adverse decisions upon applications for leave to file, as in mandamus, prohibition, etc., are not here included.

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