UNITED STATES REPORTS

VOLUME 285

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1931

FROM FEBRUARY 16, 1932, TO AND
INCLUDING APRIL 11, 1932

ERNEST KNAEBEL
REPORTER

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1932

For sale by the Superintendent of Documents, Washington, D.C. - Price $1.50 Buckram

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS [1]

CHARLES EVANS HUGHES, Chief Justice.
WILLIS VAN DEVANTER, Associate Justice.
JAMES CLARK McREYNOLDS, Associate Justice.
LOUIS D. BRANDEIS, Associate Justice.
GEORGE SUTHERLAND, Associate Justice.
PIERCE BUTLER, Associate Justice.
HARLAN FISKE STONE, Associate Justice.
OWEN J. ROBERTS, Associate Justice.
BENJAMIN N. CARDOZO, Associate Justice.[2]

WILLIAM D. MITCHELL, Attorney General.
THOMAS D. THACHER, Solicitor General.
CHARLES ELMORE CROPLEY, Clerk.
FRANK KEY GREEN, Marshal.

---

[1] For allotment of the Chief Justice and Associate Justices among the several circuits, see next page.

[2] On February 15, 1932, President Hoover nominated Benjamin N. Cardozo, Chief Judge of the Court of Appeals of New York, to succeed Mr. Justice Holmes, retired. The nomination was confirmed by the Senate on February 24, 1932. The oath was administered in open court, and he took his seat upon the bench, on March 14, 1932.

SUPREME COURT OF THE UNITED STATES

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 acts of Congress in such case made and provided, and that such allotment be entered of record, viz:

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

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

For the Third Circuit, Owen J. Roberts, Associate Justice.

For the Fourth Circuit, Charles Evans Hughes, Chief Justice.

For the Fifth Circuit, Benjamin N. Cardozo, Associate Justice.

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

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

For the Eighth Circuit, Pierce Butler, Associate Justice.

For the Ninth Circuit, George Sutherland, Associate Justice.

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

March 28, 1932.

PROCEEDINGS IN MEMORY OF CHIEF JUSTICE TAFT.[1]

Members of the Bar and officers of the Court met in the court-room, on December 13, 1930, at 10 A. M.[2]

On motion of the Solicitor General, Mr. George W. Wickersham was chosen as Chairman and Mr. Charles Elmore Cropley as Secretary.

On taking the chair, Mr. WICKERSHAM said:

"Gentlemen of the Bar: We are met here today to pay tribute to memory of a great lawyer and judge who during a period of nearly nine years occupied the exalted office of Chief Justice of the United States. From John Jay to Charles E. Hughes, almost every Chief Justice has had a record of distinguished political activity and public service before his elevation to the highest judicial position. Our Chief Justices always have been primarily statesmen, besides having achieved distinction at the bar or on the bench. Mr. Taft was the only one who also had been President of the United States. His entire life was devoted to public service. In such leisure as the exactions of official life allowed, he was a student and teacher of the law. He was largely instrumental in reorganizing and revitalizing the Cincinnati Law School, and during his term of service as U. S. Circuit Judge he made time to administer the office of Dean and lecturer on the law of real property in that school. He was an enthusiastic son of

[1] See 280 U. S. III, v; 281 U. S. v.

[2] The committee on arrangements for this meeting were: Mr. Solicitor General Thacher, Chairman, and Messrs. George W. Wickersham, George E. Hamilton, Charles Warren, and John Spalding Flannery.

Yale University, and upon his retirement from the Presidency of the United States in 1913, he accepted a professorship of Constitutional Law in that institution. When the United States entered the world war in 1917, the only place the government of the hour found for the services of this distinguished statesman and jurist was that of co-chairman of the War Labor Board. Mr. Taft accepted that comparatively humble post and devoted to its problems the same earnest and efficient capacity he had given to the offices of Solicitor General and Circuit Judge of the United States, Civil Governor of the Philippine Islands, Secretary of War and President of the United States.

"His apointment as Chief Justice in 1921 enabled him to round out his public career in a position for which by nature and training he was peculiarly fitted. He brought to that office rare qualities of learning, experience, insight, industry and temperament, and the record of his service in the Court will compare favorably with that of any other of the illustrious men who have filled that exalted position. Even a brief reference to the Chief Justice would be incomplete without referring to his unusual love of mankind, his toleration, the complete absence of resentment or rancor against wrongs done to him, and his keen sense of humor. More than any man I have ever known he obeyed the precepts of the Sermon on the Mount to love one's enemies, to bless them that curse you and to pray for them which despitefully use you.

"It was these qualities which made him so widely beloved throughout this nation during the last twenty years of his life. The people knew and loved him. His appointment to the Supreme Court gave them a new appreciation of that institution. It was no longer a mere intellectual abstraction. It became to them a body of men of which their friend Taft was the head, and they knew that no part of the government over which he presided could fail in sympathy with the common man, his daily needs, his simple homely problems. Others will speak more in detail of his record. My friendship

with him extended over a long period. I had the privilege of serving in his Presidential Cabinet. I admired him as a public servant, I loved him as a man. He lived his life 'in simpleness, in gentleness, in honor and clean mirth.'"

A committee [3] appointed by the Chair brought in the following minute and resolutions, which, after hearing the addresses hereinafter noticed, were duly adopted:

RESOLUTIONS

The members of the Bar of the Supreme Court here assembled have met to express their profound regret at the death of William Howard Taft, tenth Chief Justice of the United States, and to record their high appreciation of his conspicuous, faithful and devoted service to his country. They have adopted the following Minute:

William Howard Taft was born in the city of Cincinnati, Ohio, September 15, 1857. He was graduated with distinction at Yale University in 1878 and at the Cincinnati Law School in 1880. He was called to public service within a year after his admission to the bar, first as Assistant Prosecuting Attorney of Hamilton County, Ohio, and then as Assistant County Solicitor. In 1887, he was appointed by Governor Foraker to succeed Hon. Judson Harmon as judge of the Superior Court of Cincinnati. Three years later, in 1890, he was appointed by President Harrison Solicitor General of the United States. After two years service in that office, he was ap-

[3] The gentlemen of the committee were: Messrs. Elihu Root, John W. Davis and Charles A. Boston, of New York; Frederic W. Mansfield and Bentley W. Warren, of Massachusetts; George Wharton Pepper, of Pennsylvania; William Cabell Bruce, of Maryland; William L. Frierson, of Tennessee; Thomas W. Gregory, of Texas; Newton D. Baker, Joseph S. Graydon and Andrew Squire, of Ohio; Walter L. Fisher, of Illinois; Charles W. Bunn, of Minnesota; William V. Hodges, of Colorado; Garret W. McEnerney, of California; and Frederic D. McKenney, J. Harry Covington and Chauncey G. Parker, of the District of Columbia.

pointed Circuit Judge of the United States for the Sixth Judicial Circuit. His three years service in the Ohio state court had given Mr. Taft not only an insight into the interest and importance of the judicial office, but had awakened in him a love of the judicial function which deeply marked his character and colored his entire future career. He threw himself with ardor into the varied work of a federal circuit judge, which at that period required him to sit in courts of first instance, at law and in equity, and even on the criminal side, as well as to participate with his associates in the appellate work which the Evarts Act of 1891 devolved upon the newly created Circuit Courts of Appeals—a jurisdiction which in a large and important class of cases was final. By his learning and industry, his keen sense of values, his broad human understanding and his appreciation of the supreme importance of the administration of justice, Judge Taft soon established a high reputation as one of the ablest members of the federal judiciary. In the year 1896, Judge Taft, in connection with Judson Harmon, Lawrence Maxwell and others, reorganized the Cincinnati Law School, adopted the Harvard case-book method of teaching, and started it upon a career of enlarged activity. He accepted the position of Dean, as well as lecturer on real property law, and discharged the duties of both those positions, until his resignation from the bench in 1900. When the termination of the war with Spain left the United States with the responsibilty for the future of the Philippine Islands, President McKinley called upon Judge Taft to head a commission of distinguished Americans to proceed to those islands, study the conditions prevailing in them and make a report with recommendations as to the future relations of the Government of the United States to those islands and their people. There was little in this assignment which appealed to a federal judge devoted to his judicial work and ardently believing that the administration of justice was the supreme concern of mankind. But

the appointment was tendered him by the President as a call to public duty, and such an appeal never was made to him in vain. At the conclusion of the work of the Philippine Commission, Mr. Taft was appointed first Civil Governor of the Islands, serving in that capacity until February 1st, 1904, when he was appointed Secretary of War in the Cabinet of President Roosevelt, from which he resigned in June, 1908, because of his impending nomination for the Presidency, to which he was elected in November of that year. Space is lacking here for an appraisal of the value of the distinguished public service rendered by Mr. Taft as Civil Governor of the Philippines, as Secretary of War or as President of the United States. But it is peculiarly appropriate to this occasion to note that few Presidents, if any, have been called upon to appoint so large a number of federal judges as he, and by none was a higher standard of learning and personal character required in his nominees. During his four years of the Presidency, he selected five Associate Justices and one Chief Justice of the Supreme Court of the United States. The choice of the Chief Justice gave him more anxious thought than any other. Departing from precedents, he nominated to the Chief Justiceship an Associate Justice of the Court, Edward D. White, of Louisiana, who also was a Democrat and a former Confederate soldier. This nomination was promptly confirmed by the Senate and met with universal approval on the part of the bar and the people of the country. It had been Mr. Taft's greatest ambition himself to become Chief Justice, and in selecting Judge White for that position, he was putting another man into the only post in the Government he had ever really yearned to fill. On June 30, 1921, President Harding appointed Mr. Taft Chief Justice to succeed Chief Justice White, who had died a month earlier, and on the retirement of Chief Justice Taft himself, very shortly before his death, President Hoover appointed as his successor Charles Evans Hughes, whom President Taft

had appointed an Associate Justice of the Supreme Court in 1910 (and who had resigned to accept the Republican nomination for the Presidency in 1916).

Mr. Taft is the only American in our history who was the head of two of the three equal and coördinate branches of our Government. But the bench was his career of predilection, and he brought to the office of Chief Justice devotion to and enthusiasm in its work, as well as the experience of his long, useful and varied life in the public service. Aside from his strictly judicial work, the two outstanding events in the history of the Court during his incumbency are (1) the passage of the act which greatly limited the number of appeals as of right to the Supreme Court from the final decisions of the Circuit Courts of Appeals, substituting for the right of appeal a discretionary power of review by writ of certiorari; and (2) the enactment by Congress of a law authorizing the construction of a building in which to house the Court and its offices, and the passage of appropriations adequate for the construction of a dignified and beautiful structure, the selection of a site and the preparation and approval of the plans for the building. To the securing of both of these measures and the planning of the new court building, the Chief Justice devoted much thought and energy, appearing in person before the appropriate Congressional Committees to fully present all the reasons which had made him an advocate of these measures. His work on the Court as reflected in his opinions speaks for itself. The number of opinions he wrote was surprisingly large, and the vigor, clarity and sureness of touch which they express demonstrate his unquestioned title to a place high in the ranks of the leaders in the American Judiciary. This brief sketch of the Chief Justice would be incomplete without an allusion to those personal qualities which endeared him to many people of high and low degree throughout the land. In the truest sense of the word he was a great humanitarian, feeling the keenest sense of sympathy and interest

in all that concerned men of all sorts and conditions. He truly loved his fellows. He had compassion even for the erring. He found something good in everybody, but no mere sentimentality ever clouded his judgment or stayed the impetuous vigor of his condemnation of dishonesty or mere pretense. Not less characteristic than his broad sympathy was his genial and rescuing sense of humor. Sentiment balanced by humor produced in him a rare sanity of judgment and added to his great gifts of character and intellect the charm of a gracious and winsome personality.

It is now Resolved, That the Bar of the Supreme Court of the United States do hereby record their high appreciation of the long record of devoted and effective service rendered by William Howard Taft to the people of the United States in the many public employments to which he was called and especially in the exalted office of Chief Justice of the United States.

Further Resolved, That the Attorney General be asked to present these resolutions to the Court and to request that they be inscribed upon its permanent records. And that the Chairman of this meeting be requested to transmit a copy of the resolutions to the family of the late Chief Justice, together with the assurance of the sincere sympathy of the Bar in the great and irremediable loss they have sustained.

In presenting the resolutions to the meeting, Mr. Andrew Squire spoke of the great progress of the world in the seventy-two years of Mr. Taft's life; of the remarkable opportunities thus opened to him; of his early entry into public office; and of the incessant demands made upon his energy and ability, for the public service. Reviewing this career briefly, Mr. Squire affirmed that Mr. Taft, by his character and work, had achieved an outstanding position throughout the world, as one of the world's great leaders. In the perplexities of these changing times, it was well to stop and reflect on such a life as

Mr. Taft's—beloved by all who knew him—indeed by people everywhere—for his noble, generous and loving human qualities.

The Honorable Arthur C. Denison, United States Circuit Judge for the Sixth Circuit, spoke as representative of the Circuit and District Judges.

He recalled how Judge Taft, on March 17, 1892, soon after the Circuit Courts of Appeals became fully organized under the Act of March 4, 1891, was appointed to be the junior of the two Circuit Judges in the Sixth Circuit and became within a few months the presiding judge. On that court Judge Taft served for eight years. He wrote 200 opinions of the court, four separate opinions and only one dissenting opinion. These are to be found in volumes 51–101 of the Federal Reporter.

During this entire period the old Circuit Courts were continued; they "were the trial courts for most of the civil cases; and the Circuit Judge could and did hold the Circuit Court frequently. The appellate work was not in those days crowding; Judge Taft enjoyed trial work, and held trial terms in many of the larger cities of the circuit. Thus he became known to the bar of his circuit, from Lake Superior down through Michigan, Ohio, Kentucky and Tennessee, as no other Circuit Judge had been before or has been since. In this *nisi prius* work also, important opinions by him were prepared as carefully and reported as fully as those in the Circuit Court of Appeals. The one of these eventually best known, though it was not the first of its kind, became the leading federal case on strike injunctions. It was with reference to this case that he later made his well known comment: 'To be known as the inventor of government by injunction is not a valuable political asset.'

"In 1892, the Circuit Courts of Appeals were an experiment. They took over from the Supreme Court a large part of its federal appellate jurisdiction. The first few years of operation would justify or condemn the experiment. It is fair to say that in these early years, no one

of those courts did more than that of the Sixth Circuit, under Judge Taft's leadership, to establish them in the public confidence. Its opinions—and, in large part, his opinions—touched every field of general litigation, as well as bankruptcy, admiralty and patents. For the patent law and its application Judge Taft displayed an unusual aptitude, and in that line many of his opinions of this period, both in the Circuit Courts and on appeal, have come to be generally accepted guides along the right road.

"Having had this part in the trial and proof period of these courts, and in laying their foundation, it must have been with particular pleasure, 25 years later, that he took the chief part in completing the structure, and seeing the Act of February 13, 1925, vest in them nearly all the appellate jurisdiction which a defeated party in the federal courts can invoke as of right.

"As the next outstanding feature of his relationship to our judicial family, I see his unflagging interest in the selection of judges. Probably no man ever had as great a total of influence upon the judicial personnel. While Circuit Judge he was hearty in supporting, or outspoken in opposing, those suggested for appointment in his circuit; while Secretary of War his advice was freely given and largely followed; while President he felt in extreme degree his duty—as a sacred duty—of making the best possible selections; and as Chief Justice, he let no merely technical canon of propriety prevent him from using his influence in what he thought the right direction. He often frankly said that his most distressing and heart-breaking experiences in public office were those instances in which mediocre or unfit judicial appointments were compelled by the exigencies of politics, or by the requirements of senatorial courtesy. On no other subject did I ever know his optimism to fail; on this subject he was dissatisfied with the present and afraid of the future.

"His latest contact point with us was in the Judicial Conference. This was created by the Act of September

14, 1922. The idea was largely, or wholly, his. He presided over seven of those meetings, hearing reports from or concerning each of the district and appellate courts, discussing and advising on the best methods, and shaping the Conference Reports. The senior circuit judges came to look forward to these annual meetings with him as a helpful part of the year's program; and we have shared his strong hope that it would develop into a real force for the betterment of our judicial system.

"Others have spoken, or will speak, more fully of his rare union—in my experience, unequalled union—of those qualities of character, mind and temperament which brought to him, in each of his successive spheres of action, the high respect and esteem of his associates in that sphere, and of the great body of the impartial and thinking public; but underlying all—and more important to his memory than all—were the impulses of his great heart. No finer and truer thing has been or can be said than is found in the letter from the Supreme Court judges upon his resignation (280 U. S. v). They speak of 'your golden heart, that has brought you love from every side—your spirit that has given life an impulse that will abide.' . . . He truly loved his fellow men. Therefore they loved him, and therefore it becomes, not trite praise, but simple fact, to say that upon the roll of the federal judges of our day, his name leads all the rest."

Mr. Elihu Root said:

"Mr. Chairman: It was in this Supreme Court room, in the very place where I now stand, that I met Mr. Taft for the first time. He was then the young Solicitor-General and we were opposed in the argument of a cause in this Court. In the course of that case began an acquaintance which afterwards ripened into intimate and affectionate and loyal friendship.

"I do not think any one can appreciate any account of his character and service without keeping in mind his powerful and compelling personality. By this the signifi-

cance and effect of all his qualities were raised to the nth power.

"It has always seemed to me that there were four things determining his course in life. One was that he had an almost religious reverence, based upon firm conviction, for certain fundamental principles upon which the American experiment in self-government has rested. I think he inherited this from his father, who in his time played a great part in the government of our country as a lawyer and diplomatic officer and cabinet minister. His son was born and bred to the convictions upon which the Declaration of Independence and the Constitution of 1787 are based, and he never wavered in that faith.

"A second thing to observe is that he was by nature essentially a judge. He had a strong clear mind which readily reached definite and certain conclusions, and he had decision of character. But the way in which his mind naturally worked was to hear both sides before deciding. His instincts were for the judicial mode of action. That is the way he was built and it was always difficult for him to break away from that mode.

"It followed from his judicial make-up that it was difficult for him to adjust himself to many of the duties of executive office. He did not like to make those swift *ex parte* decisions which, whether right or wrong, are so frequently necessary for an executive. It followed also from his judicial instincts that it was difficult for him to adjust himself to the thoughts and feelings and methods of political life in a party sense. When he was thinking about public affairs he himself was not in the picture at all. A multitude of personal interests so potent in political affairs would naturally not present themselves to his mind. On the other hand, a multitude of ways in which political power is acquired or enlarged would naturally not occur to him. Accordingly, his work in the Presidency was hard work, while his work in the Court was easy and congenial. This accounts to a great degree for that extraordinary incident of his life—his amazing comeback after his defeat for re-election to the Presidency in 1912. He was such a good

loser, he accepted his defeat with such kindly philosophy, with such cheerful freedom from resentment or reserve, that he won universal admiration and friendship which continued to the day of his death.

"A fourth characteristic was one which rounded out his judicial quality. That was his broad and active human sympathy. He really liked and was interested in men, women and children. Wherever he went his dominating presence diffused a sense of genuine sympathetic interest. He was a strong and noble man and he was a dear fellow—a lovable fellow. Alas, that his glowing personality should be soon 'hid in Death's dateless night.'"

Mr. William Cabell Bruce, spoke particularly of "Taft, the Man."

"In every moral and social sense, he was, by the common consent of his time, one of the very best of men. His walk was on the high places of the earth, but he was singularly free from all the vices and infirmities of character, which are so often associated with such a walk—arrogance, conceit, vanity, selfishness, callous or negligent disregard of the gracious proprieties, courtesies and charities, which, after all, constitute the true dignity, beauty and charm of human intercourse. I have never met any individual whose every thought, word, and deed was more deeply colored than his by the spirit of human love in all its highest manifestations. He was an affectionate brother, a tender husband, a devoted father, a true and steadfast friend. Good nature, kindness, benevolence, sympathy, affection, radiated out from him as if from some great orb, full of genial light and warmth. I can not believe that he ever did a mean, or an ignoble, or an unworthy, thing in his personal relations with his fellow creatures, or ever failed to respond to a genuine call of good feeling. There was a tie of sympathy between him and the lowliest thing that breathed. I can not conceive of a man or woman, however humble, or a child, however timid, that would not instantly have been put at ease by a smile or a kind word from him. His nature was too

generous and tolerant to countenance sectional prejudice, partisan rancor, or sectarian bigotry, and I like to think that one of the happiest moments of his public life was when he availed himself of an opportunity to strike a triple blow at all those hateful things by appointing to the Chief Justiceship of this Court, Edward Douglass White, a Confederate soldier, a Democrat, and a Catholic. If any man was ever estranged from him, and did not become reconciled to him, it was only because he was too unforgiving himself to reciprocate forgiveness. As we all know, some of the decisions of William Howard Taft, as a Circuit Judge, were bitterly resented by organized labor, but it affords me no little pleasure, today, to recall the fact that, only a few years ago, I heard Samuel Gompers, the President of the American Federation of Labor, tell, in a public address, how, a few days before, Chief Justice Taft—that charming man, Gompers termed him—had met him casually on a railway train, advanced towards him, with a smiling face, and grasped his hand, exclaiming, as he did so: 'How are you, my dear old enemy?'

"He is gone! and we may well believe to a sphere where his loving nature is universal. He is gone! and, to borrow a poetic thought from Matthew Arnold, the night, in ever-nearing circle, weaves its shade about us, who were his contemporaries, and still survive him. But one thing is certain. As long as we shall survive him, we shall deem it a high privilege to have enjoyed the companionship, at times, of such an able, upright, faithful, and famous public servant, such an exemplary citizen, such an admirable, amiable, and captivating man; such an ornament, in every respect, to human nature, as William Howard Taft."

Mr. William Marshall Bullitt spoke briefly of Judge Taft's decisions, commenting particularly upon *Penn Mutual* v. *Mechanics Savings Bank,* 72 Fed. 413; *United States* v. *Addyston Pipe & Steel Co.,* 85 Fed. 271; *American Foundries* v. *Tri-City Council,* 257 U. S. 184; *Truax* v. *Corrigan,* 257 U. S. 312; *Stafford* v. *Wallace,* 258 U. S. 495; *Wisconsin Railroad Commission* v. *Chicago, B. & Q. R. Co.,*

257 U. S. 563; *Dayton-Goose Creek Ry. Co.* v. *United States,* 263 U. S. 456; *Ex parte Grossman,* 267 U. S. 87; *Coronado Coal Co.* v. *United Mine Workers,* 268 U. S. 295; *Child Labor Tax Case,* 259 U. S. 20; *Hill* v. *Wallace,* 259 U. S. 44; and *Myers* v. *United States,* 272 U. S. 52.

The speaker called attention to the perfect impartiality of Judge Taft's attitude towards capital and labor. "He was scrupulously careful of the rights of labor to strike; but, with equally great force, he denied both the right of capital to combine to restrain trade and monopolize business, and of organized labor to coerce, by boycott, intimidation or violence, the non-union worker or the business man who would not submit to their demands for the closed shop."

"He delighted in maintaining his association with practicing members of the bar. While ever kind and thoughtful in his relations with them, he insisted upon the maintenance of the highest professional ideals, which were reflected in two of his late opinions: *Weil* v. *Neary,* 278 U. S. 160, and *Harkin* v. *Brundage,* 276 U. S. 36.

"Only those who practiced before him while he was a circuit judge in the Sixth Circuit can appreciate the affectionate regard in which he was held by the bar throughout the four States of Michigan, Ohio, Kentucky, and Tennessee—a feeling which rallied their almost unanimous support to his campaign for the Presidency."

Following is a letter sent to the Solicitor General by Hon. Robert S. Marx, the last of the Judges of the Superior Court of Cincinnati, which went out of existence November 30, 1925:

November 28, 1930.

Hon. Thomas D. Thacher,
Solicitor General of the United States,
Washington, D. C.

Dear Mr. Thacher: I wish to acknowledge the notice of the meeting of the Bar of the Supreme Court of the United States to take appropriate action in memory of the late Mr. Chief Justice Taft. I regret that I can not be present to testify to the great service rendered by Judge Taft as a member of the Superior Court of Cincin-

nati. I was the last Judge of this great Court, upon which Judge Taft began his judicial career.

In my office there is a copy of the Bible upon which Judge Taft was first sworn as a Judge. I find on the fly-leaf these words:

" The old Bible on which all the Judges of the Superior Court had been sworn into office was consumed in the Court House fire.

" On his retirement by resignation March 7, 1887, Judge Harmon presented this Bible to the Court, having first used it in administering the oath of office to his successor Judge William Howard Taft, who was the first to assume the office in the new Court House.

" March 7, 1887. William H. Taft again sworn theron May 7, 1888. Full term."

The name of the Judge is in his own handwriting as are the names of the other eminent members of the Court, which included Alphonso Taft, father of William Howard Taft, and later Attorney General of the United States and Minister to Russia; Stanley Matthews, later United States Senator and Justice of the United States Supreme Court; Judson Harmon, later Attorney General of the United States and Governor of Ohio; Joseph B. Foraker, later Governor of Ohio and Senator of the United States; Edward F. Noyes, later Governor of Ohio and Minister to France; George Hoadley, later Governor of Ohio; William Y. Gholson, later Judge of the Supreme Court of Ohio; Stanley Merrill, later Judge of the Supreme Court of Ohio; Smith Hickenlooper, at present Judge of the United States Court of Appeals; and many other distinguished jurists.

The opinions of Judge Taft as a member of the Superior Court of Cincinnati rank alongside of the opinions of his father as a Judge of the same court and are still cited as landmarks of Ohio law.

In delivering the valedictory of the Court, November 30, 1925, Governor Harmon said:

" Its decisions were published separately in three series of reports, and have often been cited as authority in the highest Courts of the country . . . Besides its unusual eminence as a judicial tribunal, partly no doubt because of it, the personnel of the Court has been rich in contributions to both State and Nation in other important fields of service. There is hardly one, if there be any, from

those of President, Chief Justice, Ambassadors, Senate, Governors down, to which it has not supplied men who won distinction there."

On the same occasion, Judge Taft, the Chief Justice of the United States, paid the following tribute to the Court upon which his father and upon which he began their judicial careers. Judge Taft said in part:

"The Superior Court will cease to be on Monday, November 30, upon the expiration of Judge Marx's term . . . Beginning with the new constitution and the inauguration of the new code of procedure, the Court took its place in the judiciary of the country and acquired a reputation reaching quite beyond its local jurisdiction. The personnel of the Court at the outset, consisting of Judges Bellamy Storer, Wm. Y. Gholson and Oliver Spencer, was one that was certain to give its judgments distinction and importance. And after these came a long line of distinguished lawyers and leaders of the Cincinnati Bar . . . and of the country. It seems to have been, too, a school of statesmen. I am very sorry that it is going out of existence . . . it has had a most honorable and unique history, and all its members, I am sure, cherish with pride having sat on it."

WM. H. TAFT.

Thus, the career of William Howard Taft began as a great member of a *nisi prius* Court, many of whose members seem to have been men of destiny.

As a former Judge of that Court and as a member of the Bar of the Supreme Court of the United States, who was privileged to know and love William Howard Taft, I send these flowers, plucked from his judicial service of nearly fifty years ago, to lay upon his shrine.

Very truly yours,

ROBERT S. MARX.

A pamphlet, published by the Committee, contains in full the addresses above mentioned and the eulogies in Court that follow. There also will be found: a message addressed to Mrs. Taft by Hon. Orestes Ferrara, Ambassador of the Republic of Cuba, on behalf of his Government and People, and joined in by Señora Ferrara; resolutions adopted by the House of Representatives of the United States, March 10, 1930 (281 U. S. VI); a tran-

script of memorial proceedings at a special session of the United States Circuit Court of Appeals for the Sixth Circuit, held at Cincinnati, on March 11, 1932, at which Judge Arthur C. Denison presided and Joseph Wilby, Esq., of the Cincinnati bar, and Judge Denison delivered addresses[4]; resolutions adopted by the bench and bar of the District Court of the Canal Zone, Balboa Division, Hon. James J. Lenihan, D. J., presiding; a eulogy delivered at a session of the Supreme Court of Porto Rico, by its Chief Justice, Hon. Emilio del Toro; extract from the minutes of the District Court for the Judicial District of Ponce, Porto Rico, Hon. Angel Acosta presiding; a message on behalf of the Supreme Court of Texas, signed by Hon. C. M. Cureton, Chief Justice; resolutions adopted by the General Assembly of the State of Rhode Island; resolutions adopted by the Senate of the Commonwealth of Kentucky; resolutions of the Senate and General Assembly of the State of New Jersey; a tribute from the Bar Association of the City of Cincinnati; resolutions of the Buncombe County Bar Association, Asheville, North Carolina; resolutions of the Governing Board of the Pan American Union; resolutions adopted by delegates of the Chapters of the American Red Cross in their Annual Convention, and resolutions of the Board of Incorporators of the American Red Cross; resolutions adopted at the annual meeting of the Massachusetts Society of Mayflower Descendants, in which is set forth Mr. Taft's lineal descent from Francis Cooke, a passenger on the Mayflower; a resolution of the Board of Assistants of the Society of Mayflower Descendants in the District of Columbia; resolutions adopted by the President and Fellows of Yale University; a tribute from Mr. Taft's Class of 1878, Yale University; memorial verses entitled "Great Heart," by Mr. Henry C. Coe of that Class; a copy of a memorial address delivered in the Mur-

[4] All of the superior courts sitting at Cincinnati were represented, namely, the federal Circuit Court of Appeals and District Court; the Ohio State Court of Appeals; the Courts of Common Pleas of Hamilton, Hancock and Washington Counties. All of their judges were present except two or three, who were absent unavoidably.

ray Bay (Canada) Protestant Church, by Mr. Albert Chapin.[5]

[5] "The formal presentation to this Church of a Memorial to Mr. Taft who was associated with it for many years makes it fitting to glance at the past. Nearly forty years have elapsed since Mr. Taft first came to Murray Bay. At that time Murray Bay was an undeveloped resort. Those who came here found a spacious land of woods and waters, a mighty river, a bay never at rest, a climate which spared them the visitations of torrid heat, a sense of remoteness and calm. Charmed by the beauty of the scene, the comfort, the serenity of the life, they came again. Others followed, and in increasing numbers, until presently Murray Bay ceased to be a resort in any special or limited sense, and became a community.

"It was not an ordinary community. The Dominion and the States conspired to build it up. All were drawn here by the attractions of the region. Impelled by a common purpose, and with deliberation, they were here gathered together. Such a community was sure to be characterized by intelligence, discernment, discrimination. Among its members were men of distinction, families of culture and social charm.

"Nothing could have been more felicitous in the life of Mr. Taft than that he should find himself a member of such a community. For Mr. Taft was possessed of an unbounded capacity for friendship. We can imagine such a quality lost or wasted; but here this community, endowed as it was, disclosed a singular, a striking, fitness to recognize, to welcome, to appreciate, and to reciprocate Mr. Taft's gift and genius for friendship.

"Then there ensued the phase in the social life of Murray Bay with which we all are familiar. Between the community and Mr. Taft, there was established a warm, rational, sure, affection rarely found at any place or time, admirable in itself, gathering strength with the passage of the years, delightful in its manifestations, winning and captivating as it developed in various forms. His birthday in his later years became an event. With him we may well believe the depth of feeling was rooted in the days when Murray Bay was primitive; and if we may unveil the recesses of the heart, he found in it the joy of the Happy Warrior as portrayed in the verses which he loved . . .

"For the activities of his life, as we all know, were displayed upon a broad, an exalted plane; and yet, no matter with what lustre his name may have been illumined, no matter what distinction or achievement should be placed to his credit, nothing was nearer or dearer to him than the affection of his friends in Murray Bay. And today that affection finds its final expression in this Memorial."

SUPREME COURT OF THE UNITED STATES

Monday, June 1, 1931.

Present: The CHIEF JUSTICE, MR. JUSTICE HOLMES, MR. JUSTICE VAN DEVANTER, MR. JUSTICE MCREYNOLDS, MR. JUSTICE BRANDEIS, MR. JUSTICE SUTHERLAND, MR. JUSTICE BUTLER, MR. JUSTICE STONE, and MR. JUSTICE ROBERTS.

Mr. ATTORNEY GENERAL MITCHELL addressed the Court as follows:

"*May it please the Court:* During the December recess of this Court members of its Bar assembled here to express their profound regret at the death of William Howard Taft, tenth Chief Justice of the United States, and to make a permanent record of their high regard for his devoted public service. That gathering included many men, themselves distinguished for public service, lifelong friends of the late Chief Justice, who paid eloquent and loving tribute to his memory. A minute was prepared, reviewing the principal events of his career, and the following resolutions were adopted:

[Mr. Mitchell then read the Minute and Resolutions already set forth (*ante*, p. vii) and continued:]

"In obedience to those resolutions I am here to present them and ask that they be entered in the records of the Court.

"Chief Justice Taft was my good friend, and I am grateful for the tradition which gives to the office I hold the high privilege of representing the Bar on this occasion.

"The only man to hold the two greatest offices in the gift of the American people, he had a public career unparalleled in its variety, with great distinction as a teacher, a colonial administrator, and executive, but it is

fitting in memorial exercises by the members of the profession that he loved, and for the archives of this Court, that we speak chiefly of his service to the Court and to the cause of justice, and first of that part of his work recorded in the official reports.

" During his service as Chief Justice the Court delivered fifteen hundred and ninety-six (1,596) opinions. One-ninth of that number is one hundred and seventy-seven. He delivered two hundred and fifty-three opinions for the Court, or one-sixth of the total. The nature of the cases and the labor required in each would have to be examined to judge accurately of his relative efforts, but he did his share.

" This is not the occasion to review his judicial opinions at length, but a study of them reveals these things: His public life and experience as an administrator and executive had developed a wisdom and common sense which are disclosed in these writings. His opinions are of the kind which are useful to lawyers. They not only decided the cases presented but they are charts for the future. The style is simple and direct, and he never clouded his thought by self-consciousness in expression. His judgments disclose prodigious energy expended in study and research.

" In assigning cases to members of the Court for preparation of opinions he gave to himself at least an equal share of those dull ones which were interspersed with the important matters before the Court. He seemed to take a special interest in patent and trade-mark cases. He had an unusual facility in that field, and wrote many fine opinions in important patent litigation. It is in constitutional law that his greatest judicial work was done. Of his two hundred and fifty-three opinions seventy dealt with important constitutional questions. That in the *Myers* case, settling a controversy as old as the Union, respecting the President's exclusive power of removing executive officers, alone would mark him a great constitutional lawyer. The opinions he delivered from this

bench, together with two hundred and four others, rendered during his service as a United States Circuit Judge, form an enduring monument to his high judicial qualities.

"Beyond his performance of the routine tasks of a Chief Justice is other service for which we should be grateful.

"When he began his work here as Chief Justice the Court was eighteen months behind in disposing of the cases before it. He took a leading part in devising and procuring the passage by Congress of the Act of February 13, 1925, which gave the Court a wide discretion to decide what cases should be brought before it for review; and with that change in procedure as a starting point he and his associates set about the task of bringing the work up to date, with such determination and driving force that at the end of his service as Chief Justice, in February, 1930, the business of the Court was practically current; and with the completion of that task during the past year it may no longer be said that appeals to this Court are a means of delaying justice or allowing criminals to postpone punishment. Under his leadership this Court has set an example to the courts of the land, and brought home to the profession that it should no longer be taken for granted that courts must always be behind in their work.

"During his incumbency Congress enacted the laws authorizing the construction of a building to be occupied by the Court and its officers. He had largely to do with that and gave constant thought and effort to obtaining the necessary appropriations, acquiring the site, and above all in seeing to it that the building when completed shall be a dignified and beautiful structure. This project was dear to his heart, and we regret that he did not live to see the fulfillment of his efforts. The new Supreme Court building when completed will itself be a memorial of one of his services to the Court.

"He had much to do with the enactment of the law authorizing the Judicial Conference presided over by the Chief Justice and attended by the senior circuit judges

of the ten judicial circuits, which annually considers the operation of our Federal judicial system for the purpose of bringing about administrative and legislative changes to increase efficiency in the administration of justice.

"By his influence for a high standard in judicial appointments he rendered inestimable service to the cause of justice. As President he appointed five Associate Justices and one Chief Justice of this Court and many judges of the other Federal courts. He spoke of this Court as the chief bulwark of the institutions of civil liberty created by the Constitution, and viewed the appointment of members of the Court as the most sacred duty with which he, as President, was charged. During all his public career, in whatever office he held, his influence was exerted to elevate the standards for judicial appointments and to combat the pressure of political expediency for the selection of mediocre men.

"With all the other demands upon him, he took time to see old friends, to find new ones, to address gatherings of his fellow citizens, and to make those many public appearances expected of one in his position. His big, warm personality, kindliness, and humor, with that infectious chuckle of his, will never be forgotten by those who knew him.

"None of our institutions is so impregnable that popular confidence in and respect for it are not to be desired, and it is well for this Court and for the constitutional rights and liberties which it guards, each time there is chosen for Chief Justice one who in the public estimation is so preëminently fitted that his appointment is generally acclaimed. Chief Justice Taft had that fortunate distinction. What training for this high office could have excelled his? From early youth he was continuously in the public service. Within a year after his admission to the Bar he became prosecuting attorney of his county, then judge of a Superior Court. Forty-one years ago, in this very spot where I now stand, he commenced his service for the Nation, as Solicitor General of the United

States, and, with but a short interlude, he continued in the Nation's service until he ended it, again in this room, as Chief Justice of the United States. From Solicitor General to United States Circuit Judge, then president of the Philippine Commission, civil governor of the Philippine Islands, special representative of his Government on delicate diplomatic missions, Secretary of War, and President. What a preparation for high judicial office! When finally the opportunity came to place him on this Court, the whole Nation knew that he was qualified by character, learning, and experience. It trusted him and believed in his judicial qualities and in his big-hearted understanding of the problems of plain people.

"He had always yearned for service on this Court. His was a judicial mind. Political life was not congenial to him; but fate seemed bound to draw him against his will into the field of political and executive action. It has been said that because of his judicial instincts it was hard for him to adjust himself to the thoughts and feelings and methods of political life in a party sense. Nevertheless, twice he regretfully refused appointment as an Associate Justice of this Court because he felt he could not desert administrative responsibilities.

"He made no secret of his interest in judicial work. Millions of his fellow countrymen knew of these things and sympathized with his aspirations. They held him in affectionate regard. When, in 1912, his party, torn by dissension, went down to defeat and he failed of reëlection to the Presidency, his lack of bitterness or rancor, his smiling acceptance of his defeat, his frank and humorous public statement that he had retired from the Presidency with the full consent of the American people, met with instant response in the public mind, and from that moment, to an extraordinary degree, he found a place in the affections of the Nation. So, when he came at last to the great office of Chief Justice, he had the entire confidence and respect of great numbers of his fellow citizens. He held them to the end. His very presence on

this Court quickened public interest in its functions, strengthened it in the public regard, and helped to maintain it as the bulwark of the Constitution."

The CHIEF JUSTICE responded:

"Mr. Attorney General: In receiving the resolutions which you have presented, we recognize that of all the tributes that have been paid to the memory of this eminent statesman and jurist, there could be none which would have been more highly prized by him than this tribute coming from the profession which he loved, in recognition of the distinction of his service to the cause which was nearest to his heart.

"Blessed by forbears who had achieved high repute by virtue of eminent talent and public spirit, it may be said that William Howard Taft was born to the purple of the highest advantages which our democracy affords. It was natural that his winning personality, giving play to marked ability, without suggestion of condescension, and distinguished by a nobility of character which scorned all that was sordid, base, or narrow, should have opened early the door of opportunity for public service. The gracious leadership of his youth in the circle of the university prefigured the position which he at once took at the junior bar; and after showing his mettle in his native city as prosecutor and judge, he came, at the age of thirty-three, to the office of Solicitor General of the United States. From that time until his death, he exemplified, in varied undertakings of grave responsibility, the finest type of public servant and enjoyed an increasing general esteem, until, in the closing years, after the wounds of political strife had been healed and the victories of a magnanimous spirit had been acclaimed, he was enriched beyond any man of his time with the wealth of a universal affection.

"In other places, there have been, and will be, appropriate appreciation of his services as the representative of his country in novel and important duties as executive head of the new government in the Philippines, and as

Secretary of War and Chief Magistrate of the Republic. It is for us to recognize with gratitude, and with a deep sense of obligation and of loss, his labors in this Court, which brought his career to the fullness of illustrious accomplishment.

"Chief Justice Taft came to this service with a prestige which added weight to his pronouncements. But in the realm of lofty and conspicuous endeavor, success is never guaranteed by past achievements. It must be re-won daily, and even the highest prestige is put to fresh proof by the inescapable responsibilities of decision. Chief Justice Taft entered the Court with a distinguished reputation, but he left it with an even greater fame securely established.

"This was due to his special qualifications for judicial office, by virtue of training, aptitude and temperament. His training began, as I have said, almost as soon as he was admitted to the bar. When he took executive office at the age of forty-three, he had served nearly eleven years upon the bench, and for eight of these years as United States Circuit Judge. In that work he was indefatigable, not only in the Circuit Court of Appeals but at trial terms. One who knew intimately his labors in those days has said that Judge Taft became known to the bar of his circuit as no other circuit judge had ever been before or has been since. Nor was he content with the range of his judicial duty, but in his enthusiasm for legal study he took a leading part in law school organization and teaching. The learning and strength of his judicial opinions as a Circuit Judge made him widely known. His interest was not simply in the right adjudication of particular cases, but in jurisprudence, and he consistently labored in the interest of system and coherence. It was his effort to master the special subject in hand so as to utilize it in giving a chart for the future. A conspicuous instance of this is his opinion for the Circuit Court of Appeals of the Sixth Circuit in *United States* v. *Addyston Pipe & Steel Co.,* delivered in 1898 (85 Fed. 271), containing what was, at that time, perhaps the most thorough expo-

sition in the American reports of the law relating to restraint of trade. The judicial service of his young manhood was rendered with a zest which never abated. And his duties and experiences in executive office heightened for him the never-failing charm of the judicial career, by reason of its independence and impartiality, and its devotion to what he believed to be the paramount interests of the administration of justice. Having begun as a student of the law, he returned to his legal studies when released from executive responsibilities, and as a lecturer on constitutional law he completed his preparation for the great task to which manifest destiny was to call him.

"To Chief Justice Taft, the administration of justice was never an abstract conception, to be extolled in vain phrases and with but slight regard to changes in social conditions and to existing deficiencies. While holding in contempt the fanciful schemes with which the administration of justice in this country is threatened from time to time, he was ever pointing out its shortcomings and laboring for its improvement by practicable remedies. It was this concern which gave him a peculiar sensitiveness with respect to the qualifications for judicial office. He realized profoundly that the chief defects of the administration of justice lie in men rather than in method. A good judge, using the means at the command of an alert and informed mind, will find but rarely that he cannot force his way through to effective action. No duty seemed to President Taft more important than that of selecting federal judges. It was his special concern while he had the responsibility of appointment; and his solicitude continued and was constantly expressed after he became Chief Justice. It has fallen to but three Presidents since Washington to appoint a majority of the members of this Court. President Jackson appointed Chief Justice Taney and four Associate Justices. President Lincoln appointed Chief Justice Chase and four Associate Justices. President Taft appointed Chief Justice White and five

Associate Justices. In no act of Mr. Taft's career was his estimate of the requirements of judicial office, and his emphasis upon its proper independence of partisan considerations, more strikingly shown than in his appointment of Chief Justice White, of a different political faith, but who had represented upon the bench the highest standards of judicial conduct. And we are admonished of the rapidity of the changes in this Court, despite the apparent permanence afforded by the tenure of office, when we reflect that when Chief Justice Taft came to the bench ten years ago, only two of his appointees were still in service.

"No learning or information comes amiss to a Justice of this Court. Its members have been drawn from many fields of activity, and to its conferences are brought the wisdom derived from varied experiences in different parts of our land. By reason of the variety and importance of his previous official duties, Chief Justice Taft had in this respect an unusual equipment. The learning and industry of the judge were reënforced by the special knowledge gained in statecraft. He had abundant opportunity to apply this knowledge, and it was applied with judicial independence. As illustrating this, and also as exhibiting the quality of his judicial opinions, reference may be made to *Balzac* v. *Porto Rico,* 258 U. S. 298, and *Yu Cong Eng* v. *Trinidad,* 271 U. S. 500, dealing with fundamental questions relating to the administration of our insular possessions; to *Stafford* v. *Wallace,* 258 U. S. 495, sustaining and construing the Packers and Stockyards Act; to *Ex parte Grossman,* 267 U. S. 87, upholding the power of the President to pardon criminal contempts; and to *Myers* v. *United States,* 272 U. S. 52, sustaining the President's power of removal.

"Because of the interest which he had shown throughout his public life in the problems affecting labor, Mr. Taft was appointed, when the United States entered the War in 1917, co-chairman of the War Labor Board. And

when he came to this Court, no one had a more intimate knowledge of labor conditions in this country or was more highly respected by all those concerned in industry, whether as employers, managers, or employees. There can be no doubt of his special interest in the decisions of this Court affecting labor questions, and upon these questions he delivered many of the Court's most important opinions; as, for example, in *American Steel Foundries* v. *Tri-City Central Trades Council,* 257 U. S. 184; in *United Mine Workers* v. *Coronado Coal Company,* 259 U. S. 344 and 268 U. S. 295; in the *Pennsylvania Railroad Company Cases* relating to the function of the United States Railroad Labor Board, 261 U. S. 72 and 267 U. S. 203, and in *Charles Wolff Packing Company* v. *Industrial Court of Kansas,* 262 U. S. 522, with respect to the extent of the authority of the State in the regulation of wages in industry.

"Chief Justice Taft had also the technical knowledge and aptitude which gave him a special interest and authority in patent cases, and his skill in this difficult branch of jurisprudence is illustrated in such leading opinions as those in *Eibel Process Company* v. *Minnesota & Ontario Paper Company,* 261 U. S. 45, and *Corona Cord Tire Company* v. *Dovan Chemical Corporation,* 276 U. S. 358. The Chief Justice always had an open mind with respect to the necessary adaptation of the authority of government, especially in relation to the broadening requirements of interstate commerce under modern conditions. This was conspicuously shown in the opinions that he delivered for the Court as to the power given to the Interstate Commerce Commission by the Transportation Act of 1920, among which may be noted, as of permanent importance because of the principles definitely established, those in the cases of *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy Railroad Company,* 257 U. S. 563, relating to the power of the Interstate Commerce Commission over intrastate

rates, and *Dayton-Goose Creek Railway Company v. United States,* 263 U. S. 456, with respect to the recapture provisions of the Interstate Commerce Act. To the growing volume of jurisprudence dealing with controversies between States, he made a notable contribution, especially in the case of the *Chicago Drainage Canal,* 278 U. S. 367, and in that of *North Dakota* v. *Minnesota,* 263 U. S. 365, which clearly laid down the essential bases for recovery by one State claiming injury by reason of operations conducted by another. I have not attempted the impossible task of making, upon such an occasion as this, a comprehensive survey or even a just estimate of the judicial service of the late Chief Justice, and I have sought to cite but a few of the many important opinions in which he touched every department of the law as laid down by this Court and which stand as imperishable memorials to his ability and conscientious labor.

"Chief Justice Taft had, as has well been said, 'an almost religious reverence' for the fundamental principles of our system of government. To quote his own words: 'In the federal constitution there were embodied two great principles, first, that the government should be a representative popular government, in which every class in society, the members of which have intelligence to know what will benefit them, is given a voice in selecting the representatives who are to carry on the government and in determining its general policy. On the other hand, the same constitution exalts the personal rights and opportunities of the individual and prescribes the judicial machinery for their preservation, against infringement by the majority of the electorate in whose hands was placed the direction of the executive and legislative branches of the government.' That was his confession of faith. And he had no sympathy with any attempt to undermine the fundamental protection of fair individual opportunity upon the assumption that social riches could be gained through individual impoverishment. He

stood emphatically for the limitations of government under the Constitution and was unwilling to see these limitations exceeded even when legislative phrases were used which would otherwise have been appropriate to the exercise of legislative power. This was conspicuously shown by his opinion in delivering the judgment of the Court holding invalid the Child Labor Tax Law (259 U. S. 20), as infringing upon the reserved power of the States. 'To give any such magic,' he said, as was sought to be attributed, 'to the word "tax" would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the States.' But he did not regard the country, as he expressed it, as 'tied to the defects of the past or present,' and he looked for a sure progress through discriminating and far-sighted legislators and through judges of broad vision but imbued with the spirit of the Constitution.

"Chief Justice Taft rarely dissented. In the multitude of cases to which you have referred, Mr. Attorney General, which were decided during his incumbency, I find but seventeen in which he expressed dissent, and in but three of these did he write the dissenting opinion.

"Deeply concerned with improvements in administration, the Chief Justice gave special attention to his own duty as administrator. Even the distinction of his contribution to the jurisprudence of the Court does not obscure, but throws into a stronger light, by reason of his versatility, his preëminence in the executive department of its work. In the successful endeavor to end the delays which bring such a deserved reproach upon judicial procedure, he was ever a leader, and he would have been the first to recognize the able support which he received from his colleagues in this effort. It was not a vain attempt to bring the Court up to its work by a spasmodic activity, but the intelligent formulation of a plan which, receiving the sanction of Congress, has put the Court, we trust permanently, upon a basis by which it can keep

abreast of the demands upon it. So long as we follow the example which he has set and avail ourselves of the opportunity which his leadership provided, the delays of justice will have no countenance or illustration here.

" But the Chief Justice was not content with expediting the work of this Court. He felt a special responsibility with respect to the entire Federal judicial system. Many years before he came to this bench, he had suggested that either the Supreme Court or the Chief Justice should have an adequate executive force to keep current watch upon the business awaiting dispatch in all the districts and circuits of the United States and to make a periodical estimate of the number of judges needed in the various districts and to make the requisite assignments. In a different manner, it was sought to attain the object he had in view by the establishment, in 1922, through his persistence, of the Judicial Conference of the Senior Circuit Judges, held annually, at which the Chief Justice of this Court presides, and which considers the needs of judicial service in the different districts and makes recommendations accordingly. This is an instrumentality of great value, and what it has accomplished and the promise of what it may achieve are due in the largest measure to the foresight and intelligent guidance of Chief Justice Taft.

" No appreciation of the late Chief Justice can stop with appraisal of his intellectual power, or his juristic and executive achievements, or his moral worth. The glow of his warm heart shone through all his activities and irradiated all his associations. As with every virile character, he had ardent sympathies and strong dislikes. But he could not cherish ill-will or long harbor a sense of injury. He carried with him an invincible armor of kindliness against which the shafts of opponents had proved harmless. With him, service in the temple of justice was not an austere performance, with the ill-grace of an unnatural aloofness, but a necessary human endeavor, with

the dignity of lofty purpose, but pursued with a benignity and an affection for his fellows which made his presence in that temple a constant benediction.

"I should, in these last words, permit those to speak who were associated with him in this work, and I can do no better than to quote what they said to him upon his retirement: 'You came to us from achievements in other fields, and with the prestige of the illustrious place that you lately had held, and you showed in a new form your voluminous capacity for work and for getting work done, your humor that smoothed the rough places, your golden heart that has brought you love from every side, and, most of all, from your brethren, whose tasks you have made happy and light.'

"There are those here who have witnessed these memorial exercises in honor of three Chief Justices. In the midst of our efforts, engrossed with present demands, we are moving with a steady and inescapable progress toward the inevitable end. The figures of to-day, like those of yesterday, will soon be replaced, and the best endeavors, striking as they may be in their immediate aspect, will soon form but the background of another picture. Without illusion, and with steady will, we continue in our task, heartened by the exemplars of our faith, among whom no one has a more inspiring or abiding influence than that of the late Chief Justice."

PROCEEDINGS IN MEMORY OF MR. JUSTICE SANFORD.[1]

At the same meeting of the Bar of December 13, 1930, which honored the late Chief Justice (*ante,* pp. v *et seq.*), a committee [2] appointed by the Chair reported the following:

RESOLUTIONS

Resolved, That the members of the Bar of the Supreme Court desire to express their profound regret at the death of Edward Terry Sanford, late Justice of the Supreme Court, and to record their high appreciation of his life and character and of his conspicuous and faithful service to his country. He was born on July 23, 1865, in the State of Tennessee. He graduated from the University of Tennessee, and then entered Harvard College, where he continued his studies; later on studying in European Universities and at the Harvard Law School. He became a member of the Bar of the State of Tennessee, and practiced at Knoxville and throughout the State until the year 1907, when he became one of the Assistant Attorneys General of the United States. After a year in Washington, he accepted the office of United States District Judge for the Middle and Eastern Districts of Tennessee. He served, as such District Judge, for fifteen years, with marked ability and with the love and respect of the Bar and community. He gave much of his time to the cause of education; was Chairman of the Board of Trustees of

[1] See 281 U. S. III, v.

[2] The composition of the committee was as stated *ante,* p. vii, excepting Mr. Squire.

the George Peabody College for Teachers; also Trustee of the University of Tennessee. He was, at one time, President of the Alumni Association of the University of Tennessee, and later, President of the Alumni Association of Harvard College. In the year 1923, President Harding named him as Justice of the Supreme Court to fill the vacancy arising upon the resignation of Justice Pitney. He served on this Court with great distinction from the time of his qualification until his untimely death on the 8th day of March, 1930, at the early age of sixty-four. He had a personality of unusual charm, and was a most gifted speaker. He was a lover of literature and the arts; was widely read and deeply experienced in law and jurisprudence. He had ardent patriotism and a high sense of public duty. His work upon the Supreme Court was thorough, conscientious, and exacting, and had the high commendation of his associates and of the Bar. His death is his country's loss, and is mourned by the great circle of his friends and associates both upon the Bench and at the Bar.

Resolved Also, That the Attorney General be asked to present these resolutions to the Court and to request that they be inscribed upon its permanent records, and that the Chairman of this meeting be requested to transmit a copy of these resolutions to the family of the late Justice with an expression of our sincere sympathy in their bereavement.

In presenting the resolutions, Mr. CHAUNCEY G. PARKER said:

"Mr. Chairman: Edward Terry Sanford was born in the year of the conclusion of the Civil War, of parents who had had little to do with the struggle over slavery, but was nurtured during his adolescent years in a community that was divided in its aspirations and efforts by that great struggle. For the loyalist to the North and the loyalist to the South both contributed to the atmosphere in which he grew up. He could not have failed

to be influenced by both of these conflicting currents; and when his early education was done, it was not surprising that, having as he did the influences of a Northern father, and undergoing at the same time a Southern training, he should have aimed to be representative of both. No doubt his Northern blood turned his steps to Harvard College, and his Southern environment made him turn back to the South for his life work and career. As his mother was of Swiss descent, he received naturally an impulse to European travel and education. So after leaving Harvard he spent a year in Germany and France for instruction in languages and foreign economy, and incidentally for a visit to Lausanne to meet his kin belonging to his mother's family. Then he returned to practice law in his native State.

"Knoxville lies in a broad valley between two important mountain ranges—the Cumberland and the Alleghanies. The Cumberland Mountains divide the State of Tennessee in half—to the east lies the territory tributary to Knoxville, and to the west the lowland reaching to the Mississippi. Between North Carolina and Tennessee lie the Alleghanies, the Great Smoky Mountains as writers call them, shrouded in forests and clouds and inhabited by grim mountaineers with the traditions of pioneer days. When forests were everywhere, the water courses were the only highways, and the Cumberland River helped pioneers to reach the West. Many of them stopped at Knoxville and made their homes there. Highways and railroads followed through the valley of the Cumberland and added importance to Knoxville, nestling in the valley, half way from Virginia and North Carolina to the lowlands.

"Sanford, with his Northern and European equipment, distinguished for general scholarship and in law, ambitious for distinction at the bar and in public life, took his place in this small community. How fascinating must have been the struggles before court and jury, the close touch with his fellowmen, and the excitements of the court trials,

all so different from the drudgery of a big office in a large city! How delightful the opportunity for study and thought, and how satisfactory the consciousness that he could aid the development of this growing community by his familiarity with the larger problems of the great world.

"For nearly a score of years he was active at the Bar, on the forum, and in the community. In 1907 President Roosevelt picked him for the Department of Justice and made him an Assistant Attorney General. A year later he was sent back to Tennessee as Judge of the United States District Court for Eastern and Middle Tennessee. He was then only forty-three. Opportunity of wealth at the bar was ready at hand. But he saw a greater opportunity in service to his country and he chose it. For in a Southern State, the office of Federal Judge is unique. Our Federal Government usually takes little part in the domestic affairs of its citizens. What little part it does take is emphasized in the Federal Court. The Federal Judge embodies the authority of the Federal law, and makes many decisions that must grate upon the customs of the people. Sanford's work in the Federal Court brought him in close touch with the people of his wide circuit of jurisdiction. The handling of matters of excise, especially where mountaineers were concerned, required tact and firmness. Sanford's clearness of vision, his sympathy for the offender, and his steadiness in upholding the law won the respect and liking of the people. He delighted in the close contact with his brother lawyers. He was a regular attendant at the meetings of the bar associations, state and national, of which he was a member. And his reputation widened beyond the confines of his State. He was Charter Member of the Board of Governors of the Knoxville General Hospital; Vice-President of the American Bar Association; President of the Alumni Association of the University of Tennessee; Vice-President of the Tennessee Historical Society; Doctor of Laws from the University of Cincinnati; Chairman of the Board of Trustees of George Peabody

College for Teachers; Member of the Board of Trustees of the University of Tennessee; Vice-President of the Harvard Law School Association; President of the Harvard Alumni Association 1924; and LL.D. from Harvard University.

. . . . .

"In the year 1923 a vacancy occurred in the Supreme Court by the resignation of Justice Pitney. At that time Tennessee already was represented in the Court by one of its citizens. Sanford was a man of great modesty and was astonished when a movement began to make him Justice. His fine work as District Judge was not enough to give him a claim on that exalted position. But there was a national appeal in his selection; for he was a representative of the South, acknowledged as such by the public men and citizens of that portion of our country, and yet he was a Northerner by parentage and by education. He was a Republican, yet beloved by both Democrats and Republicans alike. Our late great Chief Justice, who had known him intimately while Sanford was in Washington, added his advice, and President Harding named him. Then followed seven years of strenuous and confining work, gruelling work as any of the Justices will tell you—and Justice Sanford did his share, receiving the confidence, respect and good will of his associates and of the bar. At Commencement, in June, 1924, Sanford presided over the meeting of the Alumni of Harvard College. All those present will remember with pleasure his charming and appropriate words. In the same year he presided at the proceedings celebrating the Ninetieth Birthday of President Eliot. In the summer of 1924 he joined the American Bar Association on its trip to Europe. He spoke at the Harvard Law School dinner in Lincoln's Inn, and at the banquet given at the Guild Hall of the Lord Mayor and Aldermen of London. Later, at the reception given by the Bar of the City of Paris, in the Palais de Justice, to the members of the American Bar Association, he delivered an address in French.

"This is no place to attempt a review of Justice Sanford's work in the Supreme Court from the lawyer's standpoint. He was a sound Judge, most conscientious and painstaking in the study and consideration of every case. In the writing of his opinions he was never satisfied unless his words exactly and concisely expressed his thought. He was most careful to avoid any expressions which were not justified by the case before him, but his decision was alway comprehensive and thorough. A member of the Court, when requested by the writer to indicate Justice Sanford's outstanding characteristics as a Judge, emphasized his conscientiousness, his industry, and his fidelity to the Court's decisions. His work on each case was never complete until he had examined and considered every aspect of the case. He was tenacious of views once formed and would never yield them unless controlled by earlier precedents. His opinions run through twenty volumes of the reports and cover many fields, but constitutional questions were nearest to his heart. His ability in handling these questions is exhibited particularly in the *Pocket Veto Case* and the *Gitlow* case, the latter involving the power of the [State] Government to regulate liberty of speech and of the press.

"In moments of relaxation, literature, music and art were his delight, but dearest to him of all was the companionship of his friends.

"At the age of sixty-four he died, suddenly, in the full possession of his mental powers and with what seemed to be the promise of a long life before him. His wife and one daughter survive him. As a Knoxville writer said—no story of his life nor any tribute to his character would be complete which did not take into consideration the wisdom and sweetness of his wife's companionship, and what her presence meant to him. His self-forgetfulness and devotion to her, inspired her to a recovery during a perilous and prolonged illness terminating happily just before his death. As this Knoxville writer said—'Few

lives have been more fully lived than his in all ambitions that were dreamed for it, or, in the full earnestness and honor with which high trusts were met and borne.'

"Let me close with his own words spoken at Commencement:

'We have gathered here from far and near; from the distant shores of the continent, and from the isles of the sea and the lands beyond. Youth and age have come; youth rejoicing in the splendor of life's morning; and age, steadfast in the majesty of its noonday, serene in the tender glow of its evening sky. Since leaving College we have traveled many pathways; we have worked and played, and loved and lost. We have walked in the sunshine upon flowery meadows, and trodden the dark shores of adversity; have known life's triumphs and its defeats; have drunk of its cup of happiness and of the bitter waters of its sorrow. We come back to-day to drink again the refreshing waters of life that spring from this sacred soil.'

"His was a blithe and valiant spirit."

Mr. William L. Frierson said:

"Mr. Chairman: There are those in this assemblage who are here to do honor to the memory of one known to them only after he became a Justice of the Supreme Court. But we in Tennessee, where he grew to manhood, practiced law, and later presided over the District Court, honor the man we knew as Ed Sanford. We would hold him in affectionate and admiring memory if he had never held official position.

"When it is said that one who has passed away has, in private and public life, been always clean and honorable and useful, has practiced law in perfect harmony with the best ideals of the profession, and has been an able and just Judge, what more need be said? All this I can and do say of Edward Terry Sanford after enjoying an intimate and lifelong friendship with him.

"To say that one has sat in the seat of the mighty means but little if that is all that can be said. But it

means much to say that he has been equal to the responsibilities incident to the proper exercise of power. It is indeed a rich encomium to say that, when he occupied a place on the bench of the great Court which sits in this room, he was, in that exalted company, only among his peers. And that all this can truthfully be said of Mr. Justice Sanford is not to be gainsaid.

"The man for whom we mourn was not one of that host of Americans who have challenged our admiration because they rose from poverty and obscurity to distinction. He was well born and accustomed all his life to the society of cultured people. His father, in his time and in the community in which he lived, was rated a wealthy man. The son's lot was one of, at least, comparative luxury and he was given the best of educational advantages.

"While he did not have the handicap of poverty, he did have what I have sometimes thought is almost as great a handicap,—the seductive temptation to a life of ease and pleasure, made possible by affluence, rather than one of earnest effort. The qualities necessary to overcome either of these handicaps are ability, force of character, ambition, and energy. And these are the qualities which our friend brought with him when he came to the bar, gifted by nature, splendidly equipped by education, and possessed of an unbending integrity and a grim determination to make a name for himself. We who have known him well do not doubt that he would have won distinction even if he had been born in lowly station.

"Let me give you a picture of him as I first saw him nearly forty years ago. He was but little beyond his majority and was glowing with the enthusiasm of ambitious youth. Accompanied by the charming bride, who is now his widow, he was attending, for the first time, a meeting of the Tennessee Bar Association. He had already attracted enough attention to give him a place among the banquet speakers. When he arose, erect,

handsome, clear eyed, smiling, perfectly at ease, and unabashed in the presence of his elders, I thought, as he spoke, and still think, that I had never seen a more splendid specimen of young manhood. His speech is the only incident of the meeting of which I have any distinct recollection. . . .

"From that day, it was freely predicted that there was a young man who would go far in his profession. And this prediction speedily came true. Very soon he was a recognized leader among the young members of the bar. And, before many years, he had taken high rank among the best lawyers of his State, was actively participating in much important litigation, and had made a record which richly merited the judicial honors that later came to him.

"In 1908, his appointment as District Judge came without his seeking and, in fact, over his protest. I happened to be one of a delegation of lawyers who called on President Roosevelt to urge the appointment of another Tennessean. The President, as was his wont, did most of the talking and finally said: 'I tell you, gentlemen, the man I want to appoint is Ed Sanford, but he won't take it.'

"His reluctance then to go on the bench was genuine. He was Assistant Attorney General and much enamoured of his work. He had come to think that, for a lawyer of his age, the position of all positions was that of Solicitor General, and entertained the hope that, if he remained in the Department of Justice, that office might, in time, be his. He was still young and loved forensic contests. He also felt that a degree of isolation was the lot of a Judge. And this, he felt, would deprive him of some of the intimate contacts with his friends which meant so much to him. But he finally yielded to the insistence of the President and began his judicial career as Judge of the Middle and Eastern Districts of Tennessee.

"He brought to his judicial duties a well trained mind, a broad culture, unusual learning in the law, the practical

experience that comes from a varied practice; and, above all, an insatiate love of justice. As a judge, he presided with a grace and dignity which commanded universal respect for his court. In the hearing of cases, he was patient and open-minded, and, in their consideration and decision, painstaking and thorough. At first his intense desire always to be right sometimes made him seem to be slow in coming to a decision and caused him to take so seriously his responsibilities that his friends feared for his health. But when he became accustomed to the duties of the bench and more confident of his judgment, he was all that could be desired of a Judge. His judgments were not less able and conscientious, but they were arrived at with less strain on himself.

"In the administration of the criminal laws he was Judge and not prosecutor. The Government was only a litigant in his court suing for justice. It stood on a parity with the humblest citizen it accused. The Constitution and laws of his country were to be obeyed and not evaded by judge, government, and accused alike. If a guilty man could not be convicted without doing violence to those constitutional rights which are for the protection of all citizens, this Judge wanted him acquitted. Prosecuting attorneys sometimes listened with misgivings to his careful definition of reasonable doubt and would have preferred that he touch more lightly on that subject. But, in his correct conception of judicial duty, it was not for him to refrain from giving proper emphasis to any right which belonged to a defendant. When all is said, he was a learned and eminently just Judge.

"His record on the District bench earned for him the place which marks the attainment of the American lawyer's highest ambition. The time came when the President felt that the appointment to fill a vacancy on the Supreme Bench should go to the South. There were many Judges and eminent lawyers who were eligible. And it is a tribute to Judge Sanford's preëminence that

he was selected in spite of the fact that another Tennessean was already a member of the Court. His appointment was no mistake. The promise of efficient service which his record gave was amply fulfilled. He bore his full part in the labors of the Court. He does not suffer by comparison with the many great men through whose labors the Supreme Court has so interpreted the Constitution as to make our Government what it is today.

"Of Tennessee's illustrious dead, the names of Catron, Jackson, and Lurton are conspicuous in the judicial history of the nation. And now she proudly adds, as entirely worthy of a place on that honor roll, the name of Sanford."

Mr. CHARLES N. BURCH said:

"Mr. Chairman, Gentlemen of the Bar, Ladies and Gentlemen: . . . Never for one time did he forget the dignity and decorum which attached to his high office. Though the dignity of his office was at all times preserved, he was intensely human. He was extremely particular for the welfare of jurors and witnesses and insisted that a high degree of courtesy and consideration for others should be maintained in his court. Particularly helpful and kind was he to youthful and inexperienced practitioners. I have never known a judge to display the patience which he did or to indicate a greater desire to arrive at the exact truth of a controversy.

"During his term of district judge many important cases were tried before him, but to these I need not refer, as a permanent memorial of these cases is found in the reports. He had a very large criminal docket. Most of these cases ended in his court and these gave him the greatest concern. While at all times seeing to it that the majesty of the law was upheld, yet he was very sympathetic with the frailties of human nature and tempered justice with mercy. At times he would call disinterested members of the bar into his chambers and, after relating

the character of a criminal case in which a conviction had just been had, he would ask the advice of members of the bar as to what punishment should be inflicted, at the same time relating all mitigating factors. I think it was a positive pain to him to inflict punishment, though he never flinched from that duty when justice required it. As a district judge he was not only patient, industrious and able, but he wrote with unusual facility and his opinions are models of clearness. I recall that in his opinions he settled many questions of practice which were in doubt in Tennessee. . . . The esteem in which he was held by the bar of the State and by the people generally can perhaps best be illustrated by the unanimous endorsement which he received from the bar of Tennessee when a vacancy occurred upon the Supreme Court of the United States; and more unusual still was the unanimous endorsement of Judge Sanford by the Legislature of Tennessee, which happened to be in session when this vacancy occurred. A great majority of that legislature belonged to an opposite political party from Judge Sanford, and yet the worth and merit of the man were so well recognized that without hesitation a resolution was passed by the General Assembly of the State endorsing him for a place on the Supreme Court of the United States. It was, indeed, a source of joy and gratification to the bar and the people of the State when he was appointed and confirmed. . . .

"His record on the Supreme Court is written in the official reports. It is needless for me to say that he maintained the high reputation which he had as a district judge, and that he measured up to the high qualifications which have always been an attribute of the members of the Supreme Court of the United States.

"Besides being a great lawyer and a great judge, he was a man of ripe and profound scholarship and took a deep interest in the best that there was in literature. He wrote and spoke the best of English and, as said of him by a member of this Court: 'He was born to charm.'

"As a district judge he was part and parcel of the communities in his district. He frequently appeared on public occasions, and spoke in behalf of all movements looking to the general welfare and betterment of the community. He was a welcome guest in any company. His addresses were always suitable and appropriate to the occasion. He was equally at home in addressing a gathering of very plain people on some local question as he was in addressing the great assembly of lawyers which took place in the Guild Hall, in London, in 1924. . . .

" His life and character are and will always be an inspiration to the youth of our State and Nation. . . .

" The Nation had reposed a great trust in him and in fidelity to this trust death came to him. In his last moments his thoughts were that duty required him to meet with his brethren of the bench at noon. In his fidelity to duty I am reminded of the Roman soldier who met his death at Pompeii when that city was submerged by the eruption of Vesuvius. He did not fly from his post of duty, but remained where duty bade him stay, and nineteen centuries later his remains were found standing erect, sword in hand, and his face towards Rome. And so, Mr. Chairman, our departed brother crossed the bar and met his Pilot face to face, unafraid, conscious that he had lived up to the highest ideals and standards of his race."

The resolutions were adopted and the meeting adjourned.

A pamphlet, published by the Committee, presents in full these resolutions and addresses concerning Mr. Justice Sanford and the eulogies in Court that follow. Memorial Resolutions adopted by the Bar Association of Knox County, Tennessee, and a telegram from the Supreme Court of Texas, by its Chief Justice, are also in that volume.

SUPREME COURT OF THE UNITED STATES

Monday, June 1, 1931.

Present: The CHIEF JUSTICE, MR. JUSTICE HOLMES, MR. JUSTICE VAN DEVANTER, MR. JUSTICE MCREYNOLDS, MR. JUSTICE BRANDEIS, MR. JUSTICE SUTHERLAND, MR. JUSTICE BUTLER, MR. JUSTICE STONE, and MR. JUSTICE ROBERTS.

Mr. ATTORNEY GENERAL MITCHELL addressed the Court as follows:

"*May it please the Court:* On the very day of the death of the late Chief Justice, Edward Terry Sanford, Associate Justice, was suddenly stricken and died. Representatives of the Bar, gathered to pay reverent tribute to his memory, adopted resolutions, which it is now my privilege to present to the Court with the request that they be entered in its records as a token of the high esteem in which Justice Sanford was held by the legal profession."

[The resolutions are printed on pp. xxxvii *et seq., ante.*]

"Justice Sanford's career in the public service had its beginning in the suggestion by Mr. Justice McReynolds, then an Assistant Attorney General of the United States, that he be retained by the Government in the investigation of the Fertilizer Trust in 1905. The marked ability disclosed in that case secured him immediate recognition and resulted in his appointment in 1907 to the position of Assistant Attorney General. While occupying that post he appeared before this Court on several occasions and made a favorable impression by the skill and force with which he presented the cases entrusted to him. He attracted the favorable attention of President Roosevelt, and in 1908 was appointed to be United States District Judge for the Eastern and Middle Districts of Tennessee.

He had hoped to have the post of Solicitor General, and accepted the judicial office with some reluctance, not realizing that he had been set upon the path that would lead him to the highest honor open to a member of his profession.

"During the last forty-five years those appointed United States District Judges have averaged forty-nine years of age when appointed. Judge Sanford was forty-three when he became a District Judge. His case is an example of the gain to the judicial service in appointing to the lower federal courts comparatively young men, of character and education, through the opportunities for distinguished judicial careers thus opened up to them.

"His service as a trial judge was one of exacting labor, rendered more than usually arduous by a temperament which demanded that every case be given the most careful and painstaking consideration regardless of its material importance. While at the bar he had shown a marked preference for practice before appellate courts, the quick and undeliberated decisions necessary in trial work being repugnant to his scholarly and rather cautious nature. For the same reason his duties as a District Judge were not entirely congenial to him, since he was constantly faced with the necessity of passing immediately upon questions to which he would have preferred to give more mature consideration.

"Nevertheless, his preferences in no way influenced his achievements, and his record was an enviable one. The high regard in which he was held by those with whom he was associated was made evident by the spontaneous outburst of approval with which they responded to the proposal that he be elevated to the Supreme Court. When the retirement of Mr. Justice Pitney, on December 31, 1922, created a vacancy, the Senate of the State of Tennessee adopted a resolution urging that Judge Sanford be considered for the position, and the overwhelming indorsement then given him by the people from his sec-

tion of the country, coupled with the desire which had always been his to become a member of an appellate tribunal, must have made his selection for the supreme bench doubly gratifying to him.

"During the seven years of his service as a Justice of the Supreme Court he delivered the opinion of the Court in 130 cases. These opinions, which are to be found in volumes 261 to 281, inclusive, of the Reports, disclose his scholarly training. In addition to his technical equipment he had that culture and breadth of vision so valuable in high judicial office. His professional learning was supplemented by an intimate familiarity with literature, which gave to his judicial opinions an unusual clarity and attractive style. Endowed by nature with the rare gift of felicitous expression, which he used to such good advantage at the bar, he could not be satisfied with a judicial utterance until it had been subjected to careful scrutiny to the end that the exposition of his views and the process of reasoning upon which they were founded might be full and lucid. His judicial labors were characterized by patient and conscientious deliberation upon every aspect of the case in hand. Fidelity to duty was ever his chief concern.

"His judicial opinions cover most of the branches of the law with which this Court is called upon to deal. Those in the *Pocket Veto Case* in the 279th, and in the *Gitlow* and *Fiske* cases in the 268th and 274th, which dealt with the constitutional validity of state statutes defining criminal anarchy, are examples of the excellence of his judicial work.

"All of his writings indicate a marked adherence to the principles on which our Constitution is based, coupled with an appreciation of the need of adjusting the application of those principles to fit the requirements of changing conditions. Conservative in judgment and strict in his adherence to tested doctrines, he was one of that great body of jurists who have maintained the stability of the common-law system of jurisprudence.

"No tribute to Justice Sanford, however brief, would be complete which touched only upon his professional achievements. His early studies, supplemented by foreign travel, bred in him an enduring appreciation of music, literature, and the fine arts. He was in every sense a man of the highest culture. His mastery of the English language and his training in the field of advocacy combined to make him a speaker of unusual ability and charm. But above all, his dominant traits of character were kindliness and affection for his fellow men. His interests in the fields of education and charity were many. The joys of friendship were his constant and supreme delight.

"The widespread grief occasioned by his death was intensified by the fact that, only sixty-four years of age, his faculties matured by long experience and untiring industry, he appeared to have many years of useful service before him. The Nation has lost an able, high-minded judge, and many of us a gracious friend. Of him it may fittingly be said, as Campbell said of Lord Holt, 'Perhaps the excellence which he attained may be traced to the passion for justice by which he was constantly actuated.'"

The CHIEF JUSTICE responded:

"Mr. Attorney General: The Court receives with deep gratification this tribute from the bar to the service of an able and faithful member of this Court, who was taken from us, with tragic suddenness, in the midst of his career.

"The strength of the Court is the resultant of the interaction and coöperation of individual forces, and the successful performance of its function depends upon the discharge of individual responsibility by Justices of equal authority in the decision of all matters that come before the Court. It has recruited its strength both from the bar and from the bench, and the contributions made to the jurisprudence of the Court by those whose judgment has been ripened by the responsibilities of administration in state and federal courts has been a conspicuous feature of its history.

"Mr. Justice Sanford had the advantage not only of careful preparation for the bar under the most exacting and stimulating teachers of the law, and of valuable experience in practice, but of many years of service as a District Judge of the United States. It was the distinguished success with which he met that long-continued test that led to his appointment to this bench. He came here as a graduate of the hard school of judicial experience, and he brought with him an intimate and precise knowledge of the problems of the federal courts. Never sacrificing the dignity, impartiality and authority of his office as a District Judge to any desire for public favor, his ability and fidelity commanded their appropriate and gratifying reward in the esteem and confidence of the comunity that he served, so that the bar and the legislature of the State of Tennessee gave to the proposal of his appointment to this Court a unanimous endorsement. It was pre-eminently his judicial quality which won this general esteem. Without eccentricity, affectation or irritation, but with simplicity, candor, patience and thoroughness, he had applied himself to every judicial task, whether agreeable or irksome, and the applause which greeted the conduct of his office was a tribute to the standards of the community as well as to his own.

"In the District Court, Judge Sanford carried a heavy burden of criminal cases and, as exemplifying his dominant traits, I may quote what has been said by an eminent member of the bar who had long observed his manner of discharging this duty: 'In the administration of the criminal laws he was judge and not prosecutor. The government was only a litigant in his court suing for justice. It stood on a parity with the humblest citizen it accused. The constitution and laws of his country were to be obeyed, and not evaded, by judge, government and accused alike.' Especially prominent in every activity was his unfailing courtesy and grace. Never lacking this quality himself, he looked for it in others, and in the District Court under his guidance there was afforded a notable

illustration of the commendable restraint and propriety in speech which heighten rather than impair the effectiveness of forensic efforts.

"In addition to sound technical training as a lawyer and broad experience as a judge, Mr. Justice Sanford had resources of culture, developed by travel and liberal studies both here and abroad. He was interested in literature, music and art, and those who enjoyed companionship with him were not disappointed because of limitations in his horizon. While the learning of the law was his supreme interest, it neither monopolized nor narrowed him. He was happy in his public addresses and brought to many important meetings the charm of eloquence. The members of the bar cannot fail to remember with especial pleasure his address in London at the Lord Mayor's dinner at Guild Hall on the occasion of the visit, in 1924, of the representatives of the American Bar Association, and his graceful response to the welcome of the French bench and bar in the Palais de Justice in Paris. The lawyers and judges of France had the unusual and welcome opportunity of listening to an eminent member of the American judiciary paying a beautiful tribute in their own tongue to their achievements and aspirations.

"You have alluded, Mr. Attorney General, to the important opinions delivered for this Court by Mr. Justice Sanford, and, as illustrating the quality of his work, you have referred in particular to the *Pocket Veto Case,* 279 U. S. 655, relating to the authority of the President, and also to the cases in which Mr. Justice Sanford dealt in clear and definite utterance with the power of the State as affecting freedom of speech, upholding the necessary authority to punish abuses of that freedom (*Gitlow* v. *New York,* 268 U. S. 652; *Whitney* v. *California,* 274 U. S. 357) while also sustaining the constitutional limitations which safeguard the liberty of the citizen (*Fiske* v. *Kansas,* 274 U. S. 380). In his work in the District Court, Mr. Justice Sanford had given special attention to the difficult problems arising in the administration of the bankruptcy

law, and he performed a noteworthy service in this Court in that branch of jurisprudence, writing a number of opinions in leading cases. *Meek* v. *Centre County Banking Company,* 268 U. S. 426, and *Taylor* v. *Voss,* 271 U. S. 176, are illustrations. Another outstanding judgment delivered by Mr. Justice Sanford was that in *Liberty Warehouse Company* v. *Grannis,* 273 U. S. 70, maintaining the essential limitation of the jurisdiction of the federal courts to 'cases' and 'controversies.' He reaffirmed with careful emphasis the fundamental principle, as he expressed it, 'that the judicial power vested by Article III of the Constitution in this Court and the inferior courts of the United States established by Congress thereunder, extends only to "cases" and "controversies" in which the claims of litigants are brought before them for determination by such regular proceedings as are established for the protection and enforcement of rights, or the prevention, redress, or punishment of wrongs; and that their jurisdiction is limited to cases and controversies presented in such form, with adverse litigants, that the judicial power is capable of acting upon them, and pronouncing and carrying into effect a judgment between the parties, and does not extend to the determination of abstract questions or issues framed for the purpose of invoking the advice of the court without real parties or a real case.'

"In estimating the value of judicial work, it is well not to lay too much stress upon opinions which seem to have a particular importance because of the public attention they receive or the spectacular circumstances of the controversies to which they are addressed. Juristic achievements are not measured by the distinction of litigants, or the amount in controversy, or the dramatic setting which gives temporary notoriety. The most worthy performance of judicial duty in the careful analysis of facts, in exact reasoning, and in the observance of a correct perspective in bringing the results of earlier controversies to their appropriate present service, may be

found in cases which attract at the time little attention on the part of the general public, but achieve importance in the annals of jurisprudence. The final reputation of a judge owes far less to contemporary estimate than to the inevitable later appraisal when his efforts find their appropriate historical setting.

"Mr. Justice Sanford was keenly aware of this, and, with philosophic bent and conscientious application, he was faithful to the judicial tradition, devoting the same care to every case which came before the Court, without regard to its rating in public opinion. He was ever intent upon the intrinsic quality of his work rather than upon adventitious circumstance.

"Although cut off in mid-career, as judicial careers are reckoned, we gratefully recognize the long service that he rendered in a life which enjoyed a succession of deserved honors and was crowned by the fulfillment of a worthy ambition. He met every responsibility with integrity of motive and singleness of purpose, and he discharged every trust with complete fidelity. His life is epitomized in his own words: 'Youth and age have come; youth rejoicing in the splendor of life's morning; and age, steadfast in the majesty of its noonday, serene in the tender glow of its evening sky.' In the midst of that serenity the final summons came, and he was taken from us. Mourning our loss, but enriched by the memory of his friendship and coöperation, we renew our labors."

TABLE OF CASES REPORTED

Page

Acheson, Florida East Coast Ry. Co. *v*..... 551
Adams Grease Gun Corp. *v*. Bassick Mfg. Co..... 531
Adcock *v*. Commissioner..... 537
Aetna Casualty & S. Co. *v*. Phoenix Nat. Bank..... 209
Aetna Life Ins. Co. *v*. Hagemyer..... 542
Akeroyd (James) & Son *v*. United States..... 550
Aleograph Co. *v*. Electrical Research Products..... 553
American Bond & Mortgage Co. *v*. United States... 538
American Car & Foundry Co., Kingston *v*..... 560
American Surety Co. *v*. Greek Catholic Union..... 526
American Trading Co. *v*. H. E. Heacock Co..... 247
Anderson *v*. Guinzburg..... 553
Ard *v*. United States..... 550
Arkansas Natural Gas Corp., Page *v*..... 532
Arkansas Power & L. Co. *v*. West Memphis Co..... 536
Armburg, Boston & Maine R. Co. *v*..... 234
Army & Navy Club *v*. United States..... 548
Asaka Shosen Kaisha *v*. Habicht Braun & Co..... 556
Atlantic Coast Line R. Co. *v*. Temple..... 143
Atlantic Refining Co. *v*. United States..... 542
Bachmann, St. Paul Fire & M. Ins. Co. *v*..... 112
Baltimore Insular Line, Cortes *v*..... 535
Baltimore & Ohio R. Co. *v*. Berry..... 532
Bankers Utilities Co. *v*. National Bank Supply Co... 541
Bassick Mfg. Co., Adams Grease Gun Corp. *v*..... 531
Becker, Carroll *v*..... 380, 534
Benson, Crowell *v*..... 22
Bernstein (M.) & Sons *v*. United States..... 554
Berry, Baltimore & Ohio R. Co. *v*..... 532

Page
Bickell, Smith-Hamburg Scott Welding Co. *v*..... 541
Blakley *v*. Brinson..... 531
Bolton, Grigg *v*..... 538
Bonwit Teller & Co., United States *v*..... 538
Boston & Maine R. Co. *v*. Armburg..... 234
Bowers *v*. Lawyers Mortgage Co..... 182
Bowman (Geo. H.) Co., Mantle Lamp Co. *v*..... 545
Box Elder County, Jones *v*..... 555
Brandywine Hundred Realty Co. *v*. Cotillo..... 555
Brast, Welch Insurance Agency *v*..... 555
Brennen *v*. Smith..... 544
Brinson, Blakey *v*..... 531
British Empire Grain Co. *v*. Paterson Steamships... 413
Bromberg, Rodgers *v*..... 542
Brunk, DePauw University *v*..... 527
Bryan, Speakman *v*..... 539
Buchhalter, Rude *v*..... 535
Buffalo *v*. United States..... 550
Bunker *v*. United States..... 557
Bunn, Hartford Accident & Ind. Co. *v*..... 169
Burnet *v*. Chicago Portrait Co..... 1
Burnet *v*. Coronado Oil & Gas Co..... 393
Burnet *v*. Hall..... 552
Burnet *v*. Leininger..... 136
Burnet, Shearer *v*..... 228
Burnet, Stewart *v*..... 228
California, Farrington *v*..... 530
Callahan *v*. United States..... 515
Campbell River Mills Co., Chicago, M., St. P. & P. R. Co. *v*..... 536
Canada Malting Co. *v*. Paterson Steamships..... 413
Carroll *v*. Becker..... 380, 534
Carter, Southern Cities Distributing Co. *v*..... 525
Chas. H. Phillips Chemical Co. *v*. McKesson & Robbins..... 552
Chetkovich *v*. United States..... 541
Chicago Great Western R. Co. *v*. Des Moines Ry. Co. 537

Page
Chicago, M., St. P. & P. R. Co. *v.* Campbell Co..... 536
Chicago, M., St. P. & P. R. Co. *v.* Nellis..... 543
Chicago Portrait Co., Burnet *v*..... 1
Chicago Short Line Ry. Co., Gidley *v*..... 554
Claiborne-Annapolis Ferry Co. *v.* United States..... 382
Clifton Highland Co. *v.* Lakewood..... 549
Cochran, Slattery *v*..... 525
Colket, Kerens *v*..... 543
Colletti *v.* United States..... 559
Colorado, *Ex parte*..... 523, 528, 530
Comfort, John Wanamaker New York *v*..... 560
Commercial Credit Co., United States *v*..... 534
Commissioner, Adcock *v*..... 537
Commissioner, Lincoln Bank & Trust Co. *v*..... 548
Commissioner, New York Trust Co. *v*..... 556
Commissioner, Northern Trust Co. *v*..... 558
Commissioner, Phelps *v*..... 558
Coombes *v.* Getz..... 434
Corker *v.* Howard..... 540
Coronado Oil & Gas Co., Burnet *v*..... 393
Corsi, U. S. *ex rel.* Stapf *v*..... 535
Cortes *v.* Baltimore Insular Line..... 535
Cotillo, Brandywine Hundred Realty Co. *v*..... 555
Couthoui, F., *v.* United States..... 548
Cramer, Lamb *v*..... 217
Crandall *v.* Habbe..... 540
Crowell *v.* Benson..... 22
Crowell, L'Hote *v*..... 533
Cutcliff *v.* United States..... 556
Czarlinsky *v.* United States..... 549
Dana, Thomson *v*..... 529
Daniel *v.* Guaranty Trust Co..... 154
Davis *v.* Reed..... 542
DeBonis *v.* United States..... 558
Delaware Trust Co., Handy *v*..... 352
DePauw University *v.* Brunk..... 527
Deppe *v.* General Motors Corp..... 545

Page
Des Moines Terminal Co. *v.* Des Moines Ry. Co.... 537
Des Moines Union Ry. Co., Chicago G. W. R. Co. *v.*. 537
Des Moines Union Ry. Co., Des Moines T. Co. *v*.... 537
D. Ginsberg & Sons *v.* Popkin..... 204
Didsbury, Erie R. Co. *v*..... 540
Donnan, Heiner *v*..... 312
Dover, *Ex parte*..... 525
Doyal, Glenn *v*..... 526
Dulion *v.* S. A. Lynch Enterprise Finance Corp.... 540
Eastern Air Transport *v.* Tax Commission..... 147
Electrical Research Products, Aleograph Co. *v*..... 553
E. L. Husting Co., Wisconsin Coca Cola Co. *v*..... 538
Endicott *v.* United States..... 555
Erie R. Co. *v.* Didsbury..... 540
Erie R. Co. *v.* Steele..... 546
Ex parte Colorado..... 523, 528, 530
Ex parte Dover..... 525
Ex parte Keogh..... 526
Ex parte Pocono Pines Hotels Co..... 526
Ex parte Ryan..... 528
Faircloth *v.* United States..... 550
Farrington *v.* California..... 530
F. Couthoui, Inc. *v.* United States..... 548
Ferroni *v.* United States..... 543
Florida East Coast Ry. Co. *v.* Acheson..... 551
Florida *ex rel.* Woods-Young Co. *v.* Tedder..... 557
Flynn, Koenig *v*..... 375, 532
Ford *v.* New York, N. H. & H. R. Co..... 549
Franco *v.* New York Life Ins. Co..... 552
Frigidaire Sales Corp. *v.* Marks..... 544
Galveston, H. & S. A. Ry. Co., Galveston Wharf Co. *v*..... 127
Galveston Wharf Co. *v.* Galveston, H. & S. A. Ry. Co. 127
Galvin, Minneapolis, St. P. & S. S. M. Ry. Co. *v*.... 551
General Import & Export Co. *v.* United States..... 534
General Motors Corp., Deppe *v*..... 545
Geo. H. Bowman Co., Mantle Lamp Co. *v*..... 545

Page
Getz, Coombes *v*. 434
Gibson *v*. United States. 557
Gidley *v*. Chicago Short Line Ry. Co. 554
Ginsberg (D.) & Sons *v*. Popkin. 204
Glenn *v*. Doyal. 526
Goodyear Tire & R. Co. *v*. Overman Tire Co. 545
Great Northern Utilities Co., Commission *v*. 524
Greek Catholic Union, American Surety Co. *v*. 526
Grigg *v*. Bolton. 538
Guaranty Trust Co., Daniel *v*. 154
Guinzburg, Anderson *v*. 553
Guzik *v*. United States. 545
Habbe, Crandall *v*. 540
Habicht Braun & Co., Osaka Shosen Kaisha *v*. 556
Hagemyer, Aetna Life Ins. Co. *v*. 542
Hagner *v*. United States. 427
Hall, Burnet *v*. 552
Hall, White *v*. 553
Handy *v*. Delaware Trust Co. 352
Harding, Illinois *ex rel.*, Kogen *v*. 558
Hartford Accident & Indemnity Co. *v*. Bunn. 169
Heacock (H. E.) Co., American Trading Co. *v*. 247
Heacock (H. E.) Co., Wm. A. Rogers *v*. 247
H. E. Heacock Co., American Trading Co. *v*. 247
H. E. Heacock Co., Wm. A. Rogers, Ltd. *v*. 247
Heiner *v*. Donnan. 312
Hicks, Spencer Kellogg & Sons *v*. 502
Holm, Smiley *v*. 355
Home Title Ins. Co., United States *v*. 191
Hopkins, Planters Cotton Oil Co. *v*. 533
Howard, Corker *v*. 540
Hurley *v*. Kincaid. 95
Hurt *v*. New York Life Ins. Co. 541
Husting (E. L.) Co., Wisconsin Coca Cola Co. *v*. 538
Illick *v*. Trust Co. of Florida. 559
Illinois *ex rel.* Harding, Kogen *v*. 558
I. N. Platt & Co., Lowenstein *v*. 539

Page

Interstate Commerce Comm., Piedmont & N. Ry. Co. *v*. 531
Irving Trust Co., Schoenthal *v*. 536
Jabczynski *v*. United States. 546
Jackson, Michigan *ex rel*. Palm *v*. 547
James Akeroyd & Son *v*. United States. 550
Johnson, Pacific Co. *v*. 480
John Wanamaker New York *v*. Comfort. 560
Jones *v*. Box Elder County. 555
Kansas City Public Service Co. *v*. Ranson. 528
Keogh, *Ex parte*. 526
Kerens *v*. Colket. 543
Kincaid, Hurley *v*. 95
King, Northern Life Ins. Co. *v*. 544
Kingston *v*. American Car & F. Co. 560
Klein *v*. U. S. Fidelity & Guaranty Co. 544
Koenig *v*. Flynn. 375, 532
Kogen *v*. Illinois *ex rel*. Harding. 558
Kombst, United States *v*. 532
Lakewood, Clifton Highland Co. *v*. 549
Lamb *v*. Cramer. 217
Lamb *v*. New Jersey *ex rel*. Tierney. 530
Lamb *v*. Schmitt. 222
Lang *v*. United States. 533
Lawrence-Williams Co., Societe Enfants Gombault *v*. 549
Lawyers Mortgage Co., Bowers *v*. 182
Leach *v*. Nichols. 165
Lee, State Bank & Trust Co. *v*. 547
Lefkowitz, United States *v*. 452
Lehigh Valley R. Co. *v*. Russell. 544
Leininger, Burnet *v*. 136
Leong Dung Dye, U. S. Fidelity & G. Co. *v*. 537
L'Hote *v*. Crowell. 533
Liebmann, New State Ice Co. *v*. 262
Limehouse, United States *v*. 424
Lincoln Bank & Trust Co. *v*. Commissioner. 548
Logan *v*. United States. 555

Page
Louisiana, Taylor *v*. 547
Louisville & N. R. Co., Missouri *ex rel.*, *v*. Ossing. . . 559
Louisville & N. R. Co., Reeves *v*. 524
Lowenstein *v*. I. N. Platt & Co. 539
Lowenstein *v*. Reikes. 539
Lucas, Whitmer *v*. 529
Lujan, Streit *v*. 527
Lynch (S. A.) Enterprise Finance Corp., Dulion *v*. . 540
MacDonald *v*. Plymouth County Trust Co. 533
Mahoning Coal R. Co. *v*. Routzahn. 559
Mahoning Coal R. Co. *v*. United States. 559
Mantle Lamp Co. *v*. Geo. H. Bowman Co. 545
Marks, Frigidaire Sales Corp. *v*. 544
M. Bernstein & Sons *v*. United States. 554
McCarthy *v*. U. S. S. B. Merchant Fleet Corp. 547
McFall, Thomas *v*. 537
McFee *v*. United States. 546
McGraw (P.) Wool Co. *v*. United States. 553
McKesson & Robbins, Phillips Chemical Co. *v*. 552
Mediavilla, Rosa, Monserrate Rafaela *v*. 557
Merchant Fleet Corp., McCarthy *v*. 547
Michigan *ex rel.* Palm *v*. Jackson. 547
Mills Novelty Co. *v*. United States. 547
Minneapolis, St. P. & S. S. M. Ry. Co. *v*. Galvin. . . 551
Missouri *ex rel.* L. & N. R. Co. *v*. Ossing. 559
Morgan Lithograph Co. *v*. Wezel-Naumann Aktiengesellschaft. 545
Mosher *v*. Phoenix. 535
Mulligan, People *ex rel.* Neve *v*. 558
Nalbantian *v*. United States. 536
Nash *v*. United States. 556
National Bank Supply Co., Bankers Utilities Co. *v*. . 541
Nellis, Chicago, M., St. P. & P. R. Co. *v*. 543
Neve, People *ex rel.*, *v*. Mulligan. 558
New Jersey *ex rel.* Tierney, Lamb *v*. 530
New State Ice Co. *v*. Liebmann. 262
New York Life Ins. Co., Franco *v*. 552

Page
New York Life Ins. Co., Hurt *v*. 541
New York Life Ins. Co., Tolbert *v*. 551
New York, N. H. & H. R. Co., Ford *v*. 549
New York Title & M. Co. *v*. Tarver. 524
New York Trust Co. *v*. Commissioner. 556
Nichols, Leach *v*. 165
Northern Life Ins. Co. *v*. King. 544
Northern Trust Co. *v*. Commissioner. 558
Oliver *v*. United States. 543
Ossing, Missouri *ex rel.* L. & N. R. Co. *v*. 559
Overman Cushion Tire Co., Goodyear Co. *v*. 545
Pacific Co. *v*. Johnson. 480
Packer Corp. *v*. Utah. 105
Page *v*. Arkansas Natural Gas Corp. 532
Palm, Michigan *ex rel.*, *v*. Jackson. 547
Paterson Steamships, British Empire Co. *v*. 413
Paterson Steamships, Canada Malting Co. *v*. 413
Paterson Steamships, Starnes *v*. 413
Pennsylvania R. Co., Steinman *v*. 552
People *ex rel.* Neve *v*. Mulligan. 558
Phelps *v*. Commissioner. 558
Philipsborn *v*. United States. 548
Phoenix, Mosher *v*. 535
Phoenix Nat. Bank & T. Co., Aetna Co. *v*. 209
Piedmont & Northern Ry. Co. *v*. Interstate Commerce Comm. 531
Planters Cotton Oil Co. *v*. Hopkins. 533
Platt (I. N.) & Co., Lowenstein *v*. 539
Plymouth County Trust Co., MacDonald *v*. 533
P. McGraw Wool Co. *v*. United States. 553
Pocono Pines Assembly Hotels Co., *Ex parte*. 526
Popkin, D. Ginsberg & Sons *v*. 204
Prudential Insurance Co., Wolfe *v*. 540
Public Service Comm. *v*. Great Northern Util. Co. . . 524
Public Service Comm., Western Distributing Co. *v*. . 119
Quinn, Reichelderfer *v*. 535
Ranson, Kansas City Public Service Co. *v*. 528

Page
Reed, Davis *v*. 542
Reeves *v*. Louisville & N. R. Co. 524
Reichelderfer *v*. Quinn 535
Reikes, Lowenstein *v*. 539
Richardson *v*. United States 543
Rodgers *v*. Bromberg 542
Rogers (Wm. A.), Ltd. *v*. H. E. Heacock Co. 247
Rosa, Monserrate Rafaela *v*. Mediavilla 557
Routzahn, Mahoning Coal R. Co. *v*. 559
Rude *v*. Buchhalter 535
Russell, Lehigh Valley R. Co. *v*. 544
Russo-Asiatic Bank, Tillman *v*. 539
Ruth Mildred, The, United States *v*. 534
Ryan, *Ex parte* 528
St. Louis Southwestern Ry. Co. *v*. Simpson 531
St. Paul Fire & M. Ins. Co. *v*. Bachmann 112
S. A. Lynch Enterprise Finance Corp., Dulion *v*. 540
Scala *v*. United States 554
Scharton, United States *v*. 518
Schmitt, Lamb *v*. 222
Schoenthal *v*. Irving Trust Co. 536
Sconyers *v*. United States 554
Seaboard Air Line Ry. Co. *v*. Spencer 539
Shearer *v*. Burnet 228
Shore *v*. United States 552
Shriver *v*. Woodbine Savings Bank 467
Simpson, St. Louis Southwestern Ry. Co. *v*. 531
Slattery *v*. Cochran 525
Smiley *v*. Holm 355
Smith, Brennen *v*. 544
Smith, United States *v*. 523
Smith-Hamburg Scott Welding Co. *v*. Bickell 541
Societe Enfants Gombault *v*. Lawrence-Williams Co. 549
South Carolina Tax Comm., Eastern Air Trans. *v*. . . 147
Southern Cities Distributing Co. *v*. Carter 525
Southern Pacific Co. *v*. United States 240
Speakman *v*. Bryan 539

Page
Spencer, Seaboard Air Line Ry. Co. *v*..... 539
Spencer Kellogg & Sons *v.* Hicks..... 502
Stapf, U. S. *ex rel.*, *v.* Corsi..... 535
Starnes *v.* Paterson Steamships..... 413
State Bank & Trust Co. *v.* Lee..... 547
Steele, Erie R. Co. *v*..... 546
Steinman *v.* Pennsylvania R. Co..... 552
Stevens *v.* The White City..... 195
Stewart *v.* Burnet..... 228
Streit *v.* Lujan..... 527
Tarver, New York Title & M. Co. *v*..... 524
Taylor *v.* Louisiana..... 547
Taylor *v.* United States..... 534
Tedder, Florida *ex rel.* Woods-Young Co. *v*..... 557
Temple, Atlantic Coast Line R. Co. *v*..... 143
Thomas *v.* McFall..... 537
Thomson *v.* Dana..... 529
Tierney, New Jersey *ex rel.*, Lamb *v*..... 530
Tillman *v.* Russo-Asiatic Bank..... 539
Tolbert *v.* New York Life Ins. Co..... 551
Trombetta *v.* United States..... 550
Trust Co. of Florida, Illick *v*..... 559
Tyson *v.* United States..... 551
United States, American Bond & M. Co. *v*..... 538
United States, Ard *v*..... 550
United States, Army & Navy Club *v*..... 548
United States, Atlantic Refining Co. *v*..... 542
United States *v.* Bonwit Teller & Co..... 538
United States, Buffalo *v*..... 550
United States, Bunker *v*..... 557
United States, Callahan *v*..... 515
United States, Claiborne-Annapolis Ferry Co. *v*..... 382
United States, Colletti *v*..... 559
United States *v.* Commercial Credit Co..... 534
United States, Cutcliff *v*..... 556
United States, Czarlinsky *v*..... 549
United States, DeBonis *v*..... 558

Page
United States, Endicott *v*. 555
United States, Faircloth *v*. 550
United States, F. Couthoui *v*. 548
United States, Ferroni *v*. 543
United States, General Import & Export Co. *v*. 534
United States, Gibson *v*. 557
United States, Guzik *v*. 545
United States, Hagner *v*. 427
United States *v*. Home Title Ins. Co. 191
United States, Jabczynski *v*. 546
United States, James Akeroyd & Son *v*. 550
United States *v*. Kombst. 532
United States, Lang *v*. 533
United States *v*. Lefkowitz. 452
United States *v*. Limehouse. 424
United States, Logan *v*. 555
United States, Mahoning Coal R. Co. *v*. 559
United States, M. Bernstein & Sons *v*. 554
United States, McFee *v*. 546
United States, Mills Novelty Co. *v*. 547
United States, Nalbantian *v*. 536
United States, Nash *v*. 556
United States, Oliver *v*. 543
United States, Philipsborn *v*. 548
United States, P. McGraw Wool Co. *v*. 553
United States, Richardson *v*. 543
United States, Scala *v*. 554
United States *v*. Scharton. 518
United States, Sconyers *v*. 554
United States, Shore *v*. 552
United States *v*. Smith. 523
United States, Southern Pacific Co. *v*. 240
United States, Taylor *v*. 534
United States *v*. The Ruth Mildred. 534
United States, Trombetta *v*. 550
United States, Tyson *v*. 551
United States, Wright *v*. 539

Page
U. S. Cities Corp., Vose *v*. 523
U. S. *ex rel.* Stapf *v*. Corsi. 535
U. S. Fidelity & Guaranty Co., Klein *v*. 544
U. S. Fidelity & G. Co. *v*. Leong Dung Dye. 537
U. S. S. B. Merchant Fleet Corp., McCarthy *v*. 547
Utah, Packer Corp. *v*. 105
Vose *v*. U. S. Cities Corp. 523
Wabash Ry. Co. *v*. Whitcomb. 546
Wanamaker (John) New York *v*. Comfort. 560
Welch Insurance Agency *v*. Brast. 555
Western Distributing Co. *v*. Public Service Comm. . . 119
West Memphis Power & W. Co., Arkansas P. & L. Co. *v*. 536
Wezel-Naumann Aktiengesellschaft Morgan Litho. Co. *v*. 545
Whitcomb, Wabash Ry. Co. *v*. 546
White *v*. Hall. 553
White City, The, Stevens *v*. 195
Whitmer *v*. Lucas. 529
Wm. A. Rogers, Ltd. *v*. H. E. Heacock Co. 247
Wisconsin Coca Cola B. Co. *v*. E. L. Husting Co. . . . 538
Wolfe *v*. Prudential Insurance Co. 540
Woodbine Savings Bank, Shriver *v*. 467
Woods-Young Co., Florida *ex rel.*, *v*. Tedder. 557
Wright *v*. United States. 539

TABLE OF CASES

Cited in Opinions

	Page
Abie State Bank *v.* Bryan, 282 U. S. 765	412
Ada, The, Fed. Cas. No. 38	421
Adams Express Co. *v.* Ohio, 165 U. S. 194	152
Adirondack Ry. Co. *v.* New York, 176 U. S. 335	105
Agnello *v.* United States, 269 U. S. 20	464
Alabama *v.* United States, 279 U. S. 229	524
Albani, The, 169 Fed. 220	421
Alberta Contracting Corp. *v.* Santomassimo, 107 N. J. L. 7	513
Aldrich *v.* Pennsylvania R. Co., 255 Fed. 330	203
Alexander *v.* Greene, 3 Hill 1	200
Allen *v.* Newberry, 21 How. 544	407
Allgeyer *v.* Louisiana, 165 U. S. 578	408
Alnwick, The, 132 Fed. 117	421
Alpha Cement Co. *v.* Massachusetts, 268 U. S. 203	409
Alzua *v.* Johnson, 231 U. S. 106	261
Amalia, The, 3 Fed. 652	421
American Insurance Co. *v.* Canter, 1 Pet. 511	50
American Ry. Express Co. *v.* Trust Co., 47 F. (2d) 16	201
American School of Magnetic Healing *v.* McAnnulty, 187 U. S. 94	91
American Steamboat Co. *v.* Chase, 16 Wall. 522	513
American Steel Foundries *v.* Industrial Board, 284 Ill. 99	84
American Steel Foundries *v.* Robertson, 269 U. S. 372	256, 258
American Surety Co. *v.* Ballman, 104 Fed. 634	215
American Surety Co. *v.* Greek Catholic Union, 284 U. S. 563	216
American Tobacco Co. *v.* Werckmeister, 207 U. S. 284	6
American Waltham Watch Co. *v.* U. S. Watch Co., 173 Mass. 85	260
Anderson *v.* Alaska S. S. Co., 22 F. (2d) 532	79
Anderson *v.* Dunn, 6 Wheat. 204	408
Andrew *v.* People's Bank, 211 Iowa 649	475
Appleby *v.* New York, 271 U. S. 364	450, 475
Apurimac, The, 7 F. (2d) 741	422
Arizona *v.* California, 283 U. S. 423	55
Arizona Grocery Co. *v.* Atchison, T. & S. F. Ry. Co., 284 U. S. 370	58
Arkansas Wholesale Grocers Assn. *v.* Federal Trade Comm., 18 F. (2d) 866	70
Armstrong *v.* Belding Bros. & Co., 297 Fed. 728	79
A. R. Robinson, The, 57 Fed. 667	203
Arturo, The, 6 Fed. 308	201
Ashwaubemie, The, 3 F. (2d) 782	203
Atchison, T. & S. F. Ry. Co. *v.* Saxon, 284 U. S. 458	147

Page

Atlantic City, The, 241 Fed. 62 203
Atlantic Coast Line R. Co. *v.* Davis, 279 U. S. 34 147
Atlantic Coast Line R. Co. *v.* Glenn, 239 U. S. 388 82
Atlantic Coast Line R. Co. *v.* Riverside Mills, 219 U. S. 186 82
Atlantic Transport Co. *v.* Imbrovek, 234 U. S. 52 39, 55, 513
Attorney General *v.* Stone, 209 Mass. 186 169
Audubon Bldg. Co. *v.* Andrews & Co., 187 Fed. 254 119
August Belmont, The, 153 Fed. 639 421
Austin *v.* Tennessee, 179 U. S. 343 108
Baccus *v.* Louisiana, 232 U. S. 334 301
Backus *v.* Ft. Street Union Depot Co., 169 U. S. 557 104
Bailey *v.* Alabama, 219 U. S. 219 329
Baizley Iron Works *v.* Span, 281 U. S. 222 40
Bakelite Corp., *Ex parte*, 279 U. S. 438 51, 58, 87, 89
Baldwin *v.* Missouri, 281 U. S. 586 407, 409
Ball *v.* United States, 140 U. S. 118 431
Baltic Mining Co. *v.* Massachusetts, 231 U. S. 68 409
Baltimore & Carolina S. S. Co. *v.* Norton, 40 F. (2d) 271 68
Baltimore & Ohio S. W. R. Co. *v.* Settle, 260 U. S. 166 408
Bank *v.* Carrollton Railroad, 11 Wall. 624 140
Bank *v.* Deveaux, 5 Cranch 61 407
Bank of Commerce *v.* Tennessee, 161 U. S. 134 187
Bank of Indianola *v.* Miller, 276 U. S. 605 526, 527
Bank of Oxford *v.* Love, 250 U. S. 603 476
Baptist Assn. *v.* Hart's Executor, 4 Wheat. 1 406

Page

Barbour *v.* Walker, 126 Okla. 227 299
Barclay & Co. *v.* Edwards, 267 U. S. 442 234, 338
Barden *v.* Northern Pacific R. Co., 154 U. S. 288 409
Barney *v.* New York, 193 U. S. 430 408
Barnitz *v.* Beverly, 163 U. S. 118 473
Bartemeyer *v.* Iowa, 18 Wall. 129 303
Bates & Guild Co. *v.* Payne, 194 U. S. 106 51, 91
Becherdass Ambaidass, The, Fed. Cas. No. 1,203 421
Bee, The, Fed. Cas. No. 1,219 421
Beeler *v.* Motter, 33 F. (2d) 788 345
Beidler *v.* Tax Commission, 282 U. S. 1 409
Belfast, The, 7 Wall. 624 55, 407
Belgenland, The, 114 U. S. 355 419
Bell's Gap R. Co. *v.* Pennsylvania, 134 U. S. 232 349
Belmonte *v.* Connor, 263 Pa. 470 70
Bernhard *v.* Creene, Fed. Cas. No. 1,349 422
Bernheimer *v.* Converse, 206 U. S. 516 449, 477
Bertig *v.* Norman, 101 Ark. 75 201
Bessette *v.* W. B. Conkey Co., 194 U. S. 324 221
Bethlehem Motors Corp. *v.* Flynt, 256 U. S. 421 493
Bifrost, The, 8 F. (2d) 361 422
Billings *v.* United States, 232 U. S. 261 234
Binderup *v.* Pathe Exchange, 263 U. S. 291 86
Blackstone *v.* Miller, 188 U. S. 189 409
Blakey *v.* Johnson, 76 Ky. 197 215
Block *v.* Hirsh, 256 U. S. 135 71, 301, 306
Blodgett *v.* Holden, 275 U. S. 142 62

Page

Blondell *v.* Consolidated Gas Co., 89 Md. 732 201
Bolden *v.* Jensen, 70 Fed. 505 422
Booth *v.* Monahan, 56 F. (2d) 168 68
Boston Safe Deposit & T. Co. *v.* Commissioner, 267 Mass. 240 169
Boston Store *v.* Graphaphone Co., 246 U. S. 8 406
Boston Towboat Co. *v.* Darrow-Mann Co., 276 Fed. 778 511
Bouldin *v.* United States, 261 Fed. 674 432
Boult *v.* Ship Naval Reserve, 5 Fed. 209 421
Bowers *v.* Lawyers Mortgage Co., 285 U. S. 182 192
Bowman *v.* Continental Oil Co., 256 U. S. 642 407
Boyd *v.* Smythe, 270 U. S. 635 527
Boyd *v.* United States, 116 U. S. 616 466, 467
Boyer, *Ex parte*, 109 U. S. 629 55
Bradley *v.* Huntington, 277 Fed. 948 164
Bragg *v.* Weaver, 251 U. S. 57 104
Brass *v.* Stoeser, 153 U. S. 391 298
Brenham *v.* German American Bank, 144 U. S. 173 406
Bridge Proprietors *v.* Hoboken Co., 1 Wall. 116 441
Bridges *v.* Sheldon, 7 Fed. 17 225
Brinkerhoff-Faris Trust & S. Co. *v.* Hill, 281 U. S. 673 408
Broad River Power Co. *v.* South Carolina, 281 U. S. 537 476
Bromley *v.* McCaughn, 280 U. S. 124 322, 336, 337, 348
Brooklyn, The, Fed. Cas. No. 1,938 201
Brooks *v.* State, 3 Boyce 1 225
Browley *v.* Christensen, 137 U. S. 86 303

Page

Brown *v.* Maryland, 12 Wheat. 419 152
Brown *v.* Routzahn, 58 F. (2d) 329 344
Brown *v.* United States, 113 U. S. 568 68
Browning *v.* Waycross, 233 U. S. 16 111
Brown's Lessee *v.* Clements, 3 How. 650 406
Bruce *v.* Tobin, 245 U. S. 18 180
Brunswick Terminal Co. *v.* Nat. Bank, 192 U. S. 386 475
Brushaber *v.* Union Pac. R. Co., 240 U. S. 1 326, 348
Buck *v.* Beach, 206 U. S. 392 407
Bucker *v.* Klorkgetter, Fed. Cas. No. 2,083 421
Budd *v.* New York, 143 U. S. 517 293, 298
Bunting *v.* Oregon, 243 U. S. 426 408
Burfenning *v.* Chicago, St. P., M. & O. Ry. Co., 163 U. S. 321 51
Burford & Co., Matter of, 36 R. P. C. 139 260
Burnett *v.* Snyder, 76 N. Y. 344 140
Burns Baking Co. *v.* Bryan, 264 U. S. 504 278
Burt *v.* Clay, 207 Ky. 278 84
Burt *v.* Munising Woodenware Co., 222 Mich. 699 84
Butler *v.* Boston & Savannah S. S. Co., 130 U. S. 527 39
Buttercup, The, 8 F. (2d) 281 203
Buttfield *v.* Stranahan, 192 U. S. 470 342
Butts *v.* Merchants & M. Transp. Co., 230 U. S. 126 76
Byars *v.* United States, 273 U. S. 28 464, 467
Calabrese *v.* Locke, 56 F. (2d) 458 68
Callaghan *v.* Myers, 128 U. S. 617 51
Camille v. Couch, 40 Fed. 176 421
Caminetti *v.* United States, 242 U. S. 470 72

Page

Campbell *v.* Barney, 5 Blatchf. 221 6
Canadian Commander, The, 43 F. (2d) 857 421
Cap. F. Bourland Ice Co. *v.* Franklin Util. Co., 180 Ark. 770 283
Capital Traction Co. *v.* Hof, 174 U. S. 1 61
Capone *v.* United States, 51 F. (2d) 609 521
Carey *v.* South Dakota, 250 U. S. 118 76
Carib Prince, The, 170 U. S. 655 510
Carolina, The, 14 Fed. 424 421
Carpenter *v.* Shaw, 280 U. S. 363 400
Carroll *v.* Becker, 45 S. W. (2d) 533 370
Carroll *v.* United States, 267 U. S. 132 466
Carter *v.* Roberts, 177 U. S. 496 90
Case *v.* Beauregard, 99 U. S. 119 140
Cason *v.* Grant County Bank, 97 Ky. 487 216
Castillo *v.* McConnico, 168 U. S. 674 527, 528
Cayuga, The, 59 Fed. 483 51
Cella Commission Co. *v.* Bohlinger, 147 Fed. 419 77
Champion Ice Mfg. Co. *v.* American Bonding Co., 115 Ky. 863 215, 216
Channel *v.* Fassitt, 16 Ohio 166 140
Chapman, *In re*, 166 U. S. 661 408
Charles River Bridge *v.* Warren Bridge, 11 Pet. 420 491
Charter Shipping Co. *v.* Bowring, Jones & Tidy, 281 U. S. 515 418, 420
Chase Nat. Bank *v.* United States, 278 U. S. 327 323, 338
Chelentis *v.* Luckenbach S. S. Co., 247 U. S. 372 39, 80, 514
Cherokee Nation *v.* Southern Kansas Ry. Co., 135 U. S. 641 105

Page

Chicago & Alton R. Co. *v.* Tranbarger, 238 U. S. 67 304
Chicago, B. & Q. R. Co. *v.* Cram, 228 U. S. 70 41
Chicago, B. & Q. R. Co. *v.* Drainage Comm'rs, 200 U. S. 561 304
Chicago, B. & Q. R. Co. *v.* McGuire, 219 U. S. 549 285, 304
Chicago & E. I. R. Co. *v.* Industrial Commission, 284 U. S. 296 239, 406
Chicago Junction Case, 264 U. S. 258 48
Chicago, M. & St. P. Ry. Co. *v.* McCaull-Dinsmore Co., 253 U. S. 97 16
Chicago, M. & St. P. Ry. Co. *v.* Solan, 169 U. S. 133 238
Chicago, R. I. & P. Ry. Co. *v.* Cole, 251 U. S. 54 57
Chicago, R. I. & P. Ry. Co. *v.* Schendel, 270 U. S. 611 86
Chicago, R. I. & P. Ry. Co. *v.* State, 123 Okla. 190 299
Chicago, R. I. & P. Ry. Co. *v.* State, 126 Okla. 48 299
Chicago, R. I. & P. Ry. Co. *v.* United States, 274 U. S. 29 392
Chicago, R. I. & P. Ry. Co. *v.* Zernecke, 183 U. S. 582 41, 82
Chicago, St. P., M. & O. Ry. Co. *v.* Holmberg, 282 U. S. 162 280
Chickasha Cotton Oil Co. *v.* Cotton County Gin Co., 40 F. (2d) 846 274
China, The, 7 Wall. 53 42
Chisholm *v.* Georgia, 2 Dall. 419 409
Choteau *v.* Burnet, 283 U. S. 691 187, 400
Christopher v. Norvell, 201 U. S. 216 449
Churchill's Case, 265 Mass. 117 70, 89
Cinofsky *v.* Industrial Commission, 290 Ill. 521 70, 89
Citizens Bank *v.* Owensboro, 173 U. S. 636 451

Page

Citizens' Telephone Co. *v.* Fuller, 229 U. S. 322 348, 349
City of Carlisle, The, 39 Fed. 807 421
City of Washington, The, 92 U. S. 31 79
Clarence L. Blakeslee, The, 243 Fed. 365 203
Clark *v.* Monarch Engineering Co., 248 N. Y. 107 84
Clark *v.* Nash, 198 U. S. 361 275
Clark *v.* Titusville, 184 U. S. 329 349
Clarke, *Ex parte*, 100 U. S. 399 367
Clay *v.* Waters, 178 Fed. 384 220
Cleveland, C., C. & St. L. Ry. Co. *v.* United States, 275 U. S. 404 391
Cleveland Terminal & V. R. Co. *v.* Cleveland S. S. Co., 208 U. S. 316 55
Cobb *v.* Brown, 193 Fed. 958 135
Cochran *v.* United States, 157 U. S. 286 431
Coe *v.* Errol, 116 U. S. 517 152
Cohan *v.* Commissioner, 39 F. (2d) 540 140
Cohen *v.* United States, 294 Fed. 488 433
Cohens *v.* Virginia, 6 Wheat. 264 419, 423
Collector *v.* Day, 11 Wall. 113 400
Colorado *v.* United States, 271 U. S. 153 390
Commerce, The, 1 Black 574 55
Commercial Bank *v.* Arden & Fraley, 177 Ky. 520 216
Commercial & R. R. Bank *v.* Slocomb, 14 Pet. 60 407
Commissioner *v.* Nevin, 47 F. (2d) 478, cert. den., 283 U. S. 835 345
Commonwealth *v.* Wetherbee, 105 Mass. 149 189
Conley *v.* Barton, 260 U. S. 677 473, 479
Connemara, The, 108 U. S. 352 53
Consumers L. & P. Co. *v.* Phipps, 120 Okla. 223 295

Page

Converse *v.* Hamilton, 224 U. S. 243 477
Converse *v.* Norwich & N. Y. Transp. Co., 33 Conn. 166 134
Conway *v.* Taylor's Executor, 1 Black 603 303
Cook *v.* Marshall County, 196 U. S. 261 349
Cook County Nat. Bank *v.* United States, 107 U. S. 445 518
Coolidge *v.* Commissioner, 268 Mass. 443 169
Coolidge *v.* Long, 282 U. S. 582 326, 338, 450
Corning *v.* McCullough, 1 N. Y. 47 450
Corn Products Rfg. Co. *v.* Eddy, 249 U. S. 427 111
Couthoui *v.* United States, 54 F. (2d) 158, cert. den., 285 U. S. 548 349
Craig *v.* Continental Ins. Co., 141 U. S. 638 511
Crain *v.* United States, 162 U. S. 625 407
Crandall *v.* Nevada, 6 Wall. 35 407
Crane *v.* Hahlo, 258 U. S. 142 47, 78, 449, 450
Crescent Cotton Oil Co. *v.* Mississippi, 257 U. S. 129 529
Crew Levick Co. *v.* Pennsylvania, 245 U. S. 292 408
Critten *v.* Chemical Nat. Bank, 171 N. Y. 219 216
Crooks v. Harrelson, 282 U. S. 55 231
Crow Dog, *Ex parte*, 109 U. S. 556 517
Crozier *v.* Krupp, 224 U. S. 290 104
Cunard S. S. Co. *v.* Smith, 255 Fed. 846 422
Cunney, *In re*, 225 Fed. 426 164
Dahlstrom Metallic Door Co. *v.* Industrial Board, 284 U. S. 594 42, 77, 78, 92
Dahnke-Walker Milling Co. *v.* Bondurant, 257 U. S. 282 153

Page

Dale *v.* Saunders Bros., 218 N. Y. 59 70
Daniel Ball, The, 10 Wall. 557 55
Danielson *v.* Entre Rios Rys. Co., 22 F. (2d) 326 421
Darnell & Son Co. *v.* Memphis, 208 U. S. 113 493
Davidor *v.* Rosenberg, 130 Wis. 22 208
Davis *v.* Farmers' Co-operative Co., 262 U. S. 312 423
Davis *v.* Hildebrandt, 241 U. S. 565 371
Davis *v.* Leslie, Fed. Cas. No. 3,639 421
Davis *v.* Mercantile Trust Co., 152 U. S. 590 181
Davis *v.* Schwartz, 155 U. S. 631 51
Dean *v.* Shingle, 198 Cal. 652 449, 450
Dean *v.* Smith, 23 Wis. 483 208
De Bearn *v.* Safe Deposit Co., 233 U. S. 24 527
Deer, The, Fed. Cas. No. 3,737; 4 Ben. 352 201
Delaware Railroad Tax Case, 18 Wall. 206 491
De Lima *v.* Bidwell, 182 U. S. 1 6, 256
De Lonjay *v.* Hartford Accident & Ind. Co., 35 S. W. (2d) 911 84
Dennison *v.* Payne, 293 Fed. 333 86
Dent *v.* West Virginia, 129 U. S. 114 301
DePue *v.* Salmon Co., 90 N. J. L. 550 513
Des Moines Nat. Bank *v.* Fairweather, 263 U. S. 103 109, 489, 493
De Witt *v.* State, 108 Oh. St. 513 84
Dexter *v.* Edmands, 89 Fed. 467 479
Diamond *v.* Earle, 217 Mass. 499 225
Diamond Distilleries Co. *v.* Gott, 137 Ky. 585 216

Page

Dickerson *v.* United States, 20 F. (2d) 901 518
Di Santo *v.* Pennsylvania, 273 U. S. 34 112
District of Columbia *v.* Brooke, 214 U. S. 138 339
Dohany *v.* Rogers, 281 U. S. 362 47, 105
Doll *v.* Ribetti, 203 Fed. 593 82
Dollar Savings Bank *v.* United States, 19 Wall. 227 479
Dolley *v.* Abilene Nat. Bank, 179 Fed. 461 109
Donnan *v.* Heiner, 48 F. (2d) 1058 325
Dorchy *v.* Kansas, 264 U. S. 286 280
Dorr *v.* United States, 195 U. S. 138 256
Douglas *v.* Noble, 261 U. S. 165 301
Douglass *v.* New York, N. H. & H. R. Co., 279 U. S. 377 87, 423, 525
Doyle *v.* Continental Insurance Co., 94 U. S. 535 407
Doyle *v.* London Guarantee & A. Co., 204 U. S. 599 221
Duignan *v.* United States, 274 U. S. 195 222
Dunbar *v.* United States, 156 U. S. 185 433
Dunphy *v.* Kleinsmith, 11 Wall. 610 406
Eagle, The, 8 Wall. 15 52, 419
Eagle Point, The, 142 Fed. 452 419
East Ohio Gas Co. *v.* Tax Commission, 283 U. S. 465 407
Educational Films Corp. *v.* Ward, 282 U. S. 379 409, 490, 493, 494
Eemdyjk, The, 286 Fed. 385 422
Ellis *v.* Sheffield Co., 2 E. & B. 767 82
El Rio, 162 Fed. 567 203
Empire Trust Co. *v.* Cahan, 274 U. S. 473 216
Employers' Liability Cases, 207 U. S. 463 76
Engel *v.* Davenport, 271 U. S. 33 39, 80, 87

Page

Ennis Water Works *v.* Ennis, 233 U. S. 652 445
Entick *v.* Carrington, 19 How. St. Tr. 1029 466
Erie R. Co. *v.* Collins, 253 U. S. 77 406
Erie R. Co. *v.* Solomon, 237 U. S. 427 526, 527
Erie R. Co. *v.* Szary, 253 U. S. 86 406
Erie R. Co. *v.* Winfield, 244 U. S. 170 239
Ester, The, 190 Fed. 216 422
Estis *v.* Trabue, 128 U. S. 225 179, 180
Ettor *v.* Tacoma, 228 U. S. 148 442, 448, 450
Euclid *v.* Ambler Realty Co., 272 U. S. 365 342, 348
Evans *v.* Nellis, 187 U. S. 271 478
Faber *v.* United States, 221 U. S. 649 6
Fairbank *v.* United States, 181 U. S. 283 501
Fairfield *v.* Gallatin County, 100 U. S. 47 407
Fairgrieve *v.* Marine Ins. Co., 94 Fed. 686 422
Falco, The, 20 F. (2d) 362 422
Farmers Bank *v.* Federal Reserve Bank, 262 U. S. 649 451
Farmers Bank *v.* Minnesota, 232 U. S. 516 350, 400
Farmers Loan & Trust Co. *v.* Funk, 49 Neb. 353 477
Farmers Loan & Trust Co. *v.* Minnesota, 280 U. S. 204 409
F. Couthoui *v.* United States, 54 F. (2d) 158, cert. den., 285 U. S. 548 349
Federal Mining & S. Co. *v.* Thomas, 99 Okla. 24 70
Federal Trade Comm. *v.* Curtis Pub. Co., 260 U. S. 568 47, 70
Federal Trade Comm. *v.* Klesner, 274 U. S. 145 391
Federal Trade Comm. *v.* Pacific States Paper Assn., 273 U. S. 52 70

Page

Ficklen *v.* Taxing District, 145 U. S. 1 408
Fidelity & Columbia Trust Co. *v.* Lucas, 7 F. (2d) 146 346
Fidelity Trust Co. *v.* Gaskell, 195 Fed. 865 163
First National Bank *v.* County Commissioners, 264 U. S. 450 78, 528
First National Bank *v.* Hartford, 273 U. S. 548 491
First National Bank *v.* Maine, 284 U. S. 312 409
Fisk *v.* Bonner Tie Co., 40 Idaho 304 84
Flannery *v.* Willcuts, 25 F. (2d) 951 345
Flash *v.* Conn, 109 U. S. 371 477
Fletcher *v.* Ingram, 46 Wis. 191 201
Flickenger *v.* Accident Commission, 181 Cal. 425 84
Flint *v.* Stone Tracy Co., 220 U. S. 107 338, 490, 491, 493, 494
Forbes *v.* Gracey, 94 U. S. 762 402, 403
Forbes Boat Line *v.* Commissioners, 258 U. S. 338 450
Fore *v.* Fore, 44 Ala. 478 76
Fourteen Diamond Rings *v.* United States, 183 U. S. 176 6
Fourth National Bank *v.* Francklyn, 120 U. S. 747 478
Francis Wright, The, 105 U. S. 381 53
Franklin Coal Co. *v.* Industrial Commission, 296 Ill. 329 70, 89
Frank Marra Co. *v.* Norton, 56 F. (2d) 246 68
Fredensbro, The, 18 F. (2d) 983 422
French *v.* Taylor, 199 U. S. 274 527
Frew *v.* Bowers, 12 F. (2d) 625 328, 350
Friedlander *v.* Texas & Pac. Ry. Co., 130 U. S. 416 406
Frost *v.* Corporation Commission, 278 U. S. 515 237, 273, 281, 283

Page

Galveston, H. & S. A. Ry. Co. *v.* Texas, 210 U. S. 217 152, 408
Garcia *v.* Vela, 216 U. S. 598 181
Garland *v.* Washington, 232 U. S. 642 407
Garnett, *In re*, 141 U. S. 1 39, 55
Garrett *v.* Garrett & Co., 78 Fed. 472 260
Gauzon *v.* Compania General, 245 U. S. 86 261
Gay *v.* United States, 12 F. (2d) 433 433
Gazzam *v.* Phillips' Lessee, 20 How. 372 406
G. & C. Merriam Co. *v.* Syndicate Pub. Co., 237 U. S. 618 260
General American Tank Car Corp. *v* Day, 270 U. S. 367 350, 493
General Ry. Signal Co. *v.* Virginia, 246 U. S. 500 111
Genesee Chief, The, 12 How. 443 49, 52, 55, 407
Georgia, F. & A. Ry. Co. *v.* Blish Milling Co., 241 U. S. 190 131, 135
German Alliance Ins. Co. *v.* Lewis, 233 U. S. 389 301, 303
Giles v. Little, 104 U. S. 291 406
Gillespie *v.* Oklahoma, 257 U. S. 501 398, 401, 403, 405
Gilson *v.* Pennsylvania R. Co., 86 N. J. L. 446 201
Givens *v.* Zerbst, 255 U. S. 11 59
Gleason *v.* Seaboard Air Line Ry. Co., 278 U. S. 349 406
Glenn *v.* Doyal, 285 U. S. 526 528
Go-Bart Co. *v.* United States, 282 U. S. 344 463, 464
Goble *v.* Clark, 56 F. (2d) 170 69
Goldman *v.* Furness, Withy & Co., 101 Fed. 467 421
Gompers *v.* Bucks Stove & Range Co., 221 U. S. 418 220
Gordon *v.* Ogden, 3 Pet. 33 406
Gordon *v.* Tax Appeal Court, 3 How. 133 408
Gorham Mfg. Co. *v.* Tax Commission, 266 U. S. 265 528
Gorsuch *v.* United States, 34 F. (2d) 279 518

Page

Gouled *v.* United States, 255 U. S. 298 465, 466
Grace & Co. *v.* Marshall, 56 F. (2d) 441 69
Grafton *v.* Meikleham, 246 Fed. 737 222
Grafton *v.* United States, 206 U. S. 333 90
Graham *v.* Goodcell, 282 U. S. 409 474
Grandi *v.* United States, 262 Fed. 123 432
Grant *v.* Marshall, 56 F. (2d) 654 69
Grant Smith-Porter Co. *v.* Rohde, 257 U. S. 469 40
Graves *v.* Minnesota, 272 U. S. 425 342
Grays Harbor Stevedore Co. *v.* Marshall, 36 F. (2d) 814 69
Great Atlantic & Pac. Tea Co. *v.* Maxwell, 284 U. S. 575 349
Great Falls Mfg. Co. *v.* Attorney General, 124 U. S. 581 104
Great Northern Ry. Co. *v.* Galbreath Cattle Co., 271 U. S. 99 135
Great Western Power Co. *v.* Pillsbury, 170 Cal. 180 76
Green *v.* Frazier, 253 U. S. 233 285, 305
Green *v.* Industrial Commission, 121 Okla. 211 84
Greenhalgh Co. *v.* Farmers' Nat. Bank, 226 Pa. 184 215
Greenwich, The, 270 Fed. 42 203
Greenwood *v.* Freight Co., 105 U. S. 13 442
Greer *v.* United States, 245 U. S. 559 406
Gregg Dyeing Co. *v.* Query, 166 S. C. 117 152
Griffiths & Sprague Stevedoring Co. *v.* Marshall, 56 F. (2d) 665 69
Grimley, *In re*, 137 U. S. 147 58, 90

Page

Group No. 1 Oil Corp. *v.* Bass, 283 U. S. 279 399, 400, 401, 403
Guarantee Co. *v.* Mechanics Bank, 80 Fed. 766 189
Guaranty Trust Co. *v.* New York & Q. C. Ry. Co., 282 U. S. 803 527
Guinzburg *v.* Anderson, 51 F. (2d) 592 325
Gulf, C. & S. F. Ry. Co. *v.* Texas, 204 U. S. 403 408
Gundling *v.* Chicago, 177 U. S. 183 108
Gunning *v.* Cooley, 281 U. S. 90 147, 204
Gunther *v.* Liverpool & L. & G. Ins. Co., 134 U. S. 110 116
Gunther *v.* Compensation Commission, 41 F. (2d) 151 69
Guy C. Goss, The, 53 Fed. 826 79
Haas *v.* Henkel, 216 U. S. 462 520
Hackett *v.* First Nat. Bank, 114 Ky. 193 215
Hale *v.* Hardon, 95 Fed. 747 479
Hale *v.* Wharton, 73 Fed. 739 225
Hall *v.* Spaulding, 42 N. H. 259 117
Hall *v.* White, 48 F. (2d) 1060 325
Hall & Long *v.* Railroad Cos., 13 Wall. 367 214
Hamilton, The, 207 U. S. 398 39
Hammerschmidt *v.* United States, 265 U. S. 182 521
Hammond Packing Co. *v.* Arkansas, 212 U. S. 322 451
Hancock Nat. Bank *v.* Farnum, 176 U. S. 640 479
Handy *v.* Delaware Trust Co., 285 U. S. 352 332
Hannis Distilling Co. *v.* Baltimore, 216 U. S. 285 527
Hanover Milling Co. *v.* Metcalf, 240 U. S. 403 260

Page

Hardee *v.* Wilson, 146 U. S. 179 181
Hardware Dealers Mut. Fire Ins. Co. *v.* Glidden Co., 284 U. S. 151 47, 78, 111, 240, 342
Harris *v.* Commissioner, 39 F. (2d) 546 140
Harrison *v.* Remington Paper Co., 140 Fed. 385 442, 448
Hartford Accident & Ind. Co. *v.* Southern Pac. Co., 273 U. S. 207 39, 49, 512
Haseltine *v.* Central Bank, 183 U. S. 130 178
Hassenbusch, *In re*, 108 Fed. 38 208
Hatch *v.* Reardon, 204 U. S. 152 349
Hawke *v.* Smith, No. 1, 253 U. S. 221 365, 372
Hawkins *v.* Bleakly, 243 U. S. 210 238
Hawthorne *v.* Calef, 2 Wall. 10 442, 444, 450
Hays *v.* Port of Seattle, 251 U. S. 233 105
Head *v.* Amoskeag Mfg. Co., 113 U. S. 9 274
Heald *v.* District of Columbia, 259 U. S. 114 234
Hebe Co. *v.* Shaw, 248 U. S. 297 111
Hebert *v.* Louisiana, 272 U. S. 312 527, 528
Heff, Matter of, 197 U. S. 488 407
Heiner *v.* Colonial Trust Co., 275 U. S. 232 187, 400
Heiner *v.* Donnan, 285 U. S. 312 354
Heisler *v.* Thomas Colliery Co., 260 U. S. 245 152, 529
Helson *v.* Kentucky, 279 U. S. 245 153, 407
Henderson *v.* Peter Henderson & Co., 9 F. (2d) 787 260
Henley *v.* Myers, 215 U. S. 373 474, 479
Henrietta Mills *v.* Rutherford County, 281 U. S. 121 528
Henry *v.* A. B. Dick Co., 224 U. S. 1 406

Page

Hepburn *v.* Griswold, 8 Wall. 603 407
Heredia *v.* Davies, 12 F. (2d) 500 422
Herring-Hall-Marvin Safe Co. *v.* Hall's Safe Co., 208 U. S. 554 260
Herron *v.* Southern Pac. Co., 283 U. S. 91 61
Hertz *v.* Woodman, 218 U. S. 205 406
Hill *v.* Merchants Mut. Ins. Co., 134 U. S. 515 479
Hillen *v.* Accident Commission, 199 Cal. 577 69
Hill's Case, 268 Mass. 491 70
Himely *v.* Rose, 4 Cranch 241 407
Hoage *v.* Murch Bros. Const. Co., 50 F. (2d) 983 69
Hoeper *v.* Tax Commission, 284 U. S. 206 142, 324, 328
Hohman v. State, 122 Okla. 45 299
Home Insurance Co. *v.* New York, 134 U. S. 594 489
Homer Ramsdell Co. *v.* Compagnie Generale Transatlantique, 182 U. S. 406 42
Home Tel. & Tel. Co. *v.* Los Angeles, 227 U. S. 278 407
Hope Natural Gas Co. *v.* Hall, 274 U. S. 284 348
Hornbuckle *v.* Toombs, 18 Wall. 648 406
Houston *v.* St. Louis Packing Co., 249 U. S. 479 51
Houston Ship Channel Stevedoring Co. *v.* Sheppeard, 57 F. (2d) 259 69
Howard *v.* Monahan, 31 F. (2d) 480 69
Howard *v.* Monahan, 33 F. (2d) 220 43
Howard *v.* United States, 65 Ct. Cls. 332 345
Hudson *v.* Guestier, 6 Cranch 281 407
Huffaker *v.* Fairfax, 115 Okla. 73 300
Hughes, *In re*, 262 Fed. 500 164
Huntington *v.* Attrill, 146 U. S. 657 441

Page

Hygrade Provision Co. *v.* Sherman, 266 U. S. 497 111
Hylton *v.* United States, 3 Dall. 171 407
Hypodame, The, 6 Wall. 216 510
Ibanez *v.* Hong Kong Banking Corp., 246 U. S. 627 261
Illinois Automobile Ins. Exchange *v.* Braun, 280 Pa. 550 215
Illinois Central R. Co. *v.* Behrens, 233 U. S. 473 239
Illinois Central R. Co. *v.* McKendree, 203 U. S. 514 77
Imperial Fire Ins. Co. *v.* Coos County, 151 U. S. 452 116
Independent Pier Co. *v.* Norton, 54 F. (2d) 734 68
Index Mines Corp. *v.* Industrial Commission, 82 Colo. 272 70
Indian Motocycle Co. *v.* United States, 283 U. S. 570 152, 400
Industrial Commission *v.* Continental Investment Co., 78 Colo. 398 84
Industrial Commission *v.* Nordenholt Corp., 259 U. S. 263 55
Infanta, The, Fed. Cas. No. 7,030 421
Insurance Co. *v.* Dunn, 19 Wall. 214 86
Insurance Co. *v.* Stinson, 103 U. S. 25 216
Inter-Island Steam Nav. Co. *v.* Ward, 242 U. S. 1 6
International Harvester Co. *v.* Carlson, 217 Fed. 736 164
International Shoe Co. *v.* Federal Trade Comm., 280 U. S. 291 47, 51, 70
International Shoe Co. *v.* Shartel, 279 U. S. 429 349
International Silver Co. *v.* S. L. & G. H. Rogers Co., 110 Fed. 955 260
International Text-Book Co. *v.* District of Columbia, 35 App. D. C. 307 112

Page

Interstate Busses Corp. *v.* Blodgett, 276 U. S. 245 350
Interstate Busses Corp. *v.* Holyoke St. Ry. Co., 273 U. S. 45 238, 240
Interstate Commerce Comm. *v.* Baird, 194 U. S. 25 48
Interstate Commerce Comm. *v.* Humboldt S. S. Co., 224 U. S. 474 54
Interstate Commerce Comm. *v.* Illinois Central R. Co., 215 U. S. 452 75
Interstate Commerce Comm. *v.* Louisville & N. R. Co., 227 U. S. 88 48, 50, 70, 93
Interstate Commerce Comm. *v.* Northern Pac. Ry. Co., 216 U. S. 538 93
Iowa Central Ry. Co. *v.* Iowa, 160 U. S. 389 526
Iquitos, The, 286 Fed. 383 421
Iron Dyke Copper Min. Co. *v.* Iron Dyke R. Co., 132 Fed. 208 225
Iroquois, The, 194 U. S. 240 41
Irvine *v.* Elliott, 203 Fed. 82 474
Isthmian S. S. Co. *v.* United States, 53 F. (2d) 251 70
Ives *v.* South Buffalo Ry. Co., 201 N. Y. 271 409
Jackson *v.* People, 9 Mich. 111 76
Jarka Corp. *v.* Monahan, 48 F. (2d) 283 68
Jarka Corp. *v.* Norton, 56 F. (2d) 287 68
Jaybird Mining Co. *v.* Weir, 271 U. S. 609 400, 405
Jefferson Branch Bank *v.* Skelly, 1 Black 436 441, 491
Jello-O Co. *v.* Landes, 20 F. (2d) 120 112
Jin Fuey Moy *v.* United States, 254 U. S. 189 406
John G. Stevens, The, 170 U. S. 113 201
Johnson Farm Loan Co. *v.* McManigal, 288 Fed. 185 222
Jones *v.* Bacon, 145 N. Y. 446 214

Page

Jones *v.* Pettingill, 245 Fed. 269 222
Jones *v.* Portland, 245 U. S. 217 305
Jones *v.* Sanitary District, 265 Ill. 98 117
Joslin Mfg. Co. *v.* Providence, 262 U. S. 668 105
Joyce *v.* Deputy Commissioner, 33 F. (2d) 218 68
J. P. Donaldson, The, 167 U. S. 599 200
Justices *v.* Murray, 9 Wall. 274 86
Kaiser Wilhelm der Grosse, The, 175 Fed. 215 421
Kansas City Sou. Ry. Co. *v.* Carl, 227 U. S. 639 135
Karoo, The, 49 Fed. 651 421
Keeney *v.* New York, 222 U. S. 525 349
Kehrer *v.* Stewart, 197 U. S. 60 152
Keller *v.* Potomac Elec. Power Co., 261 U. S. 428 50
Kenney & Greenwood, *In re*, 23 F. (2d) 681 164
Keokee Consolidated Coke Co. *v.* Taylor, 234 U. S. 224 348
Kepner *v.* United States, 195 U. S. 100 208
Kestor, The, 110 Fed. 432 422
Keyway Stevedoring Co. *v.* Clark, 43 F. (2d) 983 68
Kilbourn *v.* Thompson, 103 U. S. 168 408
Killgore *v.* Zinkham, 274 Fed. 140 71
Kimberly *v.* Arms, 129 U. S. 512 51, 79
King & Co. *v.* Horton, 276 U. S. 600 526, 527
Kirk *v.* Board of Health, 83 S. C. 372 89
Kline *v.* Burke Construction Co., 260 U. S. 226 86
Knappingsborg, The, 26 F. (2d) 935 422
Knickerbocker Ice Co. *v.* Stewart, 253 U. S. 149 39, 41, 514

Page

Knickerbocker Trust Co. *v.* Myers, 133 Fed. 764 442
Knights Templars' Indemnity Co. *v.* Jarman, 187 U. S. 197 76
Knowlton *v.* Moore, 178 U. S. 41 322, 348
Koenig *v.* Flynn, 258 N. Y. 292 370
Kountze *v.* Omaha Hotel Co., 107 U. S. 378 406
Kranski *v.* Atlantic Coast Shipping Co., 56 F. (2d) 166 69
Kunhardt *v.* Bowers, 57 F. (2d) 1054 344
Kunkle Bros., The, 211 Fed. 540 203
Kurczak *v.* United States, 14 F. (2d) 109 518
LaBelle Iron Works *v.* United States, 256 U. S. 377 234, 338
La Bourgogne, 144 Fed. 781 51, 79
La Bourgogne, 210 U. S. 95 511
Lady Furness, The, 84 Fed. 679 421
Lake Shore & M. S. Ry. Co. *v.* Ohio, 173 U. S. 285 304
Lake Shore & M. S. Ry. Co. *v.* Smith, 173 U. S. 684 407, 442
Lake Superior & M. R. Co. *v.* United States, 93 U. S. 442 243
Lake Washington Shipyards *v.* Brueggeman, 56 F. (2d) 665 69
Lamb *v.* Cramer, 285 U. S. 217 224
Lamington, The, 87 Fed. 752 422
Langnes *v.* Green, 282 U. S. 531 418, 420
La Tourette *v.* McMaster, 248 U. S. 465 525
Lawrence v. Hyde, 77 W. Va. 639 117
Lawton *v.* Steele, 152 U. S. 133 529
Leach *v.* Nichols, 285 U. S. 165 336
Leach *v.* Savings Bank, 203 Iowa 1052 475
League *v.* Texas, 184 U. S. 156 474, 479

Page

Lea Mathew Shipping Corp. *v.* Marshall, 56 F. (2d) 860 69
Leather Mfrs. Bank *v.* Morgan, 117 U. S. 96 216
Leathers *v.* Blessing, 105 U. S. 626 513
Lee *v.* Chesapeake & O. Ry. Co., 260 U. S. 653 406
Legal Tender Cases, 12 Wall. 457 284, 407
Leisy *v.* Hardin, 135 U. S. 100 407
Leloup *v.* Port of Mobile, 127 U. S. 640 407
Leman *v.* Krentler-Arnold Hinge Last Co., 284 U. S. 448 221
Lemke *v.* Farmers Grain Co., 258 U. S. 50 153
Leser *v.* Garnett, 258 U. S. 130 366
Liggett Co. *v.* Baldridge, 278 U. S. 105 278
Lilian M. Vigus, The, Fed. Cas. No. 8346 421
Lindsley *v.* Natural Carbonic Gas Co., 220 U. S. 61 529
Livengood *v.* Ball, 63 Okla. 93 227
Liverpool & London Ins. Co. *v.* Gunther, 116 U. S. 113 116
Lochner *v.* New York, 178 U. S. 45 408
Loetscher *v.* Burnet, 60 App. D. C. 38 345
Loftus *v.* Pennsylvania R. Co., 107 Oh. St. 352 525
Logan *v.* Bank of Scotland, (1906) 1 K. B. 141 423
Logan *v.* Provident Society, 57 W. Va. 384 118
Lohr *v.* Wolfe, 71 W. Va. 627 117
Lombard *v.* Park Commissioners, 181 U. S. 33 527, 528
London Guarantee & Accident Co. *v.* Industrial Comm., 279 U. S. 109 40, 55
London Joint Stock Bank *v.* MacMillan & Arthur, [1918] A. C. 777 216

Page

London Street Tramways Co. *v.* County Council, (1898) A. C. 375 410
Long Island Water Supply Co. *v.* Brooklyn, 166 U. S. 685 47, 78
Lord *v.* County Commissioners, 105 Me. 556 76
Los Angeles *v.* Young, 118 Cal. 295 76
Los Angeles Brush Mfg. Corp. *v.* James, 272 U. S. 701 78, 79
Lottawanna, The, 21 Wall. 558 39
Louisiana *v.* New Orleans, 109 U. S. 285 450
Louisiana Navigation Co. *v.* Oyster Commission, 226 U. S. 99 179
Louisiana Ry. & Nav. Co. *v.* New Orleans, 235 U. S. 164 441
Louis Pisitz Dry Goods Co. *v.* Yeldell, 274 U. S. 112 82
Louisville, C. & C. R. Co. *v.* Letson, 2 How. 497 407
Louisville & N. R. Co. *v.* United States, 245 U. S. 463 70
Lower Vein Coal Co. *v.* Industrial Board, 255 U. S. 144 42
L. P. Dayton, The, 120 U. S. 337 200
Lucas *v.* Alexander, 279 U. S. 573 62
Lucas *v.* Earl, 281 U. S. 111 141, 142
Luckenbach S. S. Co. *v.* United States, 272 U. S. 533 53
Luscomb *v.* Commissioner, 30 F. (2d) 818 344
Macallen Co. *v.* Massachusetts, 279 U. S. 620 409, 490, 491, 494, 497
Madera Sugar Pine Co. *v.* Industrial Comm., 262 U. S. 499 42, 238
Magee *v.* Commissioner, 256 Mass. 512 169

Page

Maggie Hammond, The, 9 Wall. 435 420
Magoun *v.* Illinois Trust & S. Bank, 170 U. S. 283 348
Maine *v.* Grand Trunk Ry. Co., 142 U. S. 217 408
Manchester *v.* Massachusetts, 139 U. S. 240 529
Manhattan Co. *v.* Blake, 148 U. S. 412 490
Manigault *v.* Springs, 199 U. S. 473 105
Manley *v.* Georgia, 279 U. S. 1 280, 329
Manufacturers Ry. Co. *v.* United States, 246 U. S. 457 93
Marcus Brown Holding Co. *v.* Feldman, 256 U. S. 170 306
Marin *v.* Augedahl, 247 U. S. 142 86
Marine Transit Corp. *v.* Dreyfus, 284 U. S. 263 49
Marion & Rye Valley Ry. Co. *v.* United States, 270 U. S. 280 104
Market Co. *v.* Hoffman, 101 U. S. 112 208
Marks *v.* Carne (1909), 2 K. B. 516 84
Marriott *v.* Brune, 9 How. 619 6
Marron *v.* United States, 275 U. S. 192 465
Marshall *v.* Baltimore & O. R. Co., 16 How. 314 407
Maryland Casualty Co. *v.* Dickerson, 213 Ky. 305 216
Mason *v.* Eldred, 6 Wall. 231 406
Mason *v.* Routzahn, 275 U. S. 175 68
Mason *v.* The Blaireau, 2 Cranch 240 420
Mason *v.* United States, 17 F. (2d) 317 346
Mason *v.* United States, 136 U. S. 581 181
Masterson *v.* Herndon, 10 Wall. 416 180
Mather *v.* McLaughlin, 57 F. (2d) 223 345

Page

Matheus *v.* U. S. *ex rel.* Cunningham, 282 U. S. 802 529
Matthews *v.* Huwe, 269 U. S. 262 180
McBride *v.* Neal, 214 Fed. 966 222
McCahan Sugar Rfg. Co. *v.* Norton, 43 F. (2d) 505 68
McCaughn *v.* Carvill, 43 F. (2d) 69 346
McClellan *v.* Carland, 217 U. S. 268 419, 423
McClure *v.* Commissioner, 56 F. (2d) 548 344
McCray *v.* United States, 195 U. S. 27 349
McCulloch *v.* Maryland, 4 Wheat. 316 467
McDonald *v.* Oregon Navigation Co., 233 U. S. 665 527
McDowell *v.* Duer, 78 Ind. App. 440 84
McKenna *v.* Anderson, 31 F. (2d) 1016, cert. den., 279 U. S. 869 349
McLean *v.* Arkansas, 211 U. S. 539 285
McNamara *v.* Gaylord, 3 Oh. Fed. Dec. 543, 1 Bond 302 140
McPherson *v.* Blacker, 146 U. S. 1 369
Medbury *v.* United States, 173 U. S. 492 90
Mellen *v.* Moline Malleable Iron Works, 131 U. S. 352 219
Mensevich *v.* Tod, 264 U. S. 134 7
Merchants' & Miners' Transp. Co. *v.* Norton, 32 F. (2d) 513 68
Meredith *v.* United States, 13 Pet. 486 477, 479
Merriam *v.* Hartford & N. H. R. Co., 20 Conn. 354 134
Merrick *v.* N. W. Halsey & Co., 242 U. S. 568 285
Merrimack River Savings Bank *v.* Clay Center, 219 U. S. 527 220
Messel *v.* Foundation Co., 274 U. S. 427 40, 514

Page

Metcalf *v.* Barker, 187 U. S. 165 219
Metcalf & Eddy *v.* Mitchell, 269 U. S. 514 399, 400
Metropolis Theatre Co. *v.* Chicago, 228 U. S. 61 349
Meyer *v.* United States, 60 Ct. Cls. 474 345
Michigan Transit Corp. *v.* Grown, 56 F. (2d) 200 69
Middletown Bank *v.* Railway Co., 197 U. S. 394 478
Milan, The, Lush. Adm. 401 418
Miller *v.* Horton, 152 Mass. 540 59, 89
Miller *v.* McLaughlin, 281 U. S. 261 529
Miller *v.* Milwaukee, 272 U. S. 713 491, 493, 496
Miller *v.* Robertson, 266 U. S. 243 190
Miller *v.* Schoene, 276 U. S. 272 348
Miller *v.* United States, 300 Fed. 529 463
Miller *v.* Wilson, 236 U. S. 373 111, 348
Millers' Indemnity Underwriters *v.* Braud, 270 U. S. 59 40
Milliken *v.* United States, 283 U. S. 15 322, 337, 339, 342, 350, 474
Mills *v.* Scott, 99 U. S. 25 477
Milwaukee Western Fuel Co. *v.* Industrial Comm. 159 Wis. 635 76
Minnesota *v.* First Nat. Bank, 273 U. S. 561 491
Minnesota Iron Co. *v.* Kline, 199 U. S. 593 238
Minter *v.* Crommelin, 18 How. 87 59
Missouri *v.* Dockery, 191 U. S. 165 348
Missouri *ex rel.* Hurwitz *v.* North, 271 U. S. 40 57, 78
Missouri, K. & T. Ry. Co. *v.* May, 194 U. S. 267 348
Missouri, K. & T. Ry. Co. *v.* Ward, 244 U. S. 383 135

Page

Missouri Pacific Ry. Co. *v.* Boone, 270 U. S. 466 62, 76
Missouri Pacific Ry. Co. *v.* Kansas, 248 U. S. 276 369
Missouri Pacific Ry. Co. *v.* Mackey, 127 U. S. 205 238
Missouri Pacific Ry. Co. *v.* Reynolds-Davis Grocery Co., 268 U. S. 366 131, 135
Missouri Pacific Ry. Co. *v.* Tucker, 230 U. S. 340 41
Mitchel *v.* Bowers, 15 F. (2d) 287 140
Mitchell *v.* Burlingham, 4 Wall. 270 407
Mobile, J. & K. C. R. Co. *v.* Turnipseed, 219 U. S. 35 329
Mobile & Ohio R. Co. *v.* Tennessee, 153 U. S. 486 441
Moffitt *v.* Kelly, 218 U. S. 400 526, 528
Montapedia, The, 14 Fed. 427 421
Montgomery *v.* Thompson, (1891) A. C. 217; 64 L. T. R. 748 260
Moore, *In re,* 209 U. S. 490 406
Moran *v.* Bowley, 179 N. E. 526 370
Morgan *v.* United States, 113 U. S. 476 407
Morrissey, *In re,* 137 U. S. 157 59, 90
Morse Drydock & Repair Co. *v.* Northern Star, 271 U. S. 552 39
Morton *v.* Nebraska, 21 Wall. 660 59
Moss *v.* Smith, 171 Cal. 777 445, 451
Moss Tie Co. *v.* Tanner, 44 F. (2d) 928 69
Motion Picture Co. *v.* Film Co., 243 U. S. 502 406
Mountain Timber Co. *v.* Washington, 243 U. S. 219 42, 47, 238
Mugler *v.* Kansas, 123 U. S. 623 303
Muir *v.* The Brig Brisk, Fed. Cas. No. 9901 421

Page

Muller *v.* Oregon, 208 U. S. 412 286, 408
Mulrooney *v.* Todd (1909), 1 K. B. 165 84
Munn *v.* Illinois, 94 U. S. 113 284, 293, 302, 408
Murphy *v.* California, 225 U. S. 623 348
Murphy *v.* Shipley, 200 Iowa 857 70
Murray *v.* Wasatch Grading Co., 73 Utah 430 84
Murray's Lessee *v.* Hoboken Land Co., 18 How. 272 49, 50
Musey *v.* United States, 37 F. (2d) 673 433
Mutual Film Corp. *v.* Industrial Comm., 236 U. S. 230 112
Myers *v.* United States, 272 U. S. 52 369
Napa State Hospital *v.* Flaherty, 134 Cal. 315 447, 451
Napa Valley Electric Co. *v.* Railroad Comm., 251 U. S. 366 78
Napoleon, The, Fed. Cas. No. 10015 421
National Bank *v.* Whitney, 103 U. S. 99 406
Neal *v.* Commissioner, 53 F. (2d) 806 344
Near *v.* Minnesota, 283 U. S. 697 280
Nelson *v.* Marshall, 56 F. (2d) 654 69
Neptune Steam Nav. Co. *v.* Sullivan Timber Co., 37 Fed. 159 422
Netograph Co. *v.* Scrugham, 197 N. Y. 377 225
New Amsterdam Casualty Co. v. Hoage, 46 F. (2d) 837 69
Newberry v. United States, 256 U. S. 232 367
New Brunswick *v.* United States, 276 U. S. 547 402
New Jersey Tel. Co. *v.* Tax Board, 280 U. S. 338 152
Newman, *Ex parte,* 14 Wall. 152 420

Page

New Orleans City & L. R. Co. *v.* New Orleans, 143 U. S. 192 408
New Orleans Waterworks *v.* Louisiana Sugar Co., 125 U. S. 18 441
New York *v.* Latrobe, 279 U. S. 421 349
New York *v.* Miln, 11 Pet. 102 408
New York, The, 104 Fed. 561 181
New York, The, 175 U. S. 187 418, 419
New York Central R. Co. *v.* Chisholm, 268 U. S. 29 418
New York Central R. Co. *v.* White, 243 U. S. 188 42, 47, 78, 82, 238
New York City *v.* Pine, 185 U. S. 93 104
New York & Queens Gas Co. *v.* McCall, 219 N. Y. 84 75
New York & Queens Gas Co. *v.* McCall, 245 U. S. 345 78
New York Trust Co. *v.* Eisner, 256 U. S 345 169, 336
Ng Fung Ho *v.* White, 259 U. S. 276 46, 60, 61, 90
Nichols *v.* Coolidge, 274 U. S. 531 326, 338, 350, 351
Nichols *v.* Horton, 14 Fed. 327 225
Nickel *v.* Cole, 256 U. S. 222 526, 528
Nicol *v.* Ames, 173 U. S. 509 342
Nixon *v.* Herndon, 273 U. S. 536 280
Nixon *v.* Nash, 12 Oh. St. 647 140
Noble *v.* Union River Logging Co., 147 U. S. 165 59, 85, 91
Noble State Bank *v.* Haskell, 219 U. S. 104 476
Noddleburn, The, 30 Fed. 142 422
Nogueira *v.* New York, N. H. & H. R. Co., 281 U. S. 128 39, 42, 55
Noonan *v.* Lee, 2 Black 499 406
Norfolk Turnpike Co. *v.* Virginia, 225 U. S. 264 179
Norris Coal Co. *v.* Jackson, 80 Ind. App. 423 70

Page

North American Cold Storage Co. *v.* Chicago, 211 U. S. 306 89
Northern Coal Co. v. Strand, 278 U. S. 142 39, 40
Northern Pacific Ry. Co. *v.* Dept. of Public Works, 268 U. S. 39 78
Northern Pacific Ry. Co. *v.* Solum, 247 U. S. 477 78
North Star, The, 151 Fed. 168 52
North Star, The, 106 U. S. 17 510
Northwestern Insurance Co. *v.* Wisconsin, 275 U. S. 136 400
Northwestern Stevedoring Co. v. Marshall, 41 F. (2d) 28 69
Nyack, The, 199 Fed. 383 52
O'Banner *v.* Pendlebury, 107 N. J. L. 245 84
Obrecht-Lynch Corp. *v.* Clark, 30 F. (2d) 144 68
Ocean Accident & G. Corp. *v.* Wilson, 36 Ga. App. 784 69, 70
Ochiltree *v.* Railroad Co., 21 Wall. 249 442
Oelwerke Teutonia *v.* Erlanger, 248 U. S. 521 510
Off *v.* United States, 35 F. (2d) 222 345
Ogden *v.* Saunders, 12 Wheat. 213 341
O'Gorman & Young *v.* Hartford Fire Ins. Co., 282 U. S. 251 111, 240, 284, 342
Ohio Valley Water Co. *v.* Ben Avon Borough, 253 U. S. 287 46, 60, 80, 91, 92
Oklahoma Light & P. Co. *v.* Corporation Comm., 96 Okla. 19 291, 295
Oklahoma Pipe Line Co. *v.* Lindsey, 113 Okla. 296 70
Olmstead *v.* United States, 277 U. S. 438 406
Olsen *v.* United States, 287 Fed. 85 433
One Hundred and Ninety-four Shawls, Fed. Cas. No. 10521 421

Page
Orchard *v.* Hughes, 1 Wall. 77 406
Oregon R. L. Co. *v.* Portland & A. S. S. Co., 162 Fed. 912 511
Oregon Ry. & N. Co. *v.* Fairchild, 224 U. S. 510 78, 79
Oregon-Washington R. & N. Co. v. McGinn, 258 U. S. 409 134
Orleans *v.* Phoebus, 11 Pet. 175 407
Osborne *v.* Missouri Pac. Ry. Co., 147 U. S. 248 104
Osborne *v.* Mobile, 16 Wall. 479 407
Osceola, The, 189 U. S. 158 41
Pacific Co. *v.* Johnson, 285 U. S. 480 409
Pacific Live Stock Co. *v.* Lewis, 241 U. S. 440 78
Pacific R. Co. v. Missouri Pac. Ry. Co., 111 U. S. 505 227
Paddell *v.* New York, 211 U. S. 446 349
Page Co. *v.* MacDonald, 261 U. S. 446 225, 227
Pagel *v.* Creasy, 6 Oh. App. 199 140
Palumbo *v.* Fuller Co., 99 Conn. 355 84
Panama R. Co. *v.* Johnson, 264 U. S. 375 39, 46, 49, 55, 62, 80
Panama R. Co. *v.* Napier Shipping Co., 166 U. S. 280 419, 420
Panama R. Co. *v.* Vasquez, 271 U. S. 557 39, 87
Panhandle Oil Co. *v.* Knox, 277 U. S. 218 152, 400
Parker *v.* Hotchkiss, Fed. Cas. No. 10,739 225
Parker *v.* Marco, 136 N. Y. 585 225
Parker-Washington Co. *v.* Industrial Board, 274 Ill. 498 84
Parsons *v.* Empire Trans. Co., 111 Fed. 202 511
Passavant *v.* United States, 148 U. S. 214 51, 90
Page
Passenger Cases, 7 How. 283 408
Patterson *v.* The Eudora, 190 U. S. 169 422
Patterson *v.* Winn, 11 Wheat. 380 59
Pawashick, The, Fed. Cas. No. 10,851 421
Pawhuska *v.* Pawhuska Oil & Gas Co., 28 Okla. 563 300
Peabody *v.* United States, 231 U. S. 530 104
Pearcy *v.* Stranahan, 205 U. S. 257 6
Pearson *v.* Zehr, 138 Ill. 48 60, 89
Pedersen *v.* Delaware, L. & W. R. Co., 229 U. S. 146 239
Pedersen *v.* Spreckles, 87 Fed. 938 203
Peik *v.* Chicago & N. W. Ry. Co., 94 U. S. 164 408
Peirce *v.* New Hampshire, 5 How. 504 407
Pennsylvania Gas Co. *v.* Public Service Comm., 252 U. S. 23 407
Pennsylvania R. Co. *v.* Towers, 245 U. S. 6 407
People *v.* Adams State Bank, 272 Ill. 277 474
People *v.* Potts, 264 Ill. 522 189
People *v.* Rose, 174 Ill. 310 189
Peoples National Bank *v.* Equalization Board, 260 U. S. 702 489
Pesaro, The, 255 U. S. 216 221
Philadelphia S. S. Co. *v.* Pennsylvania, 122 U. S. 326 408
Philippine Sugar Co. *v.* Philippine Islands, 247 U. S. 385 261
Phillips *v.* Commissioner, 283 U. S. 589 46, 47, 51, 60, 67, 71, 139
Phillips *v.* Dime Trust & S. D. Co., 284 U. S. 160 337, 351
Phillips *v.* Gnichtel, 27 F. (2d) 662, cert. den., 278 U. S. 636 343
Phipps *v.* United States, 251 Fed. 879 432

Page

Phoenix Assur. Co. *v.* Franklin Brass Co., 58 Fed. 166 117
Pickard *v.* Smith, 10 C. B. (n. s.) 470 82
Pierce, *Ex parte*, 155 Fed. 663 433
Pierce *v.* Creecy, 210 U. S. 387 433
Pierce *v.* Sisters, 268 U. S. 510 280
Pierce *v.* United States, 255 U. S. 398 219
Pinney *v.* Nelson, 183 U. S. 144 475
Pitts *v.* Peake, 50 F. (2d) 485 391
Pocket Veto Case, 279 U. S. 655 369
Pocahontas Fuel Co. *v.* Monahan, 41 F. (2d) 48 68
Poe *v.* Seaborn, 282 U. S. 101 142
Polk *v.* Wendell, 9 Cranch 87 59
Pollard *v.* Bailey, 20 Wall. 520 478
Pollock *v.* Farmers Loan & T. Co., 157 U. S. 429 400
Pollock *v.* Farmers Loan & T. Co., 158 U. S 601 407, 409
Porto Rico Ry. Co. *v.* Mor, 253 U. S. 345 6
Portsmouth Harbor Land Co. *v.* United States, 250 U. S. 1 104
Postum Cereal Co. *v.* California Fig Nut Co., 272 U. S. 693 50
Pratt *v.* Railway Co., 95 U. S. 43 134
Prendergast *v.* N. Y. Telephone Co., 262 U. S. 43 46, 60
Prentis *v.* Atlantic Coast Line, 211 U. S. 210 57
Presser *v.* Illinois, 116 U. S. 252 76
Price *v.* Illinois, 238 U. S. 446 285
Price *v.* United States, 269 U. S. 492 477, 479
Pritchard *v.* Norton, 106 U. S. 124 442

Page

Producers Transportation Co. *v.* Railroad Comm., 251 U. S. 228 284
Propeller Burlington, The, 137 U. S. 386 200
Providence Bank *v.* Billings, 4 Pet. 514 491
Provident Institution *v.* Massachusetts, 6 Wall. 611 489
P. R. R. No. 35, The, 48 F. (2d) 122 79
P. Stanford Ross *v.* Public Service Corp., 42 F. (2d) 79 52
Public National Bank, *Ex parte*, 278 U. S. 101 209
Pullman Car Co. *v.* Pennsylvania, 141 U. S. 18 407
Qualp *v.* Stewart Co., 266 Pa. 502 84
Quickstep, The, 9 Wall. 665 201
Quong Wing *v.* Kirkendall, 223 U. S. 59 349
Quon Quon Poy *v.* Johnson, 273 U. S. 352 90
Raley & Bros. *v.* Richardson, 264 U. S. 157 109
Ralli *v.* Troop, 157 U. S. 386 42
Ramsay Co. *v.* Associated Bill Posters, 260 U. S. 501 111
Rast *v.* Van Deman & Lewis Co., 240 U. S. 342 108, 285
Rawlins *v.* Georgia, 201 U. S. 638 527, 528
R. B. Little, The, 215 Fed. 87 203
Rea *v.* Heiner, 6 F. (2d) 389 345
Red Cross Line *v.* Atlantic Fruit Co., 264 U. S. 109 40
Reinecke *v.* Northern Trust Co., 278 U. S. 339 323, 330, 338, 340, 351
Reinman *v.* Little Rock, 237 U. S. 171. 348
Rengstorff *v.* McLaughlin, 21 F. (2d) 177 344
Reymann Brewing Co. *v.* Brister, 179 U. S. 445 493
Reynolds *v.* Stockton, 140 U. S. 254 85
Rhodes *v.* Cousins, 6 Rand. 188 209

Page

Rhodes *v.* U. S. National Bank, 66 Fed. 512 479
Rice & Givens *v.* Citizens Nat. Bank, 51 S. W. 454 216
Richmond Screw Anchor Co. *v.* United States, 275 U. S. 331 62
Rizo *v.* Burruel, 23 Ariz. 137 227
Roberts *v.* Lewis, 153 U. S. 367 406
Robert W. Parsons, The, 191 U. S. 17 419
Robins Dry Dock & Repair Co. *v.* Dahl, 266 U. S. 449 40
Rockafellow *v.* Miller, 107 N. Y. 507 140
Rodgers *v.* United States, 185 U. S. 83 517
Roe *v.* Kansas, 278 U. S. 191 526, 527
Rogers *v.* Burlington, 3 Wall. 654 407
Rogers *v.* Wm. Rogers Mfg. Co., 70 Fed. 1019 260
Root *v.* United States, 56 F. (2d) 857 346
Root *v.* Woolworth, 150 U. S. 401 221
Rosen *v.* United States, 161 U. S. 29 431
Rosen *v.* United States, 245 U. S. 467 406
Rosenberg Bros. & Co. *v.* Curtis Brown Co., 260 U. S. 516 221
Rosenthal *v.* Walker, 111 U. S. 185 430
Rothe *v.* Pennsylvania Co., 195 Fed. 21 119
Rothschild & Co. *v.* Marshall, 56 F. (2d) 415 69
Royal Exch. Assur. *v.* Thrower, 246 Fed. 768 117
Runkle *v.* United States, 122 U. S. 543 408
Russia, The, Fed. Cas. No. 12,168 422
Rust Land Co. *v.* Jackson, 250 U. S. 71 178

Page

R. W. Rogers Co. *v.* Wm. Rogers Mfg. Co., 70 Fed. 1017 260
Sacramento Navigation Co. *v.* Salz, 273 U. S. 326 190
Safford *v.* United States, 65 Ct. Cls. 242 345
Sailor's Bride, The, Fed. Cas. No. 12,220 421
St. John *v.* New York, 201 U. S. 633 339
St. Louis, I. M. & S. Ry. Co. *v.* Commercial Ins. Co., 139 U. S. 223 214
St. Louis, I. M. & S. Ry. Co. *v.* Taylor, 210 U. S. 281 82
St. Louis Land Co. *v.* Kansas City, 241 U. S. 419 527
St. Louis & S. F. Ry. Co. *v.* Mathews, 165 U. S. 1 82
Salomon *v.* Tax Commission, 278 U. S. 484 349
Salomoni, The, 29 Fed. 534 421
Saltonstall *v.* Saltonstall, 276 U. S. 260 169, 323
Sampson *v.* Graves, 208 App. Div. 522 226
Sanbern *v.* Wright & Cobb Co., 171 Fed. 449, aff'd, 179 Fed. 1021 511
Sandel *v.* South Carolina, 269 U. S. 532 527
Sawyer, *Ex parte*, 21 Wall. 235 181
Sawyer *v.* Old Lowell Nat. Bank, 230 Mass. 342 201
Schaffer *v.* Hampton Ins. Co., 235 N. W. 618 117
Schechter *v.* United States, 7 F. (2d) 881 463
Schlesinger, Estate of, 184 Wis. 1 331
Schlesinger *v.* Wisconsin, 270 U. S. 230 324, 326, 328, 336, 338
Schlosser *v.* Hemphill, 198 U. S. 173 179
Schoenheit *v.* Lucas, 44 F. (2d) 476 344
Schrader *v.* Polley, 26 S. D. 5 370
Scotland, The, 105 U. S. 24 419

Page

Scott *v.* McNeal, 154 U. S. 34 441
Seabury *v.* Arkansas Natural Gas Corp., 171 La. 199 84
Second Employers' Liability Cases, 223 U. S. 1 87, 419, 423
Second National Bank *v.* First Nat. Bank, 242 U. S. 600 179
Security Mutual Life Ins. Co. *v.* Prewitt, 202 U. S. 246 407
Seirstad, The, 12 F. (2d) 133 422
Shafer *v.* Farmers Grain Co., 268 U. S. 189 153
Shaffer *v.* Carter, 252 U. S. 37 221
Shakman *v.* U. S. Credit System Co., 92 Wis. 366 189
Shanks *v.* Delaware, L. & W. R. Co., 239 U. S. 556 238
Shaw *v.* Oil Corp., 276 U. S. 575 400
Sheehan Co. *v.* Shuler, 265 U. S. 371 42
Sheehy *v.* Mandeville, 6 Cranch 253 406
Shelden *v.* Sill, 8 How. 441 86
Shelton *v.* The Collector, 5 Wall. 113 406
Sherlock *v.* Alling, 93 U. S. 99 42, 238, 513
Sherlock *v.* Sherlock, 112 Neb. 797 84
Shevlin-Carpenter Co. *v.* Minnesota, 218 U. S. 57 340
Shields *v.* Ohio, 95 U. S. 319 442
Showers *v.* Crowell, 46 F. (2d) 361 69
Siebold, *Ex parte,* 100 U. S. 371 367
Silberschein *v.* United States, 266 U. S. 221 47, 51, 90
Sims *v.* Mutual Fire Ins. Co., 101 Wis. 586 215
Sinking-Fund Cases, 99 U. S. 700 284, 293, 342
Sirius, The, 47 Fed. 825 421
Slater *v.* Mexican National R. Co., 194 U. S. 120 418
Slaughter-House Cases, 16 Wall. 36 303, 408

Page

Smart *v.* United States, 21 F. (2d) 188 346
Smelting Co. *v.* Kemp, 104 U. S. 636 59, 91
Smiley *v.* Holm, 285 U. S. 355 379, 382
Smith *v.* Condry, 1 How. 28 418
Smith *v.* Hitchcock, 34 App. D. C. 521 59
Smith *v.* Hitchcock, 226 U. S. 53 91
Smith *v.* Illinois Bell Tel. Co., 282 U. S. 133 125
Sneland I, The, 19 F. (2d) 528 422
Societe du Gaz de Paris *v.* Armateurs Francais, (1926) Sess. Cas. (H. L.) 13 423
Society for Savings *v.* Coite, 6 Wall. 594 489
Sonderberg, The, 47 F. (2d) 723 421
Sonneborn Bros. *v.* Cureton, 262 U. S. 506 152, 407
Soper *v.* Hammond Lumber Co., 4 F. (2d) 872 81
Sorenson & Co. *v.* Liverpool, B. & R. P. S. N. Co., 47 F. (2d) 332 79
South Carolina *v.* United States, 199 U. S. 437 400
Southern Pacific Co. *v.* Industrial Commission, 251 U. S. 259 239
Southern Pacific Co. *v.* Jensen, 244 U. S. 205 39, 41, 514
Southern Ry. Co. *v.* Prescott, 240 U. S. 632 131
Southgate *v.* Eastern Transp. Co., 21 F. (2d) 47 203
Spiller *v.* Atchison, T. & S. F. Ry. Co., 253 U. S. 117 48
Spring Valley Water Works *v.* Schottler, 110 U. S. 347 293
Stafford *v.* Union Bank, 16 How. 135 406
Stafford *v.* Wallace, 258 U. S. 495 71, 153
Stairs *v.* Peaslee, 18 How. 521 6

Page

Standard Marine Ins. Co. *v.* Scottish Assur. Co., 283 U. S. 284 214
Standard Oil Co. *v.* Graves, 249 U. S. 389 407
Standard Oil Co. *v.* Lincoln, 275 U. S. 504 305
State *v.* Edwards, 86 Me. 102 274
State *v.* Packer Corp., 297 Pac. 1013 108
State *v.* Salt Lake Pub. Co., 68 Utah 187 109
State *ex rel.* Peach Co. *v.* Bonding Co., 279 Mo. 535 189
State Industrial Corp. *v.* Nordenholt Corp., 259 U. S. 263 81
State National Bank *v.* Sayward, 91 Fed. 443 478
State Tax Commission *v.* Robinson's Executor, 234 Ky. 415 325
State Tax Commissioners *v.* Jackson, 283 U. S. 527 349
State Tax on Railway Gross Receipts, 15 Wall. 284 408
Steamer Syracuse, The, 12 Wall. 167 201
Steamer Webb, The, 14 Wall. 406 200
Steamship Co. *v.* Joliffe, 2 Wall. 450 442, 450, 477
Stearns *v.* Minnesota, 179 U. S. 223 441
Stebbins *v.* Riley, 268 U. S. 137 341, 349
Stephens *v.* United States, 261 Fed. 590 432
Stevenson *v.* Fain, 195 U. S. 165 86
Stewart *v.* Ramsay, 242 U. S. 128 225
Stockwell *v.* United States, 13 Wall. 531 479
Strickley *v.* Highland Boy Mining Co., 200 U. S. 527 275
Stromberg *v.* California, 283 U. S. 359 280
Stuart *v.* Bank of Montreal, 41 Sup. Ct. Can. 516 410
Sultan Ry. & Timber Co. *v.* Labor Dept, 277 U. S. 135 40

Page

Sun, The, 271 Fed. 953 79
Superior Oil Co. *v.* Mississippi, 280 U. S. 390 152
Sutherland *v.* Payne, 274 Fed. 360 119
Swan, *In re*, 150 U. S. 637 220
Swearingen *v.* United States, 161 U. S. 446 425
Sweet *v.* Rechel, 159 U. S. 380 105
Sweeting *v* The Western States, 210 U. S. 433 52
Taft *v.* Bowers, 278 U. S. 470 338, 340, 351
Tagg Bros. & Moorhead *v.* United States, 280 U. S. 420 46, 47, 48, 50, 51, 60, 70, 71, 75, 80
Tanner *v.* Little, 240 U. S. 369 108, 285
Taylor *v.* Blackwell Lumber Co., 37 Idaho 707 70
Taylor *v.* Carryl, 20 How. 583 420
Tebbets *v.* Mercantile Credit Co., 73 Fed. 95 189
Tempel *v.* United States, 248 U. S. 121 104
Terral *v.* Burke Construction Co., 257 U. S. 529 407
Terrell *v.* Allison, 21 Wall. 289 219
Texas *v.* Eastern Texas R. Co., 258 U. S. 204 390
Texas *v.* White, 7 Wall. 700 400, 407
Texas Co. *v.* Brown, 258 U. S. 466 407
Texas & Gulf S. S. Co. *v.* Parker, 263 Fed. 864 511
Texas & Pacific Ry. Co. *v.* Callender, 183 U. S. 632 134
Texas & Pacific Ry. Co. *v.* Clayton, 173 U. S. 348 134
Texas & Pacific Ry. Co. *v.* Leatherwood, 250 U. S. 478 135
Texas & Pacific Ry. Co. *v.* Reiss, 183 U. S. 621 134
Texas & Pacific Ry. Co. *v.* Volk, 151 U. S. 73 118

Page

Texas Transp. & T. Co. *v.* New Orleans, 264 U. S. 150 408
Thaddeus Davids Co. *v.* Davids Mfg. Co., 233 U. S. 461 260
Thomas *v.* Matthiessen, 232 U. S. 221 475
Thomas Jefferson, The, 10 Wheat. 428 407
Thomassen *v.* Whitwell, Fed. Cas. No. 13,928 421
Thompson *v.* The Catharina Fed. Cas. No. 13,949 421
Threshermen's Nat. Ins. Co. *v.* Industrial Comm., 201 Wis. 303 84
Tiedt *v.* Carstensen, 61 Iowa 334 76
Tilghman *v.* Proctor, 125 U. S. 136 51
Tilton *v.* Cofield, 93 U. S. 163 219
Tindall, *Ex parte*, 102 Okla. 192 299
Tips *v.* Bass, 21 F. (2d) 460 346
Todd *v.* United States, 48 F. (2d) 530 463
Todd Dry Docks *v.* Marshall, 49 F. (2d) 621 69
Toledo Newspaper Co. *v.* United States, 247 U. S. 402 220
Toledo Scale Co. *v.* Computing Scale Co., 261 U. S. 399 178
Tomlinson *v.* Jessup, 15 Wall. 454 442
Topsy, The, 44 Fed. 631 421
Trade-Mark Cases, 100 U. S. 82 76, 256, 284
Transit Commission *v.* United States, 284 U. S. 360 390
Transportation Line *v.* Hope, 95 U. S. 297 200
Travelers Ins. Co. *v.* Locke, 56 F. (2d) 443 68
Treat *v.* White, 181 U. S. 264 338
Troop, The, 118 Fed. 769 422
Truax *v.* Raich, 239 U. S. 33 111
Tucker *v.* Ferguson, 22 Wall. 527 402
Tumey *v.* Ohio, 273 U .S. 510 280

Page

Turner *v.* Bank, 4 Dall. 8 86
Tyler *v.* United States, 281 U. S. 497 323, 326, 337, 339, 340, 351
Tyson & Bro. *v.* Banton, 273 U. S. 418 277, 408
Ucayali, The, 164 Fed. 897 421
Union Tank Line Co. *v.* Wright, 249 U. S. 275 407
United Drug Co. *v.* Rectanus Co., 248 U. S. 90 256, 258
United States *v.* Abilene & Sou. Ry. Co., 265 U. S. 274 48
United States *v.* American Tobacco Co., 166 U. S. 468 214
United States *v.* Babcock, 250 U. S. 328 51
United States *v.* Barber, 157 Fed. 889 433
United States *v.* Chamberlin, 219 U. S. 250 477, 479
United States *v.* Chase, 135 U. S. 255 208
United States *v.* Cress, 243 U. S. 316 104
United States *v.* Dickson, 15 Pet. 141 16
United States *v.* Fox, 95 U. S. 670 76
United States *v.* Great Falls Mfg. Co., 112 U. S. 645 104
United States *v.* Healey, 160 U. S. 136 16
United States *v.* Heinszen & Co., 206 U. S. 370 256
United States *v.* Hirsch, 100 U. S. 33 522
United States *v.* Holt State Bank, 270 U. S. 49 55
United States *v.* Hudson & Goodwin, 7 Cranch 32 86
United States *v.* Jackson, 280 U. S. 183 16
United States *v.* Ju Toy, 198 U. S. 253 51
United States *v.* Kirschenblatt, 16 F. (2d) 202 464
United States *v.* Loan & Bldg. Co., 278 U. S. 55 190
United States *v.* Louisville & N. R. Co., 235 U. S. 314 70

Page

United States *v.* Louisville & N. R. Co., 236 U. S. 318 6
United States *v.* Lynah, 188 U. S. 445 104
United States *v.* McElvain, 272 U. S. 633 522
United States *v.* Missouri Pac. R. Co., 278 U. S. 269 16
United States *v.* Mosley, 238 U. S. 383 367
United States *v.* Nice, 241 U. S. 591 407
United States *v.* Noveck, 271 U. S. 201 521, 522
United States *v.* Peters, 166 Fed. 613 208
United States *v.* Phellis, 257 U. S. 156 188
United States *v.* Phelps, 107 U. S. 320 406
United States *v.* Rabinowich, 238 U. S. 78 522
United States *v.* Railroad Co., 17 Wall. 322 327
United States *v.* Reese, 92 U. S. 214 77
United States *v.* Reid, 12 How. 361 406
United States *v.* Rodgers, 150 U. S. 249 419
United States *v.* Sanges, 144 U. S. 310 220
United States *v.* Tennessee & C. R. Co., 176 U. S. 242 222
United States *v.* The Recorder, 1 Blatchf. 218 6
United States *v.* Union Pac. R. Co., 249 U. S. 354 243
United States *v.* Utah, 283 U. S. 64 55
United States *v.* Wells, 283 U. S. 102 323, 327, 328, 330, 342, 343, 345
U. S. *ex rel.* Claussen *v.* Curran, 276 U. S. 590 529
U. S. Navigation Co. *v.* Cunard S. S. Co., 284 U. S. 474 71, 78
U. S. Printing & Litho. Co. *v.* Griggs, C. & Co., 279 U. S. 156 258

Page

Untermyer *v.* Anderson, 276 U. S. 440 338
Uphoff *v.* Industrial Board, 271 Ill. 312 76
Utah *v.* United States, 284 U. S. 534 219
Van Allen *v.* Assessors, 3 Wall. 573 489
Vaughn *v.* Boyd, 142 Ga. 230 226
Vaughn *v.* Riordan, 280 Fed. 742 345
Veazie Bank *v.* Fenno, 8 Wall. 533 402
Vick Medicine Co. *v.* Vick Chemical Co., 11 F. (2d) 33 260
Vicksburg, S. & P. R. Co. *v.* Dennis, 116 U. S. 665 491
Vidal *v.* Girard's Executors, 2 How. 127 406
Virginia, The, 264 Fed. 986, aff'd 278 Fed. 877 511
Virginian Ry. Co. *v.* United States, 272 U. S. 658 47, 51
Wabash R. Co. *v.* Flannigan, 192 U. S. 29 526, 527
Wabash R. Co. *v.* Hayes, 234 U. S. 86 239
Wabash, St. L. & P. Ry. Co. *v.* Illinois, 118 U. S. 557 293, 408
Wadley Southern Ry. Co. *v.* Georgia, 235 U. S. 651 78
Wagner *v.* Covington, 251 U. S. 95 493
Wait *v.* Krewson, 59 N. J. L. 71 76
Walla Walla *v.* Walla Walla Water Co., 172 U. S. 1 518
Walls *v.* Midland Carbon Co., 254 U. S. 300 304
Walter D. Wallet, The, 66 Fed. 1011 421
Wampler *v.* LeCompte, 282 U. S. 172 529
Warburton *v.* White, 176 U. S. 484 445
Ward & Gow *v.* Krinsky, 259 U. S. 503 42, 82
Waring *v.* Clarke, 5 How. 441 39, 45

Page

Warren *v.* Morse Drydock Co., 235 N. Y. 445 514
Warren County *v.* Marcy, 97 U. S. 96 219
Washburn Crosby Co. *v.* Boston & A. R. Co., 180 Mass. 252 134
Washington *v.* Dawson, 264 U. S. 219 39, 41, 55, 513, 514
Washington *v.* Miller, 235 U. S. 422 517
Washington *v.* Roberge, 278 U. S. 116 280
Washington University *v.* Rouse, 8 Wall. 439 409
Waterman Co. *v.* Modern Pen Co., 235 U. S. 88 260
Watson *v.* State Comptroller, 254 U. S. 122 339
Watts, Watts & Co. *v.* Unione de Navigazione, 248 U. S. 9 418
Wavelet, The, 25 Fed. 733 79
Wayman *v.* Southard, 10 Wheat. 1 6
Weeks *v.* United States, 232 U. S. 383 464, 466
Weems *v.* United States, 217 U. S. 349 222
Weiberg *v.* The Brig St. Oloff, Fed. Cas. No. 17,357 421
Weidhorn *v.* Levy, 253 U. S. 268 164
Weiss *v.* Stearn, 265 U. S. 242 188
Welch *v.* Swasey, 214 U. S. 91 348
Wells *v.* Steam Navigation Co., 2 Comstock 204 201
Wells, Fargo & Co. *v.* Nevada, 248 U. S. 165 152
Welton *v.* Missouri, 91 U. S. 275 152, 493
Westchester Fire Ins. Co. *v.* Fitzpatrick, 2 F. (2d) 651 119
Western Fuel Co. *v.* Garcia, 257 U. S. 233 40, 513
Western Pacific Calif. R. Co. *v.* Southern Pacific Co., 284 U. S. 47 390
Western States, The, 159 Fed. 354 52

Page

Western Transit Co. *v.* Davidson S. S. Co., 212 Fed. 696 52
Western Union *v.* Kansas, 216 U. S. 1 237, 238
Weston *v.* Charleston, 2 Pet. 449 402
Westphal *v.* Westphal's Corp., 216 App. Div. 53; *id.*, 243 N. Y. 639 260
W. H. Baldwin, The, 271 Fed. 411 203
Wheeler *v.* Sohmer, 233 U. S. 434 407
Wheeler *v.* Sweet, 137 N. Y. 435 216
Wheeling Corrugating Co. *v.* McManigal, 41 F. (2d) 593 68
White *v.* Macomber Co., 244 Mass. 195 84
White *v.* Maddison, 45 F. (2d) 335 230
Whitman *v.* Oxford Nat. Bank, 176 U. S. 559 475, 477, 479
Whitney *v.* California, 274 U. S. 357 529
W. H. Simpson, The, 80 Fed. 153 203
Wilfley *v.* Helmich, 56 F. (2d) 845 345
Willcox *v.* Edwards, 162 Cal. 455 445, 447, 451
Willcuts *v.* Bunn, 282 U. S. 216 400, 411
Willendson *v.* The Forsoket, Fed. Cas. No. 17,682 421
Wm. A. Rogers *v.* International Silver Co., 30 App. D. C. 97 261
Wm. A. Rogers *v.* International Silver Co. (1), 34 App. D. C. 410 261
Wm. A. Rogers *v.* International Silver Co. (2), 34 App. D. C. 413 261
Wm. A. Rogers *v.* International Silver Co. (3), 34 App. D. C. 484 261

	Page
Wm. A. Rogers *v.* Rogers Silverware Redemption Bureau, 247 Fed. 178	261
Wm. Rogers Mfg. Co. *v.* Rogers, 84 Fed. 639	260
Wm. Rogers Mfg. Co. *v.* Rogers, 95 Fed. 1007	260
Wm. Rogers Mfg. Co. *v.* Rogers Mfg. Co., 16 Phila. Rep. 178	261
Wm. Rogers Mfg. Co. *v.* Rogers & Spurr Mfg. Co., 11 Fed. 495	260
Wm. Rogers Mfg. Co. *v.* R. W. Rogers Co., 66 Fed. 56	260
Williams *v.* Parker, 188 U. S. 491	105
Williams *v.* Standard Oil Co., 278 U. S. 235	237
Williams *v.* Walsh, 222 U. S. 415	110
Williamson *v.* American Bank, 115 Fed. 793	478
Wilson *v.* Daniel, 3 Dall. 401	406
Wilson *v.* Hite's Executor, 154 Ky. 61	216
Wilson *v.* Sibley, 36 Fed. 379	203
Wilson & Co. *v.* Locke, 50 F. (2d) 81	68
Winchester *v.* Howard, 136 Cal. 432	446, 449
Wisinger *v.* White Oil Corp., 24 F. (2d) 101	84
Wisner, *Ex parte*, 203 U. S. 449	406
Wolff Co. *v.* Industrial Court, 262 U. S. 522; s. c., 267 U. S. 552	277, 280, 293
Woolfolk *v.* Bank, 73 Ky. 504	215
Workman *v.* New York, 179 U. S. 552	513
Yarbrough, *Ex parte*, 110 U. S. 651	367
Yazoo & M. V. R. Co. *v.* Thomas, 132 U. S. 174	491
York Junction Trans. & S. Co. v. Accident Comm'rs, 202 Cal. 517	69
Young *v.* American Bonding Co., 228 Pa. 373	189
Yu Cong Eng *v.* Trinidad, 271 U. S. 500	261
Zahn *v.* Board of Public Works, 274 U. S. 325	342
Zurich Accident & L. Co. *v.* Marshall, 56 F. (2d) 652	69
Zurich Ins. Co. *v.* Marshall, 42 F. (2d) 1010	69

TABLE OF STATUTES

Cited in Opinions

(A) Statutes of the United States

	Page
1789, Sept. 24, c. 20, § 9, 1 Stat. 76	52, 513
1845, Feb. 26, c. 20, 5 Stat. 726	52
1851, Mar. 3, c. 38, 9 Stat. 629	6
1851, Mar. 3, c. 43, 9 Stat. 635	39, 506
1866, July 25, c. 242, 14 Stat. 239	243
1866, July 27, c. 278, § 11, 14 Stat. 292	242
1875, Mar. 3, c. 137, 18 Stat. 470	86
1886, June 4, c. 421, § 4, 24 Stat. 80	506
1897, July 24, c. 11, 30 Stat. 151	6
1898, July 1, c. 541, 30 Stat. 544	206
1901, Mar. 2, c. 803, 31 Stat. 910	256
1905, Feb. 20, c. 592, § 29, 33 Stat. 724	257, 260
1906, June 16, c. 3335, 34 Stat. 267	398
1907, Mar. 2, c. 2564, 34 Stat. 1246	425
1908, Apr. 22, c. 149, 35 Stat. 65	39, 143, 237
1909, Mar. 4, c. 321, 35 Stat. 1088	426
1909, Aug. 5, c. 6, 36 Stat. 11	10, 11
1909, Aug. 5, c. 8, § 26, 36 Stat. 130	257
1910, June 18, c. 309, §§ 1, 13, 36 Stat. 539	70, 71
1911, Aug. 8, c. 5, 37 Stat. 13	379
1911, Aug. 8, c. 5, §§ 3, 4, 5, 37 Stat. 13	362, 373
1913, Mar. 1, c. 92, 37 Stat. 701	70
1913, Oct. 3, c. 16, Par. G (b), 38 Stat. 114	11
1913, Oct. 22, c. 32, 38 Stat. 208	389, 390
1914, Sept. 26, c. 311, § 5, 38 Stat. 717	70
1914, Oct. 15, c. 323, § 11, 38 Stat. 730	70
1915, Mar. 4, c. 153, 38 Stat. 1164	39
1915, Mar. 4, c. 153, § 20, 38 Stat. 1164	87
1916, Aug. 29, c. 416, 39 Stat. 545	258
1916, Sept. 7, c. 451, §§ 29, 31, 39 Stat. 728	70
1916, Sept. 7, c. 451, § 30, 39 Stat. 728	71
1916, Sept. 7, c. 458, § 28, 39 Stat. 748	42
1916, Sept. 8, c. 463, 39 Stat. 756	166
1916, Sept. 8, c. 463, §§ 5 (a), 6 (a), 12 (a), 39 Stat. 756	11

	Page
1916, Sept. 8, c. 463, § 202 (b), 39 Stat. 756.	333, 343
1916, Sept. 8, c. 463, § 202 (c), 39 Stat. 756.....	333
1916, Sept. 8, c. 463, § 202 (B) (b), 39 Stat. 756.	343
1916, Sept. 8, c. 463, § 203, 39 Stat. 756.....	166, 167
1916, Sept. 8, c. 463, Title II, 39 Stat. 756.....	333
1917, Feb. 5, c. 29, 39 Stat. 874	7
1917, Feb. 5, c. 29, § 19, 39 Stat. 874	90
1917, Oct. 3, c. 63, 40 Stat. 300	142
1917, Oct. 3, c. 63, §§ 1201 (1), 1207 (1), 40 Stat. 300	11
1919, Feb. 24, c. 18, §§ 214 (a), 222, 234 (a), 238, 40 Stat. 1057.....	14
1919, Feb. 24, c. 18, § 214 (a) (3), 40 Stat. 1057.	13
1919, Feb. 24, c. 18, § 216 (e), 40 Stat. 1057....	18
1919, Feb. 24, c. 18, § 218 (a), 40 Stat. 1057....	138
1919, Feb. 24, c. 18, §§ 222 (a), 238 (a), 40 Stat. 1057.....	12, 15
1919, Feb. 24, c. 18, § 222 (a) (3), 40 Stat. 1057.	19
1919, Feb. 24, c. 18, § 224, 40 Stat. 1057.....	140
1919, Feb. 24, c. 18, § 230, 40 Stat. 1057.....	187
1919, Feb. 24, c. 18, § 402 (c), 40 Stat. 1057.	333, 343
1919, Feb. 24, c. 18, § 402 (f), 40 Stat. 1057....	333
1919, Oct. 22, c. 80, Title II, § 108, 41 Stat. 297....	71
1919, Oct. 28, c. 85, §§ 18, 21, 22, 41 Stat. 305.....	463
1919, Oct. 28, c. 85, §§ 21, 22, 41 Stat. 305.....	461
1919, Oct. 28, c. 85, Title II, § 3, 41 Stat. 305....	516
1919, Oct. 28, c. 85, Title II, § 29, 41 Stat. 305....	517
1920, Feb. 28, c. 91, 41 Stat. 456.....	390
1920, Feb. 28, c. 91, § 1, pars. 18, 19, 20, 41 Stat. 456.....	386
1920, Feb. 28, c. 91, § 1, par. 20, 41 Stat. 456.....	391
1920, Feb. 28, c. 91, § 402, pars. 18–20, 41 Stat. 456.....	283
1920, June 5, c. 240, 41 Stat. 948.....	243
1920, June 5, c. 250, 41 Stat. 988.....	39
1920, June 5, c. 250, § 33, 41 Stat. 1007.....	87
1920, June 10, c. 285, § 20, 41 Stat. 1063.....	70
1921, Aug. 15, c. 64, §§ 204, 315, 316, 42 Stat. 159.	71
1921, Nov. 23, c. 136, § 218 (a), 42 Stat. 227.....	138
1921, Nov. 23, c. 136, § 222 (a), 42 Stat. 227....	7
1921, Nov. 23, c. 136, § 224, 42 Stat. 227.....	140
1921, Nov. 23, c. 136, § 238 (a), 42 Stat. 227.....	4
1921, Nov. 23, c. 136, § 238 (e), 42 Stat. 227....	4, 9
1921, Nov. 23, c. 136, § 246, 42 Stat. 227.....	184, 191
1921, Nov. 23, c. 136, § 246 (a), 42 Stat. 227.....	186
1921, Nov. 23, c. 136, § 402 (c), 42 Stat. 227.....	343
1921, Nov. 23, c. 136, § 1000, 42 Stat. 227.....	191
1921, Nov. 23, c. 136, § 1000, (a), 42 Stat. 227.....	186
1922, Feb. 18, c. 57, § 2, 42 Stat. 388.....	71
1922, Sept. 21, c. 356, § 401, 42 Stat. 858.....	517
1922, Sept. 21, c. 356, § 593 (b), 42 Stat. 858.....	516
1922, Sept. 21, c. 369, § 6 (b), 42 Stat. 998.....	71

Page

1924, June 2, c. 234, § 207 (a), (b), 43 Stat. 253. 233
1924, June 2, c. 234, § 218 (a), 43 Stat. 253..... 229
1924, June 2, c. 234, § 246, 43 Stat. 253..... 184, 191
1924, June 2, c. 234, §§ 301 (a), 303 (a) (4), 319, 321 (a) (1), 43 Stat. 253..... 333
1924, June 2, c. 234, § 302 (c), 43 Stat. 253..... 343
1924, June 2, c. 234, §§ 319–324, 43 Stat. 253..... 333
1924, June 2, c. 234, § 322, 43 Stat. 253..... 334
1924, June 2, c. 234, § 700, 43 Stat. 253..... 191
1924, June 2, c. 234, §§ 1200 (a), 1201 (a), (b), 43 Stat. 253..... 230
1925, Feb. 13, c. 229, 43 Stat. 936 ..... 108, 425, 523, 525, 530
1925, Feb. 13, c. 229, § 7, 43 Stat. 936..... 253
1925, Feb. 13, c. 229, § 8, 43 Stat. 936..... 177
1926, Feb. 26, c. 27, § 301, 44 Stat. 9..... 322, 334
1926, Feb. 26, c. 27, § 302 (c), 44 Stat. 9..... 320, 343, 346, 355
1926, Feb. 26, c. 27, § 324, 44 Stat. 9..... 334
1926, Feb. 26, c. 27, § 1003 (a), 44 Stat. 9..... 67, 71
1926, Feb. 26, c. 27, § 1003 (b), 44 Stat. 9..... 67
1926, Feb. 26, c. 27, § 1110 (a), 44 Stat. 9..... 520
1926, Feb. 26, c. 27, § 1114 (a), (c), 44 Stat. 9... 521
1926, Feb. 26, c. 27, § 1114 (b), 44 Stat. 9.... 520, 521
1926, Feb. 26, c. 27, § 1200 (a), 44 Stat. 9..... 330
1926, June 30, c. 712, 44 Stat. 1 (Part I)..... 373
1927, Mar. 4, c. 509, 44 Stat. 1424..... 36, 65

Page

1927, Mar. 4, c. 509, § 3 (a), 44 Stat. 1424..... 38
1927, Mar. 4, c. 509, § 19 (a), 44 Stat. 1424..... 65
1928, Jan. 31, c. 14, 45 Stat. 54 425
1928, Apr. 26, c. 440, 45 Stat. 466 425
1928, May 15, c. 569, §§ 3, 4, 102, 45 Stat. 534..... 99
1928, May 29, c. 852, § 404, 45 Stat. 791..... 334
1929, Feb. 28, c. 366, 45 Stat. 1349..... 246
1929, June 18, c. 28, 46 Stat. 21..... 361, 379, 381
1929, June 18, c. 28, § 21, 46 Stat. 21..... 373
1930, June 10, c. 436, §§ 10, 11, 46 Stat. 531..... 71

Constitution. See Index at end of Volume.

Criminal Code.
§ 37..... 461
§ 211..... 425
§ 215..... 429

Judicial Code.
§ 24..... 419, 513
§ 208..... 390
§ 237..... 470, 487
§ 237 (a).. 108, 523, 525, 530
§ 237 (c)..... 523, 525, 530
§ 256..... 513
§ 261..... 206
§ 266..... 123, 151

Revised Statutes.
§ 566..... 52
§ 1025..... 431
§ 3893..... 426
§ 4283..... 506, 510
§ 4289..... 506
§ 5219..... 491

U. S. Code.
Title 2, §§ 2–5 373
5, § 778 442
15, §§ 81 *et seq*... 257
§ 108 257
18, § 338 429
§ 556 431
19, § 231 517
§ 497 516

U. S. Code—Con. Page

Title 26 §§ 261, 306, 316, 555, 667, 775, 843, 1180, 1181, 1184 and 1186 521
27, § 12 516
§§ 30, 33, 34... 463
§ 46 518
28, § 41 (3)..... 513
§§ 46, 47..... 390
U. S. Code—Con. Page

Title 28, § 345 389
§ 350 177
§ 380 151
§ 770 52
33, §§ 901–950 36
46, § 183 .... 506, 510
§ 188 506
49, § 1 390
Supp. V, Title 18, § 585.. 520
Supp. V, Title 26, § 1094. 320
Supp. V, Title 26, § 1266. 520

(B) Statutes of the States and Territories

California. Page

Constitution (1879)
Art. XII, § 1..... 440
§ 3..... 439
446, 449
Art. XIII, § 16.... 488
1929 Stats., c. 13, p. 19.. 488
Civil Code, § 309..... 445
Political Code, § 327.... 451
District of Columbia.
1929 Code, Title 18, § 43. 391
Georgia.
Constitution (1789), Art. II, § 10..... 370
Iowa.
Constitution, Art. 8, § 12..... 472
1873 Code, § 1090..... 472
§ 1572..... 476
1897 Code, § 1619..... 472
§ 1857..... 476
§§ 1878, 1879, 1880.... 470
§ 1882..... 476
1925 Laws, Act of Mar. 13, c. 181..... 471
1927 Code, §§ 9235, 9238, 9239, 9246–9248, 9251, 9252, 9277. 476
§§ 9246–9250. 470
§ 9248–a(1). 471
Kentucky.
Constitution (1792), Art. I, § 28..... 370
1930 Stats. (Carroll's) § 3720b–124, 125..... 215
Minnesota. Page

Constitution, Art. 4, §§ 1, 11, 23.....363
1858 Laws, c. 83..... 364
1872 Laws, c. 21..... 364
1881 Laws, c. 128..... 364
1891 Laws, c. 3..... 364
1901 Laws, c. 92..... 364
1913 Laws, c. 513..... 364
1929 Laws, c. 64..... 364
Massachusetts.
Constitution (1789).... 369
Resolves, Oct.–Nov., 1788, c. XLIX, p. 52. 369
Resolves, May–June, 1792, c. LXIX, p. 23. 369
1921 Gen. Laws, vol. 1, c. 65, §§ 1, 6, 7, 9, 17. 166, 167, 168
Workmen's Compensation Act, c. 152, § 66, Mass. Gen. Laws..... 236
Maryland.
1789 Laws, c. 8, § 2.... 306
1799, Herty's Digest, p. 250..... 306
Mississippi.
1918 Laws, c. 128, § 3.. 176
1927 Code (Hemingway's), § 2598..... 176
New Hampshire.
Constitution (1792), Part Second, § XLIV. 370
New York.
1789 Laws, c. 11..... 370
1797 Laws, c. 62..... 370
1802 Laws, c. 72..... 370

New York—Continued. Page
1890 Laws, c. 690, Art. V, § 170 (1)..... 184
1904 Laws, c. 543..... 184
1911 Laws, c. 525..... 184
1913 Laws, c. 215..... 184
Insurance Law, Art. V.. 192
Oklahoma.
1908 Laws, June 10, § 13..... 294
1915 Sess. Laws, c. 176, § 3..... 283, 299
1917 Sess. Laws, c. 270. 299
1921 Comp. Stats., §§ 9415, 9417, 9423..... 398
1923 Sess. Laws, c. 113, § 4..... 299
1925 Sess. Laws, c. 102, §§ 5, 6..... 300
c. 147..... 271, 280
Pennsylvania.
Constitution (1790), Art. I, § 22..... 370
Philippine Islands.
1903, Mar. 6, Act. No. 666..... 252, 260
1915, Act No. 2460..... 257
South Carolina.
1791–1794, 1 S. C. Acts of Assembly, p. 88... 306
South Carolina—Continued. Page
1922 Acts, pp. 835–838.. 151
1929 Acts, pp. 107–112. 151
5 Stats. 186..... 306
Utah.
1890 Laws, c. 65, § 1.. 108
1896 Laws, c. 95, § 1.. 275
1903 Laws, c. 135 109
1911 Laws, c. 51 .. 108, 109
1913 Laws, c. 59 109
1921 Laws, c. 145, § 1..... 108, 109
§ 2..... 107, 109
§ 3..... 109
§ 4..... 109
1923 Laws, c. 52, § 1..... 108, 109
§ 2..... 107
§ 4..... 109
1925 Laws, c. 68..... 108
1929 Laws, c. 92..... 107
1930 Laws, c. 5, § 1.... 108
1930 Laws, c. 5, § 1 (k). 108
Vermont.
Constitution (1777), c. II, § XIV..... 370
Constitution (1786), c. II, § XVI..... 370
Constitution (1793), c. II, § XVI..... 370

(C) Treaties

Page
1903, Dec. 17, 33 Stat. 2136 (Commercial Convention with Cuba)..... 6

(D) Foreign Statutes

England. Page
44 Vict., c. 12, § 38 (2) (a)..... 334
52 Vict., c. 7, § 11 (1).. 335
England—Continued. Page
10 Edw. VII, c. 8, § 59 (1)..... 335

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1931.

BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* CHICAGO PORTRAIT CO.

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

No. 378. Argued January 20, 21, 1932.—Decided February 23, 1932.

1. The term "foreign country," when used with reference to government rather than to territory, may mean a foreign State in the international sense, or it may mean a foreign government having authority over a particular area or subject-matter, which is not itself an international person but only a component or political subdivision of a larger international unit. P. 5.
2. The term "foreign country" is not a technical or artificial one; and the sense in which it is used in a statute must be determined by reference to the purpose of the particular legislation. *Id.*
3. The Revenue Act of 1921, § 238 (a) and (e), provides (with limitations) that domestic corporations may credit against their income taxes like taxes paid during the same taxable year "to any foreign country," and that where such a corporation owns a majority of the voting stock of a foreign corporation from which it receives dividends in any taxable year, it shall be presumed to have paid the same proportion of any income tax paid by such foreign corporation "to any foreign country" upon the accumulated profits from which such dividends were paid, as the amount of such dividends bears to the amount of such accumulated profits. *Held,* construing it in connection with earlier legislation:

   (1) That the purpose is to mitigate the evil of double taxation and to facilitate the foreign enterprises of domestic corporations, and

137818°—32——1

(2) That the term "foreign country" is not limited to international States, but embraces any foreign government competent to lay the tax sought to be credited. Pp. 5–15.

4. Administrative construction of a statute, if not uniform and consistent, will be taken into account by courts only to the extent that it is supported by valid reasons. P. 16.

5. Ambiguous regulations are of little value in solving statutory ambiguities. *Id.*

50 F. (2d) 683, affirmed.

CERTIORARI, 284 U. S. 607, to review a judgment of the Circuit Court of Appeals affirming a determination of the Board of Tax Appeals, 16 B. T. A. 1129.

Assistant Attorney General Youngquist, with whom *Solicitor General Thacher,* and *Messrs. Whitney North Seymour, Sewall Key,* and *Andrew D. Sharpe* were on the brief, for petitioner.

Only taxes paid to a foreign sovereign state or a self-governing colony are deductible under § 238 of the Revenue Act of 1921.

The administrative construction of the phrase "foreign country" is supported by several decisions and is consistent with its meaning when used in other federal statutes and in international law. *Stairs* v. *Peaslee,* 18 How. 521; *Faber* v. *United States,* 221 U. S. 649, 658; *United States* v. *The Ship Recorder,* 1 Blatch. 218; U. S. C., Title 22, §§ 38, 177, 216; U. S. C. App., Title 22, § 291. The term "country" is used in the same sense to define a state or person in international law. Hyde, Int. L., I, pp. 16–17; Moore, Int. L. Dig., I, pp. 14–18, and authorities cited; Hall, Int. L., pp. 17 *et seq.;* Wheaton, Int. L., 6th ed., I, pp. 38 *et seq.*

Relief from international double taxation has been the subject of international negotiation, and the nature and scope of those negotiations indicate that the nations generally have been concerned only with relieving their nationals from double taxation by sovereign states and not from that of political subdivisions.

The right to credit taxes paid to a foreign country is in the nature of an exemption. If there were any doubt about the intention of Congress, it should be resolved in favor of the Government. *Cornell* v. *Coyne,* 192 U. S. 418, 431; *Swan & Finch Co.* v. *United States,* 190 U. S. 143, 147; *Bank of Commerce* v. *Tennessee,* 161 U. S. 134, 146.

There is no provision in the revenue acts which permits the crediting of taxes imposed by a State of the United States against income and profits taxes imposed by the United States. State taxes are deducted from gross income in computing net income, under § 234 (a) (3) of the Revenue Act of 1921. It is not to be presumed that Congress intended to allow credits to corporations for taxes paid to states or other subdivisions of foreign countries while withholding similar credits for taxes paid to States of the United States.

New South Wales is not a "foreign country" within the meaning of the Revenue Act of 1921.

Mr. Arnold R. Baar, with whom *Mr. Albert L. Hopkins* was on the brief, for respondent.

The word "country" in the phrase "any foreign country" means any foreign tax-levying authority. Dicey's Conflict of Laws, 4th ed., pp. 59, 60; *Campbell* v. *Barney,* 4 Fed. Cas. 1157; *Mensevich* v. *Tod,* 264 U. S. 134; *Seif* v. *Nagle,* 14 F. (2d) 416; *United States* v. *Smith,* 2 F. (2d) 90; *In re Farez,* 8 Fed. Cas. 1011; *Pagano* v. *Cerri,* 93 Oh. St. 345; *In re Ghio's Estate,* 157 Cal. 552; *Mansell's Admnx.* v. *Israel,* 6 Ky. 510; *Mendrie Mfg. Co.* v. *Pendrick,* 21 Hawaii 258.

The Government's interpretation of the term "foreign country" is based on a misapplication of some of the older tariff decisions, but the fact is that there is no uniform definition of the term even in the particular field of tariff legislation. *Pearcy* v. *Stranahan,* 205 U. S. 257, 269; *Stairs* v. *Peaslee,* 18 How. 521; *Faber* v. *United States,* 221 U. S. 649; *United States* v. *The Ship Recorder,* 1 Blatch. 218.

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

This proceeding was brought for the redetermination of a deficiency in income tax for the year 1923. The respondent, Chicago Portrait Company, is an Illinois corporation with its principal place of business at Chicago. It owned 51 per cent. of the capital stock of the International Art Company of Sydney, Australia, a foreign corporation. Respondent received dividends from the International Art Company and sought credit for a proportionate part of the income taxes paid by that corporation to the Commonwealth of Australia, to the State of New South Wales, and to the Dominion of New Zealand. Section 238 (e) of the Revenue Act of 1921 (42 Stat. 227, 258, 259) permitted credit in the case of such taxes paid "to any foreign country." Credit was allowed on account of the income taxes paid to the Commonwealth of Australia and to the Dominion of New Zealand but was refused as to those paid to the State of New South Wales. The Board of Tax Appeals held that the respondent was entitled to the credit with respect to the last mentioned taxes also, and the Circuit Court of Appeals affirmed that decision. 16 B. T. A. 1129; 50 F. (2d) 683. This Court granted a writ of certiorari.

The sole question is whether New South Wales is a "foreign country" within the meaning of the applicable statute.[1]

---

[1] The provisions of § 238 (a) and (e) of the Revenue Act of 1921 are as follows:

"Sec. 238 (a) That in the case of a domestic corporation the tax imposed by this title, plus the war-profits and excess-profits taxes, if any, shall be credited with the amount of any income, war-profits, and excess-profits taxes paid during the same taxable year to any foreign country, or to any possession of the United States: *Provided,* That the amount of credit taken under this subdivision shall in no case exceed the same proportion of the taxes, against which such credit is taken, which the taxpayer's net income (computed without deduction

The word "country," in the expression "foreign country," is ambiguous. It may be taken to mean foreign territory or a foreign government. In the sense of territory, it may embrace all the territory subject to a foreign sovereign power. When referring more particularly to a foreign government, it may describe a foreign State in the international sense, that is, one that has the status of an international person with the rights and responsibilities under international law of a member of the family of nations;[2] or it may mean a foreign government which has authority over a particular area or subject-matter, although not an international person but only a component part, or a political subdivision, of the larger

---

for any income, war-profits, and excess-profits taxes imposed by any foreign country or possession of the United States) from sources without the United States bears to its entire net income (computed without such deduction) for the same taxable year. . . .

. . . . . .

"(e) For the purposes of this section a domestic corporation which owns a majority of the voting stock of a foreign corporation from which it receives dividends (not deductible under section 234) in any taxable year shall be deemed to have paid the same proportion of any income, war-profits, or excess-profits taxes paid by such foreign corporation to any foreign country or to any possession of the United States, upon or with respect to the accumulated profits of such foreign corporation from which such dividends were paid, which the amount of such dividends bears to the amount of such accumulated profits: *Provided,* That the credit allowed to any domestic corporation under this subdivision shall in no case exceed the same proportion of the taxes against which it is credited, which the amount of such dividends bears to the amount of the entire net income of the domestic corporation in which such dividends are included. The term 'accumulated profits' when used in this subdivision in reference to a foreign corporation, means the amount of its gains, profits, or income in excess of the income, war-profits, and excess-profits taxes imposed upon or with respect to such profits or income; . . ."

[2] Oppenheim, Internat. L., 4th ed., vol. I, §§ 63, 64, pp. 133–135; Hyde, Internat. L., vol. 1, §§ 6–8, pp. 15–18; Moore, Internat. L. Dig., vol. I, pp. 14–18.

international unit.[3] The term "foreign country" is not a technical or artificial one, and the sense in which it is used in a statute must be determined by reference to the purpose of the particular legislation.[4]

In the case of tariff acts, this Court said in *Stairs* v. *Peaslee,* 18 How. 521, 526, that the word "country" has always been construed "to embrace all the possessions of a foreign State, however widely separated, which are subject to the same supreme executive and legislative control." See, also, *United States* v. *The Ship Recorder,* 1 Blatchf. 218, 225–227; *Campbell* v. *Barney,* 5 Blatchf. 221. Accordingly, in construing the Act of March 3, 1851 (9 Stat. 629, 630) providing that imported merchandise should be appraised at its market value "at the principal markets of the country" from which it had been imported, the Court held that a commodity shipped from Halifax, Nova Scotia, should be appraised according to the value in the principal markets under the British rule, and these were found, in fact, to be London and Liverpool. After the ratification of the Treaty of Peace between the United States and Spain, Porto Rico and the Philippines ceased to be "foreign country" under the tariff laws. *De Lima* v. *Bidwell,* 182 U. S. 1; *Fourteen Diamond Rings* v. *United States,* 183 U. S. 176, 179. It followed that the term "other countries" in the Commercial Convention with Cuba of 1903 (33 Stat. 2136, 2140) did not include the Philippine Islands. *Faber* v. *United States,* 221 U. S. 649, 658. Under the provisions of the Platt Amendment and the Constitution of Cuba, the Isle of Pines was *de facto* under the jurisdiction of Cuba and hence remained "foreign country" within the meaning of the Tariff Act of 1897 (30 Stat. 151). *Pearcy* v. *Stranahan,* 205 U. S. 257, 265.

[3] See Dicey, Conflict of Laws, 4th ed., pp. 59, 60.

[4] *Wayman* v. *Southard,* 10 Wheat. 1, 29; *Marriott* v. *Brune,* 9 How. 619, 635, 636; *American Tobacco Co.* v. *Werckmeister,* 207 U. S. 284, 293; *United States* v. *Louisville & N. R. Co.,* 236 U. S. 318, 333; *Inter-Island Steam Nav. Co.* v. *Ward,* 242 U. S. 1, 4; *Porto Rico Ry., L. & P. Co.* v. *Mor,* 253 U. S. 345, 348.

In construing legislation providing for the deportation of aliens "to the country whence they came," the place of emigration affords the dominant consideration. Thus, under the Immigration Act of 1917 (39 Stat. 874, 890) the Court held that an alien emigrating from Grodno, then a part of Russia, was properly deported to Poland, because at that time Grodno was a part of Poland. "The term country," said the Court, was used in the statute "to designate, in general terms, the state which, at the time of deportation, includes the place from which the alien came." *Mensevich* v. *Tod,* 264 U. S. 134, 136, 137. The evident purpose of the statute determined the significance to be attached to the expression.

In the instant case, the question is one of credit for income taxes "paid to any foreign country." The word "country" is manifestly used in the sense of government. And to decide what government fits the description, whether only that of a foreign power which may be considered an international person, or that of a political entity which, although not an international person, levies and collects income taxes which may be the subject of the intended credit, it is necessary to consider the object of the enactment and to construe the expression "foreign country" so as to achieve, and not defeat, its aim. We think that the purpose of the statute is clear. The fact that the provision is for a credit to the domestic corporation, against income taxes payable here, of income taxes "paid during the same taxable year to any foreign country," itself demonstrates that the primary design of the provision was to mitigate the evil of double taxation. Cognate provisions in the case of individuals disclose a similar intent. Section 222 (a)[5] of the same Revenue

---

[5] "Sec. 222. (a) That the tax computed under Part II of this title shall be credited with:

"(1) In the case of a citizen of the United States, the amount of any income, war-profits and excess-profits taxes paid during the

Act (1921) provides that the income tax, in the case of a citizen of the United States, should be credited with the amount of any income taxes "paid during the taxable year to any foreign country or to any possession of the United States." In the case of an alien resident of the United States, the credit is conditioned upon reciprocal treatment. The resident alien is to be credited with "the amount of any such taxes paid during the taxable year to any foreign country, if the foreign country of which such alien resident is a citizen or subject, in imposing such taxes, allows a similar credit to citizens of the United States residing in such country." 42 Stat. 249.[6]

---

taxable year to any foreign country or to any possession of the United States; and

"(2) In the case of a resident of the United States, the amount of any such taxes paid during the taxable year to any possession of the United States; and

"(3) In the case of an alien resident of the United States, the amount of any such taxes paid during the taxable year to any foreign country, if the foreign country of which such alien resident is a citizen or subject, in imposing such taxes, allows a similar credit to citizens of the United States residing in such country; . . ."

[6] With respect to the allowance of such credits, as distinguished from deductions from gross income in computing net income, the Committee on Ways and Means of the House of Representatives in its report on the Revenue Bill of 1918 (H. R. Rep. No. 767, 65th Cong., 2d sess., p. 11), said: "Under existing law a citizen of the United States can only deduct income, war or excess profits taxes paid to a foreign country from gross income in computing net income. With the corresponding high rates imposed by certain foreign countries the taxes levied in such countries in addition to the taxes levied in the United States upon citizens of the United States place a very severe burden upon such citizens. The bill provides that a credit against the income tax imposed in the United States be allowed a citizen of the United States subject to income and war or excess profits taxes in a foreign country of an amount equal to the tax paid in such country upon income that is received from sources within such country. The bill further provides that, in the case of an alien resident of the United States who is a citizen or subject of a country which imposes income, war profits, or excess profits taxes, a like

In the case of domestic corporations, the purpose is also disclosed to facilitate their foreign enterprises. The provision of § 238 (e) of the Revenue Act of 1921 indicates appreciation of the practical exigencies which lead to the foreign incorporation of subsidiaries for the extension by domestic corporations of their business abroad. This clearly appears to be the reason for the allowance by that Act of a credit to a domestic corporation, against its income tax here upon dividends received from its foreign subsidiary, of a proportionate part, as defined, of the income taxes paid by that subsidiary to "any foreign country."[7] The same provision applies to subsidiaries with

---

credit shall be allowed if such country allows a similar credit to citizens of the United States resident in such country."

The Conference Report on the Revenue Bill of 1918 (H. R. Rep. No. 1037, 65th Cong., 3d sess., p. 53), contains the following statement: "Amendment No. 118: The House bill provided that a citizen of the United States might credit against his income tax the amount of any income, war-profits, and excess-profits taxes paid to any foreign country, Porto Rico, or the Philippine Islands, upon income derived from sources therein, and allowed a similar credit to an alien resident if his country makes reciprocal provisions. The Senate amendment entirely rewrites the section and broadens it to include a credit for taxes paid to any possession of the United States, which is also to be given to an alien resident of the United States. The House recedes with an amendment providing that if any deduction is allowed for taxes accrued in any possession or foreign country, the commissioner may require the taxpayer to give a surety bond providing for the payment of any tax found to be due the Government in case too great a deduction shall be allowed for accrued taxes in our possessions or any foreign country. . . ."

[7] In the Report of the Committee on Ways and Means of the House of Representatives in relation to the Revenue Bill of 1921 (H. R. Rep. No. 350, 67th Cong., 1st sess., p. 8), the following statement was made with respect to American concerns doing business in foreign countries: "Under existing law an American citizen or domestic corporation is taxed upon his or its entire income even though all of it is derived from business transacted without the United States. This results in double taxation, places American business concerns at a serious disadvantage in the competitive struggle for foreign trade, and

respect to income taxes paid "to any possession of the United States."

In effectuating these purposes, it is manifest that the controlling consideration was the fact that the income tax was paid to a foreign government competent to lay the tax, and not the international status of that government. The burden upon the domestic corporation was the same whether the foreign government had international standing or was a lesser political entity which nevertheless had authority to impose the exaction upon the corporation or its subsidiary. And if credit was to be allowed here by reason of the payment of the income tax abroad, it made no difference to the Government of the United States whether the payment abroad was made to the one sort of foreign government or the other. The reasons underlying the allowance of the credit were applicable in either case.

An examination of the provisions of earlier income tax acts in which the expression "foreign country" is found, does not support, but rather negatives, the conclusion that the term was used in the restricted sense for which the petitioner contends. In the Corporation Tax Act of

---

encourages American corporations doing business in foreign countries to surrender their American charters and incorporate under the laws of foreign countries." While this statement was made to introduce a remedial proposal, which was not adopted, it discloses the purpose entertained. See, also, Report of Committee of Finance of the Senate (Sen. Rep. No. 275, 67th Cong., 1st sess., p. 9).

The Conference Report on the Revenue Bill of 1921 (H. R. Rep. 486, 67th Cong., 1st sess., p. 38), contains the following: "Amendment No. 436: The House bill provided for the exclusion from income of all dividends received from a corporation. Senate amendments agreed to by the conferees having provided for the inclusion in gross income of certain dividends received from a foreign corporation, Senate amendment No. 436 provides, under proper safeguards, for the credit by a domestic corporation of taxes paid by its subsidiary foreign corporation with respect to the income or profits of the foreign corporation paid as taxable dividends to the domestic corporation; and the House recedes."

1909 (36 Stat. 113) deduction from gross income was allowed to the corporation for all sums paid by it within the year for taxes "imposed by the government of any foreign country as a condition to carrying on business therein." That corporation tax was an excise on the privilege of doing business in a corporate capacity. The provision with respect to taxes laid by a foreign government manifestly referred to that government which, as the statute said, imposed a privilege tax. There was no suggestion that the foreign government laying the tax must have an international status; it was enough that it had authority to require the payment "as a condition to carrying on business." In the Income Tax Act of 1913, Paragraph G (b), 38 Stat. 173, deduction was allowed, in computing net income of a corporation, of "all sums paid by it within the year for taxes imposed under the authority of the United States or of any State or Territory thereof, or imposed by the Government of any foreign country." The Income Tax Act of 1916, §§ 5 (a), 6 (a) and 12 (a), 39 Stat. 759, 769, provided for deduction from gross income of "Taxes paid within the year imposed by the authority of the United States, or its Territories, or possessions, or any foreign country, or under the authority of any State, county, school district, or municipality, or other taxing subdivision of any State, not including those assessed against local benefits." The Income Tax Amendments of 1917, §§ 1201 (1), 1207 (1), 40 Stat. 330, 335, continued the provisions for deductions as to taxes imposed "by the authority" of "any foreign country" in obviously the same sense.[8]

[8] These provisions in the Act of 1917 read: "Taxes paid within the year imposed by the authority of the United States (except income and excess profits taxes), or of its Territories, or possessions, or any foreign country, or by the authority of any State, county, school district, or municipality, or other taxing subdivision of any State, not including those assessed against local benefits."

There appears to be no room for the conclusion that, under these Acts, the deductions for taxes paid abroad were available only if paid to a foreign government that had an international standing, and not if paid to a foreign government which, although not having that standing, was still authorized to exact the taxes. The criterion was the fact that the tax was imposed by the authority of a foreign country and not the international status of the particular government to which it was paid. We have not been referred to any opposing administrative construction of these Acts.[9]

The Revenue Act of 1918, with its provisions for credits, against income taxes laid here, of taxes paid "to any foreign country, upon income derived from sources therein," §§ 222 (a), 238 (a); 40 Stat. 1073, 1080,[10] was

[9] On the contrary, Treasury Regulations No. 33, Revised (issued in January, 1918, applicable to the Income Tax Acts of 1916 and 1917) had the following provision in Article 8 with respect to the deductions allowed to citizens and resident aliens for taxes paid abroad: "Taxes: State or any political subdivision thereof, Federal or foreign (except income and excess profits taxes paid to the United States), and not including taxes assessed against local benefits."

The provision of these regulations as to the taxes deductible in cases of corporations, had the same import.

This provision was as follows: "Art. 191. *Taxes deductible.*—Taxes imposed against a corporation by authority of the United States (except income and excess-profits taxes) its territories or any foreign country, or by authority of any State, county, school district, municipality, or other taxing subdivision of a State (not including those assessed against local benefits) and paid within the year for which the return is made, are deductible from the gross income of a domestic corporation."

[10] These provisions as to individuals were as follows:

"Sec. 222 (a). That the tax computed under Part II of this title shall be credited with:

"(1) In the case of a citizen of the United States, the amount of any income, war-profits and excess-profits taxes paid during the tax-

enacted with this background and we find no basis whatever for the conclusion that the term "foreign country" was used in that statute in any different sense. In the Act of 1918, the provisions for deductions from gross income, in computing net income, by citizens or residents, and by domestic corporations, of taxes paid to a foreign country, were continued as in the prior acts, save that there was excepted from these deductions the amount of the credits now allowed to citizens and residents under § 222 and to domestic corporations under § 238 (40 Stat. 1067).[11] In these provisions for deductions, the expres-

able year to any foreign country, upon income derived from sources therein, or to any possession of the United States; and

"(2) In the case of a resident of the United States, the amount of any such taxes paid during the taxable year to any possession of the United States; and

"(3) In the case of an alien resident of the United States who is a citizen or subject of a foreign country, the amount of any such taxes paid during the taxable year to such country, upon income derived from sources therein, if such country, in imposing such taxes, allows a similar credit to citizens of the United States residing in such country; . . ."

And with respect to domestic corporations:

"Sec. 238 (a). That in the case of a domestic corporation the total taxes imposed for the taxable year by this title and by Title III shall be credited with the amount of any income, war-profits and excess-profits taxes paid during the taxable year to any foreign country, upon income derived from sources therein, or to any possession of the United States. . . ."

[11] These provisions for deductions in the Revenue Act of 1918 were: "Sec. 214 (a) . . . (3). Taxes paid or accrued within the taxable year imposed (a) by the authority of the United States, except income, war-profits and excess-profits taxes; or (b) by the authority of any of its possessions, except the amount of income, war-profits and excess-profits taxes allowed as a credit under section 222; or (c) by the authority of any State or Territory, or any county, school district, municipality, or other taxing subdivision of any State or Territory, not including those assessed against local benefits of a kind

sion " foreign country " undoubtedly had the same meaning that it had in the prior income tax acts.[12] It will be observed that taxes paid to the States of the Union, or to their political subdivisions, were deductible from gross income.[13] But in the provisions introduced in the Act of 1918 for credits against income taxes, such taxes paid to the States of the Union, and to their political subdivisions, were not included.[14] This fact does not affect the present question, for credits were allowed in the case of income taxes paid to foreign countries, and the provision as to such countries was the same in the section relating to credits as in that with respect to deductions. The slight difference in phraseology in §§ 222 and 238 as to credits for taxes paid " *to* any foreign country," instead of taxes imposed " *by the authority of* any foreign country," as in §§ 214 (a) and 234 (a)[15] is not important. As the context plainly shows, both phrases were intended to convey the same meaning. Thus § 234 (a) (3) (d) provides for deduction, in computing the net income of

---

tending to increase the value of the property assessed; or (d) in the case of a citizen or resident of the United States, by the authority of any foreign country, except the amount of income, war-profits and excess-profits taxes allowed as a credit under section 222; . . ."

Section 234 (a) (3) (d) provided for a similar deduction of taxes paid by a domestic corporation, excepting from such deductions the credits allowed under section 238.

[12] Treasury Regulations No. 45, under the Revenue Act of 1918, thus described these deductions: "Art. 131. *Taxes.*—Federal taxes (except income, war profits and excess profits taxes), State and local taxes (except taxes assessed against local benefits of a kind tending to increase the value of the property assessed), and taxes imposed by possessions of the United States or by foreign countries (except the amount of income, war profits and excess profits taxes allowed as a credit against the tax), are deductible from gross income. . . ." See, *supra,* note 9.

[13] *Supra,* note 11.

[14] *Supra,* note 10.

[15] *Supra,* note 11.

a domestic corporation, of the taxes imposed "by the authority of any foreign country, except the amount of income, war-profits and excess-profits taxes allowed as a credit under section 238." The distinction made with respect to income taxes paid to the States of the Union, and to their political subdivisions, between deductions from gross income and credits against taxes, simply reflected the economic policy adopted in making allowances for taxes paid within the borders of continental United States and the organized territories. In relation to income taxes paid outside these borders, the provision as to credits was enacted to give greater and not less relief. Not only was the same expression as to foreign countries used in the section as to credits against income taxes as had been employed, and was still continued, as to deductions from gross income, but that the reference was not to a government having an international status was indicated by the provision for similar credits in cases of income taxes paid to "any possession of the United States."[16] And that the dominant thought in the mind of the Congress was to allow a credit for income taxes paid in any foreign country, whenever imposed by the authority of a foreign government, is shown in the reports, above cited, of the committees in connection with the Revenue Bill of 1918.[17]

No change, or qualification, was made in the use of the term "foreign country" in the Revenue Act of 1921,[18] and we think it must be regarded as having the same significance as it unquestionably had through the series of the prior income tax acts to which we have referred. The same controlling purpose is manifest, and the credit provision, here in question, in relation to taxable dividends

[16] See §§ 222 (a) and 238 (a) of the Revenue Act of 1918; *supra,* note 10.

[17] *Supra,* note 6.

[18] *Supra,* notes 1 and 5.

from foreign subsidiaries of domestic corporations was introduced not to narrow that purpose but to carry it out more effectively.[19]

The present controversy has arisen under the Treasury Regulations adopted with respect to the Revenue Acts of 1918 and 1921 as to credits.[20] The familiar principle is invoked that great weight is attached to the construction consistently given to a statute by the executive department charged with its administration. *United States* v. *Jackson,* 280 U. S. 183, 193. But the qualification of that principle is as well established as the principle itself. The Court is not bound by an administrative construction, and if that construction is not uniform and consistent, it will be taken into account only to the extent that it is supported by valid reasons. *United States* v. *Missouri Pacific R. Co.,* 278 U. S. 269, 280. See, also, *United States* v. *Dickson,* 15 Pet. 141, 161; *United States* v. *Healey,* 160 U. S. 136, 145; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *McCaull-Dinsmore Co.,* 253 U. S. 97, 99. Moreover, ambiguous regulations are of little value in resolving statutory ambiguities. In the Preliminary Edition of Treasury Regulations No. 45 under the Act of 1918, Article 382 relating to credits stated: "'Foreign country' means any governmental authority, not that of the United States or any part or possession thereof, having power to impose such taxes, and it therefore includes a self-governing colony, such as the Dominion of Canada." But this provision was shortly superseded in the amended Regulations No. 45, promulgated

[19] See reports of committees in relation to the Revenue Bill of 1921, *supra,* note 7.

[20] So far as deductions of taxes from gross income, in computing net income, are concerned, the regulation under the Act of 1918 was continued under that of 1921. Treasury Regulations No. 62, Art. 131; see, *supra,* note 12.

April 17, 1919, by a new Article 382 containing the following: "'Foreign country' includes within its meaning any foreign sovereign state or self-governing colony (for example, the Dominion of Canada), but does not include a foreign municipality (for example, Montreal) unless itself a sovereign State (for example, Hamburg). 'Any possession of the United States' includes, among others, Porto Rico, the Philippines and the Virgin Islands." The Department thus sought to introduce a qualification as to the significance of 'foreign country' not found in the words of the statute, or in those of the preceding income tax acts, or in departmental regulations under them, and one that was inconsistent with the apparent purpose of the enactment. It was a qualification which not only did not conform to the view that the expression 'foreign country' was limited to a foreign State having the status of an international person under international law, but, on the other hand, afforded no definite criterion. Its phrase 'self-governing colony' had no certain application, as there are colonies with varying degrees of self-government, and if, in view of the aim of the statute, it was important to draw a distinction with respect to self-government, it would appear that the particular phase of autonomy that was relevant to the purpose of the statute was the competency to impose income taxes upon the domestic corporation, or its foreign subsidiary, with respect to which the relief was granted. It is true that certain foreign political divisions which formerly had not had an international status were achieving it; but even that progress, at the time of the adoption of the regulation in 1919,[21] was still uncertain both as to the quality and extent of the international recognition which would be accorded, and, however im-

[21] See Oppenheim, International Law, 4th ed., vol. 1, §§ 63, 94*a*, 94*b*.

portant in other relations that progress might be, it was not the concern of this statute, and its operation cannot be deemed to depend upon it. The departmental regulation became the more ambiguous as it proceeded with its illustrations relating to municipalities.

By § 216 (e) of the Revenue Act of 1918, a nonresident alien individual was allowed credits for personal exemptions and for dependents if the 'country' of which he was a citizen or subject allowed a similar credit to citizens of the United States not residing in 'such country.' Article 307 of Regulations No. 45 gave a list of 'countries' which satisfied the credit requirements of this provision. This list was amended in later editions of these regulations, applicable to the Revenue Act of 1918, and embraced a great variety of 'countries,' including, for example, British Honduras, Ceylon, Cyprus, Fiji Islands, Gibraltar, Gold Coast, Malay States, Mauritius, St. Kitt-Nevis, etc.[22] As already noted, the expression 'foreign

[22] See Article 307, Treasury Decisions, vol. 21, p. 245; vol. 23, p. 444; vol. 24, p. 118. As finally amended, the Article was as follows:

"Art. 307. *When nonresident alien individual entitled to personal exemption.*—(a) The following is an incomplete list of countries which either impose no income tax or in imposing an income tax allow both a personal exemption and a credit for dependents which satisfy the similar credit requirement of the statute: Argentina, Bahama, Barbados, Basutoland, Bechuanaland Protectorate, Belgium, Bermuda, Bolivia, Bosnia, Brazil, British Guiana, British Honduras, Bukowina, Bulgaria, Canada, Carniola, Ceylon, Chile, China, Colombia, Cuba, Cyprus, Czechoslovakia, including Bohemia, Moravia, and Slovakia, Dalmatia, Denmark, Ecuador, Egypt, Falkland Islands, Fiji Islands, France, Galicia, Gambia, Germany, Gibraltar, Gold Coast, Goritz, Gradisca, Greece, Grenada, Guatemala, Herzegovina, Hongkong, Istria, Jamaica, Kenya, Luxemburg, Malay States, Malta, Mauritius, Mexico, Montenegro, Montserrat, Morocco, Newfoundland, Nicaragua, Nigeria, Northern Rhodesia, Norway, Nyasaland Protectorate, Panama, Paraguay, Persia, Peru, Porto Rico, Portugal, Rumania, St. Kitt-Nevis, St. Helena, Santo Domingo, Serbia, Siam, Sierra Leone, Silesia, Somaliland Protectorate, Spain, Swaziland, Switzerland, Trieste, Uganda Protectorate, Union of South Africa, Venezuela, Virgin Islands (British), Weihaiwei, Western Pacific Islands,

country' was used in § 222 (a) (3) of the Revenue Act of 1918 in relation to credits allowed to an alien resident of the United States for taxes upon income derived from sources in such 'country,' if the latter allowed a similar credit to citizens of the United States.[23] Article 385 of Regulations No. 45, set forth the list of 'countries' which did or did not satisfy this reciprocal credit requirement. This Article further illustrates the ambiguity of the regulations.[24]

Zanzibar Protectorate. (b) The following is an incomplete list of countries which in imposing an income tax allow a personal exemption which satisfies the similar credit requirement of the statute, but do not allow a credit for dependents: Bachka, Banat of Temesvar, Croatia, Finland, India, Italy, Salvador, Slavonia, Transylvania. (c) The following is an incomplete list of countries which in imposing an income tax do not allow to citizens of the United States not residing in such country either a personal exemption or a credit for dependents and therefore fail entirely to satisfy the similar credit requirements of the statute: Australia, Austria, including Carinthia, Lower Austria, Salzberg, Styria, Tyrol, Upper Austria and Vienna, Costa Rica, Dutch Guiana, Great Britain and Ireland, Japan, the Netherlands, New Zealand, Trinidad, Sweden. The former names of certain of these territories are here used for convenience, in spite of an actual or possible change in name or sovereignty. A nonresident alien individual who is a citizen or subject of any country in the first list is entitled for the purpose of the normal tax to such credit for personal exemption and for dependents as his family status may warrant. If he is a citizen or subject of any country in the second list he is entitled to a credit for personal exemption, but to none for dependents. If he is a citizen or subject of any country in the third list he is not entitled to credit for either personal exemption or for dependents. If he is a citizen or subject of a country which is in none of the lists, then to secure credit for either a personal exemption or for dependents he must prove to the satisfaction of the commissioner that his country does not impose an income tax or that in imposing an income tax it grants the similar credit required by the statute."

[23] *Supra,* note 10.

[24] Article 385 of Regulations No. 45 is as follows (Treasury Decisions, vol. 3, p. 473):

"Art. 385. *Countries which do or do not satisfy the similar credit requirement.*—(a) The following is an incomplete list of the countries

It is urged that the Revenue Act of 1921 must be deemed to have been adopted with the meaning attributed to the term 'foreign country' by the regulations under the Act of 1918. But regulations of such an ambiguous character supplying no definite criterion cannot be deemed to determine satisfactorily the interpretation

---

which satisfy the similar credit requirement of section 222 (a) (3) of the Revenue Act of 1918, either by allowing to citizens of the United States residing in such countries a credit for the amount of income, war profits, or excess profits taxes paid to the United States upon incomes derived from sources therein, or in imposing such taxes, by exempting from taxation the incomes received from sources within the United States by citizens of the United States residing in such countries: Bulgaria, Canada, Italy, Newfoundland, Salvador. (b) The following is an incomplete list of the countries which do not satisfy the similar credit requirement of section 222 (a) (3) of the Revenue Act of 1918, either by allowing no credit to citizens of the United States residing in such countries, for the amount of income, war profits, or excess profits taxes paid to the United States upon incomes derived from sources therein, or because such countries do not impose any income, war profits, or excess profits taxes: Argentina, Bahama, Belgium, Bermuda, Bolivia, Bosnia, Brazil, Chile, China, Costa Rica, Ecuador, Egypt, Finland, France, Great Britain and Ireland, Guatemala, Herzegovina, India, Jamaica, Japan, Montenegro, Morocco, New Zealand, Nicaragua, Panama, Paraguay, Persia, Peru, Portugal, Roumania, Santo Domingo, Serbia, Siam, Sweden, Switzerland, Venezuela. The former names of certain of these territories are here used for convenience in spite of the actual or possible change in the name or sovereignty. A resident of the United States who is a citizen or subject of any country in the first list is entitled, for the purpose of the total tax due the United States for 1918 and subsequent years, to a credit for the amount of any income, war profits, and excess profits taxes paid or accrued during the taxable year to such country upon income from sources therein. If he is a citizen or subject of any country in the second list, he is not entitled to such credit. If he is a citizen or subject of a country which is in neither list, then to secure the desired credit he must prove to the satisfaction of the Commissioner that his country satisfies the similar credit requirement of the statute."

of the statute. The Revenue Act of 1918 had continued the expression 'foreign country' precisely as it had been used in the preceding income tax acts without any such restricting gloss, and the Act of 1921 continued the expression as used in the Act of 1918. In these circumstances, we are of the opinion that the expression 'foreign country' in the Act of 1921 should be deemed to have the same significance in that Act that it had in the prior acts and was not limited by the regulations adopted under the Act of 1918. The regulations under the Act of 1921 were of the same equivocal sort as those to which we have referred under the Act of 1918, and can be deemed to have no greater effect.[25] The decisions of the Treasury Department [26] applying these regulations have no more force than the reasons given to sustain them and these, in our opinion, furnish no adequate ground for denying effect to the credit provisions of the statute in accordance with their manifest purpose.

In this view, we find it unnecessary to consider the arguments that have been adduced with respect to the status of New South Wales in its relation to the Commonwealth of Australia. There is no question that New South Wales levied the income taxes for which credit is sought and that its government had adequate authority to impose them.

We conclude that the Board of Tax Appeals and the Circuit Court of Appeals were right in holding that these income taxes fell within the statutory provision as to credits, and the judgment is affirmed.

Judgment affirmed.

---

[25] Regulations No. 62, Articles 382, 385.

[26] Solicitor's Memorandum No. 1187, October 18, 1919; Office Decision No. 1050, C. B. 5, p. 194, Solicitor's Memorandum No. 1614, C. B. III–1, p. 227.

CROWELL, DEPUTY COMMISSIONER, *v.* BENSON.*

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

No. 19. Argued October 20, 21, 1931.—Decided February 23, 1932.

1. In virtue of its power to alter or revise the maritime law, Congress may provide that where employees in maritime employment are disabled or die from accidental injuries arising out of or in the course of their employment upon the navigable waters of the United States, their employers shall pay reasonable compensation, without regard to fault as the cause of injury, and be thereby relieved from other liability. P. 39.
2. The Longshoremen's and Harbor Workers' Compensation Act, which provides a scheme for compensation in the class of cases above described, applicable if recovery "through workmen's compensation proceedings may not validly be provided by State law," *upheld* as to substantive provisions. P. 22.
3. The classifications of disabilities and beneficiaries and the amounts of compensation provided in the Act not being unreasonable, the Act in those respects is consistent with the due process clause of the Fifth Amendment. Pp. 41–42.
4. The difficulty of ascertaining actual damages justifies the fixing of standard compensation in such an Act at figures reasonably approximating probable damages. *Id.*
5. Considerations respecting the relation of master and servant, which sustain workmen's compensation laws of the States against objections under the due process clause of the Fourteenth Amendment, are applicable to the substantive provisions of this Act of Congress, tested by the due process clause of the Fifth Amendment. *Id.*
6. Claims for compensation under the above-mentioned Act are filed with administrative officers called deputy commissioners, who "shall have full power and authority to hear and determine all questions in respect of such claim." They may issue subpœnas which are enforcible through contempt proceedings in federal courts. In in-

---

* Together with No. 20, *Crowell, Deputy Commissioner, and Knudsen* v. *Benson.*

vestigating and hearing claims they are not to be bound by the common-law or statutory rules of evidence, except as provided in the Act, but are to proceed in such manner "as to best ascertain the rights of the parties." Hearings are to be public and reported stenographically and records are to be made, for which the Commission created by the Act must provide by regulation. Orders for compensation are to become final in 30 days. When compensation ordered is not paid, a supplementary order may be made declaring the amount in default, and judgment for that amount may be entered in a federal court if the order "is in accordance with law." Review of such judgment may be had as in suits for damages at common law. The Act further provides that if a compensation order is "not in accordance with law," it may be suspended or set aside, in whole or in part, through injunction proceedings against the deputy commissioner who made it; and also that beneficiaries of such an order, or the deputy commisioner, may have it enforced in a federal court if the court determines that the order "was made and served in accordance with law." *Held:*

(1) As the claims are governed by the maritime law and within the admiralty jurisdiction, trial by jury is not required by the Seventh Amendment. P. 45.

(2) The Act reserves to the admiralty courts full power to pass upon all questions of law, including the power to deny effect to an administrative finding which is without evidence or contrary to the indisputable character of the evidence, or where the hearing was inadequate, unfair, or arbitrary. In this respect it satisfies due process and attempts no interference with the judicial power in admiralty and maritime cases. Pp. 46, 49.

(3) As regards questions of fact, the Act does not expressly preclude the court, in proceedings to set aside an order as not in accordance with law, from making its own examination and determination of facts whenever that is deemed necessary to enforce constitutional rights; and, as the Act is to be construed to support rather than to defeat it, no such limitation should be implied. P. 46.

(4) Apart from constitutional rights to be enforced in court, the Act contemplates that, in cases within its purview, the findings of a deputy commissioner on questions of fact respecting injuries to employees shall be final if supported by evidence. P. 46.

(5) So limited, the use of the administrative method for determining facts (assuming due notice and opportunity to be heard and that findings are based upon evidence) is consistent with due process

and is not an unconstitutional invasion of the judicial power. Pp. 47, 51.

(6) The Act requires a public hearing and that all proceedings upon a particular claim shall be shown in the record and open to challenge and opposing evidence; facts known to the deputy commissioner but not put in evidence will not support a compensation order. P. 48.

(7) The provision that the deputy commissioner shall not be bound by the rules of evidence applicable in a court or by technical rules of procedure is compatible with due process provided the substantial rights of the parties be not infringed. *Id.*

(8) Equipping the admiralty courts with power of injunction, for enforcing the standards of maritime law as defined by the Act, is consistent with Art. III of the Constitution. P. 49.

(9) Where the question of fact relates to either of the two fundamental and jurisdictional conditions of the statute, viz., (a) occurrence of the injury upon navigable waters of the United States, and (b) existence of the relation of master and servant, the finding of the deputy commissioner is not conclusive, but the question is determinable *de novo* by the court on full pleadings and proofs in a suit for an injunction, in which the court is not confined to the evidence taken and record made before the deputy commissioner. The statute is susceptible of this construction and must be so construed to avoid unconstitutionality. Pp. 54, 62.

(10) In amending and revising the maritime law, Congress can not reach beyond the constitutional limits of the admiralty and maritime jurisdiction. P. 55.

(11) Congress has no general authority to amend the maritime law so as to establish liability without fault in maritime cases regardless of particular circumstances or relations,—in this instance, the relation of master and servant. P. 56.

7. As respects the power of Congress to provide for determinations of fact otherwise than through the exercise of the judicial power reposed by the Constitution in the courts of the United States, a clear distinction exists between cases arising between the Government and other persons which by their nature do not require judicial determination (though they may be susceptible of it) and cases of private right, that is, of the liability of one individual to another under the law as defined. P. 50.
8. Proper maintenance of the federal judicial power in enforcing constitutional restrictions precludes a power in Congress to substitute for constitutional courts, in which the judicial power of the United

States is vested, an administrative agency for the final determination of facts upon which the enforcement of the constitutional rights of the citizen depend. P. 56.

9. A State, on the other hand, may distribute its powers as it sees fit, provided only that it acts consistently with the essential demands of due process and does not transgress restrictions of the Federal Constitution applicable to state authority. P. 57.

10. The power of Congress to change the procedure of the courts of admiralty would not justify lodging in an administrative officer final decision of facts upon which the constitutional rights of individuals are dependent. P. 61.

11. In deciding upon the validity of an Act of Congress, regard must be had to substance rather than form. P. 53.

12. Where the validity of an Act of Congress is drawn in question or where a serious doubt of its constitutionality is raised, it is a cardinal principle that the court will first ascertain whether a construction of the Act is fairly possible by which the question may be avoided. P. 62.

13. A declaration in a statute that if any of its provisions, or the application thereof to any persons or circumstances, shall be found unconstitutional, the validity of the remainder of the statute and the applicability of its provisions to other persons or circumstances shall not be affected, evidences an intention that no implication from the terms of the Act which would render them invalid should be indulged. P. 63.

45 F. (2d) 66, affirmed.

CERTIORARI, 283 U. S. 814, to review a decree which affirmed a decree of the District Court, 33 F. (2d) 137; 38 *id.* 306, enjoining the enforcement of an award of compensation made by a deputy commissioner under the Longshoremen's and Harbor Workers' Compensation Act.

Solicitor General Thacher, with whom *Mr. Erwin N. Griswold* was on the brief, for Crowell, petitioner.

This statute is a comprehensive workmen's compensation law, modeled after the New York state compensation law. See H. Rep. No. 1190, 69th Cong., 1st Sess., p. 2.

Unless the provision confining court review to questions of law is valid, the time required for final determination of awards will be greatly increased and the Act will have fallen far short of its mark.

The provision that the administrative determination of fact shall be conclusive in the courts, when supported by evidence, is found in a great majority of the state workmen's compensation laws. The state courts have without exception upheld such provisions.

In at least two instances this Court has considered state workmen's compensation laws which contained provisions that administrative findings of fact should be final. *New York Central R. Co.* v. *White,* 243 U. S. 188; *Booth Fisheries Co.* v. *Industrial Commission,* 271 U. S. 208.

Under § 21, the only ground on which a compensation order may be set aside is that it is " not in accordance with law." This language was adopted from the statutory provision for review of the decisions of the Board of Tax Appeals, § 1003 (b), Rev. Act 1926, under which it is settled that the Board's determinations of fact, when supported by evidence, are conclusive. *Phillips* v. *Commissioner,* 283 U. S. 589; *Old Colony Trust Co.* v. *Commissioner,* 279 U. S. 716; *Avery* v. *Commissioner,* 22 F. (2d) 6; *American Savings Bank & Tr. Co.* v. *Burnet,* 45 F. (2d) 548; *Nichols* v. *Commissioner,* 44 F. (2d) 157; *Bedell* v. *Commissioner,* 30 F. (2d) 622. There is no room for any other construction of the same words as they are used in the present Act.

Had Congress intended a trial *de novo,* the jurisdiction of the court would not have been limited to consideration of the legality of the administrative order. The words " if not in accordance with law," which plainly limit the power of the court to " suspend or set aside " the order, like the words " as the facts and law of the case may

warrant" under consideration in *Ma-King Co.* v. *Blair,* 271 U. S. 479, 483, merely give the court authority to determine whether the order is based upon an error of law, is wholly unsupported by the evidence, or is arbitrary or capricious. This interpretation is strongly supported by the frame and purpose of the Act as a whole.

All the provisions of the Act dealing with the manner in which a remedy is given to an injured employee and the limited time within which action must be taken, indicate a clear intention that the facts shall be speedily determined by the deputy commissioner so that compensation may be awarded without the delay usually incident to litigation in the courts.

The due process clause of the Fifth Amendment is fully satisfied by the provision for a hearing before an administrative tribunal and for a judicial review of the administrative determination if that determination is "not in accordance with law." *Reetz* v. *Michigan,* 188 U. S. 505, 507; *Weimer* v. *Bunbury,* 30 Mich. 201, 211; *Long Island Water Co.* v. *Brooklyn,* 166 U. S. 685, 695; *Phillips* v. *Commissioner,* 283 U. S. 589, 600.

In numerous instances Congress has expressly provided that administrative findings of fact when supported by evidence shall be conclusive. Fed. Tr. Comm. Act, U. S. C., Tit. 15, § 45; Clayton Act, *id.* § 21; Tariff Act, 1922, U. S. C., Tit. 19, § 176; Tariff Act, 1930, U. S. C., Supp. IV, Tit. 19, § 1337 (c); Radio Act, *id.* Tit. 47, § 96.

In many decisions of this Court statutes of this type have been applied, and in other decisions findings of administrative bodies have been held conclusive, even though the statutes involved did not explicitly so provide. *Federal Trade Comm.* v. *Curtis Pub. Co.,* 260 U. S. 568, 580; *International Shoe Co.* v. *Federal Trade Comm.,* 280 U. S. 291, 297.

The courts will not review the findings of fact of the Interstate Commerce Commission by passing upon the

credibility of witnesses or the effective weight of testimony. See *e. g., Interstate Commerce Comm.* v. *Delaware, L. & W. R. Co.,* 220 U. S. 235, 251; *id.* v. *Union Pac. R. Co.,* 222 U. S. 541; *id.* v. *Louisville & N. R. Co.,* 227 U. S. 88; *Western Papermakers Co.* v. *United States,* 271 U. S. 268; *Virginian Ry. Co.* v. *United States,* 272 U. S. 658, 663.

Decisions of heads of executive departments upon questions of fact are final and conclusive. *Bates & Guild Co.* v. *Payne,* 194 U. S. 106; *Public Clearing House* v. *Coyne,* 194 U. S. 407; *Houston* v. *St. Louis Packing Co.,* 249 U. S. 479; *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420, 443, 444; *Medbury* v. *United States,* 173 U. S. 492; *Nishimura Ekiu* v. *United States,* 142 U. S. 651; *Fong Yue Ting* v. *United States,* 149 U. S. 698; *Lem Moon Sing* v. *United States,* 158 U. S. 538; *United States* v. *Ju Toy,* 198 U. S. 253; *Quon Quon Poy* v. *Johnson,* 273 U. S. 352.

So of determinations of fact by other administrative officials. *Passavant* v. *United States,* 148 U. S. 214; *Smelting Co.* v. *Kemp,* 104 U. S. 636; *Burfenning* v. *Chicago, St. P., M. & O. Ry. Co.,* 163 U. S. 321, 323; *Johnson* v. *Drew,* 171 U. S. 93; *Silberschein* v. *United States,* 266 U. S. 221; *United States* v. *Williams,* 278 U. S. 255; *Ma-King Co.* v. *Blair,* 271 U. S. 479, 483; *Williamsport Wire Rope Co.* v. *United States,* 277 U. S. 551.

Findings of fact of the Board of Tax Appeals are conclusive upon the courts. *Phillips* v. *Commissioner,* 283 U. S. 589. See also *Old Colony Trust Co.* v. *Commissioner,* 279 U. S. 716.

There is nothing in the Constitution establishing a universal rule that there must be a trial *de novo* in the courts in all suits to set aside decisions made by administrative authorities. The award of compensation by a deputy commissioner and the finding of facts upon which it is made are not different by nature from findings and

orders made by the Federal Trade Commission, the Interstate Commerce Commission, or other administrative bodies.

The jurisdiction of the District Court under § 21 (b) is limited to a determination of the question whether the order is "not in accordance with law." This requires a consideration of the case on the record made before the deputy commissioner. If there is substantial evidence to support the order, the findings of the deputy commissioner are conclusive.

Distinguishing: *Ohio Valley Water Co.* v. *Ben Avon Borough,* 253 U. S. 287; *Bluefield Co.* v. *Public Serv. Comm.,* 262 U. S. 679, 689; *Lehigh Valley R. Co.* v. *Commissioners,* 278 U. S. 24, 37–41; *Liu Hop Fong* v. *United States,* 209 U. S. 453, 461; *Ng Fung Ho* v. *White,* 259 U. S. 276, 284. See Dickinson, Administrative Justice and the Supremacy of Law (1927) pp. 39–75; Frankfurter, The Task of Administrative Law (1927) 75 U. of P. L. Rev. 614, 619–20.

The decision in the *Ohio Valley Water Co.* case is simply that a legislative rate-making order of a commission must be subject to the same review as an act of the legislature. It did not overrule decisions arising in other fields of administrative activity in which it has repeatedly been held that determinations of fact may be made conclusive when they are supported by evidence. Indeed, many such decisions have been announced by this Court since the decision of the *Ohio Valley Water Co.* case. See *e. g., Federal Trade Comm.* v. *Curtis Pub. Co.,* 260 U. S. 568, 580; *Virginian Ry. Co.* v. *United States,* 272 U. S. 658, 663; *United States* v. *Williams,* 278 U. S. 255; *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420, 443–444; *Phillips* v. *Commissioner,* 283 U. S. 589.

In the present case the administrative proceedings were not legislative in character but were brought to determine a present liability based on past facts and exist-

ing legislation. In such a case the administrative body is sitting in a quasi-judicial capacity, and under the numerous decisions of this Court, heretofore referred to, its conclusions on the facts when supported by evidence may properly be made conclusive.

The *Liu Hop Fong* case is clearly no more than a determination that the statute there involved by its terms provided for a trial *de novo* on an appeal to the District Court.

In *Ng Fung Ho* v. *White,* 259 U. S. 276, the question of citizenship was considered to be jurisdictional, because, if the person was a citizen, the Secretary of Labor was wholly without authority to order his deportation. Of course, administrative determinations are valid only when they are made within the power which has been conferred. The determination of the question whether the administrative officer has exceeded his authority is essentially a question of law, subject to review in the courts. No such question arises in this case. The statute defines the commissioner's jurisdiction. It grants "full power and authority to hear and determine all questions" in respect of the claim for compensation. § 19 (a). It follows that Knudsen's assertion of employment, made in his claim and disputed by Benson, presented a question which the commissioner had power—that is, jurisdiction—to determine. There was nothing inherent in the nature of this issue to distinguish it from other questions of fact which may constitutionally be left to administrative determination.

At the time Knudsen was employed, Benson had notice through the Act that liability might be imposed. The liability was a risk incidental to his business. Probably the present question would never have been raised were it not for the decision in the *Ohio Valley Water Co.* case. In all of the other numerous cases involving it in the lower federal courts, the contention we make has been sustained.

A great majority of the state workmen's compensation acts expressly provide that administrative findings of fact shall be final. Apparently without a single exception such provisions have been held valid and constitutional by the state courts. The decisions reaching this result are too numerous to catalogue. See especially *Nega* v. *Chicago Rys. Co.,* 317 Ill. 483; *Helfrick* v. *Dahlstrom Metallic Door Co.,* 256 N. Y. 199.

There is no basis for the contention that the federal district courts sitting in admiralty are the only tribunals competent to consider compensation for injuries sustained on navigable waters. When the injury is such that it is merely a matter of local concern, compensation may be had under the state compensation laws and the award may be made by the administrative tribunals created by the State. Seamen injured on navigable waters may recover under the Jones Act in actions at law commenced in state courts. When the remedy sought is *in personam*, it may be by libel in the District Court, or by an action at law in a federal or state court.

This enactment was within the power of Congress to alter, amend, or revise the maritime law. No limitation upon the exercise of this power is to be found in the words of the Constitution extending the judicial power of the United States to all cases of admiralty and maritime jurisdiction.

The court below erred in directing a transfer from the equity to the admiralty side.

Mr. Alexis T. Gresham, with whom *Mr. Palmer Pillans* was on the brief, for Knudsen, petitioner.

The question relates solely to the procedural provisions of the Act. The makers of the Constitution were not concerned with fixing the jurisdiction of the lower courts of the general Government as between Congress

and the judiciary, much less with establishing the procedure of such courts. To reach the conclusion found by the courts below, it must be held that the Constitution denies the right of the Congress to fix the procedure of the lower federal courts in respect to the determination of facts. But even the States may in matters of mere local concern exclude the jurisdiction of the admiralty courts over cases to which the jurisdiction otherwise would extend. However, the power of the Congress in the maritime law is broad and paramount. By it that law has from time to time been materially changed, the jurisdiction of the lower federal courts defined and restricted, the procedure of the district courts sitting in admiralty defined and regulated. In fields of congressional activity other than the maritime field Congress has restricted the jurisdiction of the inferior federal tribunals, and has done so constitutionally, as this court has decided. Jurisdiction, either original or appellate, may extend (save in certain cases before this Court) as Congress wills. There is no distinction in the congressional grants of judicial power between the field of maritime activity and other fields entrusted to the general Government. If the Congress may restrict the jurisdiction of the inferior federal courts to limits beyond which those courts had theretofore exercised jurisdiction, as respecting cases arising under the Constitution and laws of the United States, it may so limit cases within the admiralty and maritime jurisdiction. *A fortiori* Congress may, in a proceeding under a maritime workers' compensation act, require determinations of fact in the first instance to be reached by an administrative officer.

Mr. Harry T. Smith, with whom *Mr. Vincent F. Kilborn* was on the brief, for respondent.

The ruling on the motions to dismiss the bill did not raise the question of whether the cause was triable *de*

novo, or in admiralty, and petitioners entered upon a *de novo* trial in the District Court, offered evidence and took their chance of a favorable decision, without objection or exception to such procedure, and should not be heard to complain that the proceedings were irregular or erroneous. *Commissioner* v. *St. Louis S. W. Ry. Co.,* 257 U. S. 547; *Reavis* v. *Fianza,* 215 U. S. 16, 25.

The only issue in fact tried and decided by the District Judge was whether or not Knudsen was an employee of Benson. If he was not, the deputy commissioner had no power or jurisdiction to enter an award in his favor. *Ng Fung Ho* v. *White,* 259 U. S. 276; *United States* v. *Grimley,* 137 U. S. 147; *Crowell* v. *Benson,* 45 F. (2d) 66; *Pine* v. *Industrial Comm.,* 108 Okla. 185; *Borgnis* v. *Falk Co.,* 147 Wis. 327; *Courter* v. *Simpson Const. Co.,* 264 Ill. 488; *Hunter* v. *Colfax Consol. Coal Co.,* 175 Ia. 245; *Uphoff* v. *Industrial Board,* 271 Ill. 312; *Hahnemann Hospital* v. *Industrial Board,* 282 Ill. 316; *Thede Bros.* v. *Industrial Comm.,* 285 Ill. 483; *Paul* v. *Industrial Comm.,* 288 Ill. 532; *Dorlon Bros.* v. *Industrial Comm.,* 173 Cal. 250; *Roberts* v. *Industrial Comm.,* 52 Cal. App. 31; *Industrial Comm.* v. *Evans,* 52 Utah 394.

The jurisdiction of the deputy commissioner being special and limited, the District Court had the right to determine, on its independent judgment of the law and the evidence offered before it, whether jurisdiction to make the award existed, or whether the deputy commissioner acted beyond and without his jurisdiction. Fundamental and jurisdictional questions are always open to determination in the courts, whether the order or decision be made by a court of special or limited jurisdiction, or by an administrative board or body; the question of whether such a board or body acted within or beyond its jurisdiction is always a judicial question. *Ng Fung Ho* v. *White,* 259 U. S. 276; *United States* v. *Grimley,* 137 U. S. 147; *Hawkins* v. *Bleakly,* 243 U. S. 210, 215; *Kempe's Lessee*

v. *Kennedy,* 5 Cranch 173, 185; *McClaughry* v. *Deming,* 186 U. S. 49, 63; *Runkle* v. *United States,* 122 U. S. 543, 555; *Givens* v. *Zerbst,* 255 U. S. 11, 19.

The question as to whether such an award is subject to review *de novo* upon matters other than the jurisdictional facts does not seem to us to be material, as it was the finding of the court in this case that the jurisdictional facts did not exist.

Since it is provided by the Constitution that no citizen shall be deprived of life, liberty and property without due process of law, what difference does it make under what classification we may place the commissioner? Surely it matters not from what source authority may be obtained or what powers Congress may attempt to confer upon him, he can never be so empowered as to enable him to condemn a citizen to liability to another, by any proceedings which may be beyond the limits of his jurisdiction; and this proposition is accentuated when it appears, as in this case, that the order has not been based entirely upon the evidence produced at a hearing, but has been based, at least in part, upon the information obtained by the commissioner from other sources.

To limit the court, in its review of the jurisdictional facts, to a consideration of the evidence offered before the commissioner at the hearing would make it impossible for the court to consider the question of jurisdiction at all, since the commissioner was not required to and did not reveal in his report either the nature or the result of the private inquiries upon which he relied, in part or in whole, for his finding, so that such findings as he made could not be reviewed except upon a proceeding *de novo.*

There is no express provision in the Act for an appeal only on questions of law or that the commissioner's finding of facts shall be conclusive if supported by any substantial evidence. The method of review provided is in a court ordinarily of original jurisdiction only, and the

proceeding prescribed is original in character. There is no provision in regard to how the proceedings in the court shall be heard, nor as to what papers shall be filed or what testimony given. There is no provision that the proceedings shall be upon a transcript of the proceedings before the commissioner or for bringing up a record by bill of exceptions. Every consideration exists in this case that influenced the court to hold in the case of *Liu Hop Fong* v. *United States,* 209 U. S. 453, 461–2, that a Chinaman appealing to the District Court from the judgment or order of a United States Commissioner in cases arising under the Chinese Exclusion Law, is entitled to a trial *de novo.*

The case is one within the admiralty and maritime jurisdiction, and even on appeal in such cases, unless Congress has clearly indicated the contrary, the trial is *de novo* both on the law and the facts.

The expression " not in accordance with law " is equivocal and should not be so construed as to take away jurisdiction of admiralty cases of this character expressly and clearly conferred on the federal courts.

The Act if construed to accord a hearing *de novo* in the District Court, will not materially affect a speedy hearing in most cases; and if it did, justice should not be sacrificed to speed, nor should the clear jurisdiction conferred on district courts be withdrawn by implication from an argument of convenience.

The fact that, while the Act is modeled on the New York Act, it omits the provisions of that Act making the finding of the commissioner final on all questions of fact and providing for the certifying only of questions of law, is strongly indicative that Congress never intended an appeal only on questions of law.

Conceding the power of Congress, a party should not be deprived of the security of a judicial hearing heretofore plainly provided for, unless that result is made necessary by clear and unmistakable language.

This is a case or controversy under a new system of admiralty or maritime rules; and the application of those rules to a past state of facts, so as to determine liability *vel non* as between a contesting employer and employee, involves the exercise of the judicial power of the Federal Government which, under Art. 3, §§ 1 and 2 of the Constitution, can only be exercised by a constitutional court created under that article. *Ex parte Bakelite Corp.,* 279 U. S. 438; *American Ins. Co.* v. *Carter,* 1 Pet. 511, 546; *Den* v. *Hoboken Land & Imp. Co.,* 18 How. 272; *Kansas* v. *Colorado,* 206 U. S. 46.

Any attempt by Congress to confer this judicial power or jurisdiction on any federal administrative officer, board or legislative court would violate that article, and likewise would violate the due process clause of the Fifth Amendment, because it is not the process provided for such cases by the Constitution. *Martin* v. *Hunter's Lessee,* 1 Wheat. 304; *Ng Fung Ho* v. *White,* 259 U. S. 276.

To construe the Act as contended for by petitioners would at least raise a grave question as to its constitutionality which should always be avoided, if possible. *United States* v. *Jin Fuey Moy,* 241 U. S. 394, 401; *United States* v. *La Franca,* 282 U. S. 568; *Russian Volunteer Fleet* v. *United States,* 282 U. S. 481.

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

This suit was brought in the District Court to enjoin the enforcement of an award made by petitioner Crowell, as deputy commissioner of the United States Employees' Compensation Commission, in favor of the petitioner Knudsen and against the respondent Benson. The award was made under the Longshoremen's and Harbor Workers' Compensation Act (Act of March 4, 1927, c. 509, 44 Stat. 1424; U. S. C. Tit. 33, §§ 901–950) and rested upon

the finding of the deputy commissioner that Knudsen was injured while in the employ of Benson and performing service upon the navigable waters of the United States. The complainant alleged that the award was contrary to law for the reason that Knudsen was not at the time of his injury an employee of the complainant and his claim was not 'within the jurisdiction' of the deputy commissioner. An amended complaint charged that the Act was unconstitutional upon the grounds that it violated the due process clause of the Fifth Amendment, the provision of the Seventh Amendment as to trial by jury, that of the Fourth Amendment as to unreasonable search and seizure, and the provisions of Article III with respect to the judicial power of the United States. The District Judge denied motions to dismiss and granted a hearing *de novo* upon the facts and the law, expressing the opinion that the Act would be invalid if not construed to permit such a hearing. The case was transferred to the admiralty docket, answers were filed presenting the issue as to the fact of employment, and the evidence of both parties having been heard, the District Court decided that Knudsen was not in the employ of the petitioner and restrained the enforcement of the award. 33 F. (2d) 137; 38 F. (2d) 306. The decree was affirmed by the Circuit Court of Appeals, 45 F. (2d) 66, and this Court granted writs of certiorari. 283 U. S. 814.

The question of the validity of the Act may be considered in relation to (1) its provisions defining substantive rights and (2) its procedural requirements.

First. The Act has two limitations that are fundamental. It deals exclusively with compensation in respect of disability or death resulting "from an injury occurring upon the navigable waters of the United States" if recovery "through workmen's compensation proceedings

may not validly be provided by State law," and it applies only when the relation of master and servant exists. § 3.[1] "Injury," within the statute, "means accidental injury or death arising out of and in the course of employment," and the term "employer" means one "any of whose employees are employed in maritime employment, in whole or in part," upon such navigable waters. § 2 (2) (4). Employers are made liable for the payment to their employees of prescribed compensation "irrespective of fault as a cause for the injury." § 4. The liability is exclusive, unless the employer fails to secure payment of the compensation. § 5. The employer is required to furnish appropriate medical and other treatment. § 7. The compensation for temporary or permanent disability, total or partial, according to the statutory classification, and in case of the death of the employee, is fixed, being based upon prescribed percentages of average weekly wages, and the persons to whom payments are to be made are designated. §§ 6, 8, 9, 10. Employers must secure the pay-

[1] Section three of the Act as to "Coverage" provides:

"Sec. 3. (a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of—

"(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

"(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

"(b) No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another."

ment of compensation by procuring insurance or by becoming self-insurers in the manner stipulated. § 32. Failure to provide such security is a misdemeanor. § 38.

As the Act relates solely to injuries occurring upon the navigable waters of the United States, it deals with the maritime law, applicable to matters that fall within the admiralty and maritime jurisdiction (Const. Art. III, § 2; *Nogueira* v. *N. Y., N. H. & H. R. Co.*, 281 U. S. 128, 138); and the general authority of the Congress to alter or revise the maritime law which shall prevail throughout the country is beyond dispute.[2] In limiting the application of the Act to cases where recovery "through workmen's compensation proceedings may not validly be provided by State law," the Congress evidently had in view the decisions of this Court with respect to the scope of the exclusive authority of the national legislature.[3] The pro-

[2] *Waring* v. *Clarke*, 5 How. 441, 457, 458; *The Lottawanna*, 21 Wall. 558, 577; *Butler* v. *Boston & Savannah Steamship Co.*, 130 U. S. 527, 556, 557; *In re Garnett*, 141 U. S. 1, 14; *The Hamilton*, 207 U. S. 398, 404; *Atlantic Transport Co.* v. *Imbrovek*, 234 U. S. 52, 62; *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, 214, 215; *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, 160; *Washington* v. *Dawson*, 264 U. S. 219, 227, 228; *Panama R. Co.* v. *Johnson*, 264 U. S. 375, 386, 388.

Important illustrations of the exercise of this authority are the Limitation of Liability Act of 1851 (9 Stat. 635; *Hartford Accident & Indemnity Co.* v. *Southern Pacific Co.*, 273 U. S. 207, 213–215); the Seamen's Act of 1915 (38 Stat. 1185; *Chelentis* v. *Luckenbach Steamship Co.*, 247 U. S. 372, 381, 384); the Ship Mortgage Act of 1920 (41 Stat. 1000; *Morse Drydock & Repair Co.* v. *Northern Star*, 271 U. S. 552, 555, 556); and the Merchant Marine Act of 1920, incorporating, in relation to seamen, the Federal Employers' Liability Act into the maritime law of the United States (41 Stat. 1007; *Panama R. Co.* v. *Johnson, supra; Engel* v. *Davenport*, 271 U. S. 33, 35; *Panama R. Co.* v. *Vasquez*, 271 U. S. 557, 559, 560; *Northern Coal Co.* v. *Strand*, 278 U. S. 142, 147). See U. S. C., Titles 33 and 46.

[3] *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205; *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149; *Washington* v. *Dawson*, 264 U. S. 219;

priety of providing by Federal statute for compensation of employees in such cases had been expressly recognized by this Court,[4] and within its sphere the statute was designed to accomplish the same general purpose as the workmen's compensation laws of the States.[5] In de-

---

Robins Dry Dock & Repair Co. v. *Dahl,* 266 U. S. 449. For decisions since the passage of the Act in question, see *Messel* v. *Foundation Co.,* 274 U. S. 427; *Northern Coal & Dock Co.* v. *Strand,* 278 U. S. 142; *London Guarantee & Accident Co.* v. *Industrial Commission,* 279 U. S. 109, 125; *Baizley Iron Works* v. *Span,* 281 U. S. 222.

The application of State Workmen's Compensation Acts has been sustained where the work of the employee has been deemed to have no direct relation to navigation or commerce and the operation of the local law "would work no material prejudice to the essential features of the general maritime law." *Western Fuel Co.* v. *Garcia,* 257 U. S. 233, 242; *Grant Smith-Porter Co.* v. *Rohde,* 257 U. S. 469, 477; *Millers' Indemnity Underwriters* v. *Braud,* 270 U. S. 59, 64; *Sultan Railway & Timber Co.* v. *Department of Labor,* 277 U. S. 135, 137; *Baizley Iron Works* v. *Span, supra,* at pp. 230, 231. See, also, *Red Cross Line* v. *Atlantic Fruit Co.,* 264 U. S. 109.

[4] *Washington* v. *Dawson,* 264 U. S. 219, 227, where the Court said "Without doubt Congress has power to alter, amend or revise the maritime law by statutes of general application embodying its will and judgment. This power, we think, would permit enactment of a general employers' liability law or general provisions for compensating injured employees; but it may not be delegated to the several States."

[5] The Committee on the Judiciary of the Senate, in reporting upon the proposed measure, said (Sen. Rep. No. 973, 69th Cong., 1st sess., p. 16):

"The committee deems it unnecessary to comment upon the modern change in the relation between employers and employees establishing systems of compensation as distinguished from liability. Nearly every State in the Union has a compensation law through which employees are compensated for injuries occurring in the course of their employment without regard to negligence on the part of the employer or contributory negligence on the part of the employee. If longshoremen could avail themselves of the benefits of State compensation laws, there would be no occasion for this legislation; but, unfortunately, they are excluded from these laws by reason of the character of their employment; and they are not only excluded but

fining substantive rights, the Act provides for recovery in the absence of fault, classifies disabilities resulting from injuries, fixes the range of compensation in case of disability or death, and designates the classes of beneficiaries. In view of Federal power to alter and revise the maritime law, there appears to be no room for objection on constitutional grounds to the creation of these rights, unless it can be found in the due process clause of the Fifth Amendment. But it cannot be said that either the classifications of the statute or the extent of the compensation provided are unreasonable. In view of the difficulties which inhere in the ascertainment of actual damages, the Congress was entitled to provide for the payment of amounts which would reasonably approximate the probable damages. See *Chicago, B. & Q. R. Co.* v. *Cram,* 228 U. S. 70, 84; compare *Missouri Pacific Ry. Co.* v. *Tucker,* 230 U. S. 340, 348. Liability without fault is not unknown to the maritime law,[6] and,

---

the Supreme Court has more than once held that Federal legislation can not, constitutionally, be enacted that will apply State laws to this occupation. (*Southern Pacific Co.* v. *Jensen,* 244 U. S. 205; *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149; *Washington* v. *Dawson & Co.,* 264 U. S. 219.)"

The House Committee in its report made the following statement (House Rep. No. 1767, 69th Cong., 2d sess., p. 20):

"The principle of workmen's compensation has become so firmly established that simple justice would seem to require that this class of maritime workers should be included in this legislation. . . .

"The bill as amended, therefore, will enable Congress to discharge its obligation to the maritime workers placed under their jurisdiction by the Constitution of the United States by providing for them a law whereby they may receive the benefits of workmen's compensation and thus afford them the same remedies that have been provided by legislation for those killed or injured in the course of their employment in nearly every State in the Union."

[6] See, *e. g., The Osceola,* 189 U. S. 158, 169; *The Iroquois,* 194 U. S. 240, 241, 242. In *Chicago, R. I. & P. R. Co.* v. *Zernecke,* 183 U. S. 582, 586, the Court said: "Our jurisprudence affords examples of legal liability without fault, and the deprivation of property without

apart from this fact, considerations are applicable to the substantive provisions of this legislation, with respect to the relation of master and servant, similar to those which this Court has found sufficient to sustain workmen's compensation laws of the States against objections under the due process clause of the Fourteenth Amendment. *New York Central R. Co.* v. *White,* 243 U. S. 188; *Mountain Timber Co.* v. *Washington,* 243 U. S. 219; *Ward & Gow* v. *Krinsky,* 259 U. S. 503; *Lower Vein Coal Co.* v. *Industrial Board,* 255 U. S. 144; *Madera Sugar Pine Co.* v. *Industrial Accident Comm.,* 262 U. S. 499, 501, 502; *Sheehan Co.* v. *Shuler,* 265 U. S. 371; *Dahlstrom Metallic Door Co.* v. *Industrial Board,* 284 U. S. 594. See *Nogueira* v. *N. Y., N. H. & H. R. Co., supra,* at pp. 136, 137.

Second. The objections to the procedural requirements of the Act relate to the extent of the administrative authority which it confers. The administration of the Act—'except as otherwise specifically provided'—was given to the United States Employees' Compensation Commission,[7] which was authorized to establish compensation districts, appoint deputy commissioners, and make regulations. §§ 39, 40. Claimants must give written notice to the deputy commissioner and to the employer of the injury or death within thirty days thereafter; the deputy commissioner may excuse failure to give such notice for satisfactory reasons. § 12. If the employer contests the right to compensation, he is to file notice to that effect. § 14 (d). A claim for compensation must be filed with

---

fault being attributable to its owner. The law of deodands was such an example. The personification of the ship in admiralty law is another." See Holmes, "The Common Law," pp. 26–29; *The China,* 7 Wall. 53, 67, 68; *Sherlock* v. *Alling,* 93 U. S. 99, 105–108; *Homer Ramsdell Co.* v. *Compagnie Générale Transatlantique,* 182 U. S. 406, 413, 414. As to the basis of general average contribution, see *Ralli* v. *Troop,* 157 U. S. 386, 394, 395.

[7] This Commission was created by the Act of September 7, 1916, c. 458, § 28, 39 Stat. 748; U. S. C., Tit. 5, § 778.

the deputy commissioner within a prescribed period, and it is provided that the deputy commissioner shall have full authority to hear and determine all questions in respect to the claim. §§ 13, 19 (a). Within ten days after the claim is filed, the deputy commissioner, in accordance with regulations prescribed by the Commission, must notify the employer and any other person who is considered by the deputy commissioner to be an interested party. The deputy commissioner is required to make, or cause to be made, such investigations as he deems to be necessary and upon application of any interested party must order a hearing, upon notice, at which the claimant and the employer may present evidence. Employees claiming compensation must submit to medical examination. § 19. In conducting investigations and hearings, the deputy commissioner is not bound by common law or statutory rules of evidence, or by technical or formal rules of procedure, except as the Act provides, but he is to proceed in such manner " as to best ascertain the rights of the parties." § 23 (a). He may issue subpœnas, administer oaths, compel the attendance and testimony of witnesses, the production of documents or other evidence or the taking of depositions, and may do all things conformable to law which may be necessary to enable him effectively to discharge his duties. Proceedings may be brought before the appropriate Federal court to punish for misbehavior or contumacy as in case of contempt. § 27. Hearings before the deputy commissioner are to be public and reported stenographically, and the Commission is to provide by regulation for the preparation of a record. § 23 (b).[8] Compensation orders are to be filed in the office of the deputy commissioner, and copies must be sent

[8] In the regulations promulgated by the Commission in the form of instructions to deputy commissioners, provision was made for findings of fact. Report, United States Employees' Compensation Commission, for fiscal year ending June 30, 1930, p. 64. See *Howard* v. *Monahan,* 33 F. (2d) 220.

to the claimant and employer. § 19. The Act provides that it shall be presumed, in the absence of substantial evidence to the contrary, that the claim comes within the provisions of the Act, that sufficient notice of claim has been given, that the injury was not occasioned solely by the intoxication of the injured employee, or by the willful intention of such employee to injure or kill himself or another. § 20. A compensation order becomes effective when filed, and unless proceedings are instituted to suspend it or set it aside, it becomes final at the expiration of thirty days. § 21 (a). If there is a change in conditions, the order may be modified or a new order made. § 22. In case of default for thirty days in the payment of compensation, application may be made to the deputy commissioner for a supplementary order declaring the amount in default. Such an order is to be made after investigation, notice and hearing, as in the case of claims. Upon filing a certified copy of the supplementary order with the clerk of the Federal court, as stated, judgment is to be entered for the amount declared in default, if such supplementary order "is in accordance with law." Review of the judgment may be had as in civil suits for damages at common law and the judgment may be enforced by writ of execution. § 18.

The Act further provides that if a compensation order is "not in accordance with law," it "may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest" against the deputy commissioner making the order and instituted in the Federal district court for the judicial district in which the injury occurred.[9] Payment is not to be stayed pending such proceedings unless, on hearing after notice, the court allows the stay on evi-

[9] In the District of Columbia, the proceedings are to be instituted in the Supreme Court of the District.

dence showing that the employer would otherwise suffer irreparable damage. § 21 (b). Beneficiaries of awards, or the deputy commissioner, may apply for enforcement to the Federal district court and, if the court determines that the order "was made and served in accordance with law," obedience may be compelled by writ of injunction or other proper process. § 21 (c).[10]

As the claims which are subject to the provisions of the Act are governed by the maritime law as established by the Congress and are within the admiralty jurisdiction, the objection raised by the respondent's pleading as to the right to a trial by jury under the Seventh Amendment is unavailing (*Waring* v. *Clarke,* 5 How. 441, 459, 460); and that under the Fourth Amendment is neither explained nor urged. The other objections as to procedure invoke the due process clause and the provision as to the judicial power of the United States.

(1) The contention under the due process clause of the Fifth Amendment relates to the determination of questions of fact. Rulings of the deputy commissioner upon questions of law are without finality. So far as

[10] The United States Employees' Compensation Commission estimates that the number of employees who at times are engaged in employments covered by the Act is in excess of 300,000. Report for fiscal year ending June 30, 1931, p. 66. The Commission states that 138,788 cases have been closed during the four years that the law has been in operation. *Id.*, p. 69. During the last fiscal year the injuries reported under the Act numbered 28,861, of which 156 were 'fatal' cases. The total number of cases disposed of during that year, including those brought forward from the preceding years, was 30,489, of which there were 13,261 'non-fatal' cases which caused no loss of time, and 4,067 of such cases in which the duration of disability did not exceed seven days. Compensation payments were completed in 11,776 cases. Hearings held by deputy commissioners during the fiscal year number 1,217, of which 905 involved compensation payments. At the end of the fiscal year, there were 102 cases pending in federal district courts wherein the plaintiffs asked review of compensation orders. *Id.*, 68–70.

the latter are concerned, full opportunity is afforded for their determination by the Federal courts through proceedings to suspend or to set aside a compensation order, § 21 (b), by the requirement that judgment is to be entered on a supplementary order declaring default only in case the order follows the law (§ 18), and by the provision that the issue of injunction or other process in a proceeding by a beneficiary to compel obedience to a compensation order is dependent upon a determination by the court that the order was lawfully made and served. § 21 (c). Moreover, the statute contains no express limitation attempting to preclude the court, in proceedings to set aside an order as not in accordance with law, from making its own examination and determination of facts whenever that is deemed to be necessary to enforce a constitutional right properly asserted. See *Ohio Valley Water Co.* v. *Ben Avon Borough,* 253 U. S. 287, 289; *Ng Fung Ho* v. *White,* 259 U. S. 276, 284, 285; *Prendergast* v. *New York Telephone Co.,* 262 U. S. 43, 50; *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420, 443, 444; *Phillips* v. *Commissioner,* 283 U. S. 589, 600. As the statute is to be construed so as to support rather than to defeat it, no such limitation is to be implied. *Panama Railroad Co.* v. *Johnson,* 264 U. S. 375, 390.

Apart from cases involving constitutional rights to be appropriately enforced by proceedings in court, there can be no doubt that the Act contemplates that, as to questions of fact arising with respect to injuries to employees within the purview of the Act, the findings of the deputy commissioner, supported by evidence and within the scope of his authority, shall be final. To hold otherwise would be to defeat the obvious purpose of the legislation to furnish a prompt, continuous, expert and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task.

The object is to secure within the prescribed limits of the employer's liability an immediate investigation and a sound practical judgment, and the efficacy of the plan depends upon the finality of the determinations of fact with respect to the circumstances, nature, extent and consequences of the employee's injuries and the amount of compensation that should be awarded. And this finality may also be regarded as extending to the determination of the question of fact whether the injury " was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another." While the exclusion of compensation in such cases is found in what are called " coverage " provisions of the Act (§ 3), the question of fact still belongs to the contemplated routine of administration, for the case is one of employment within the scope of the Act and the cause of the injury sustained by the employee as well as its character and effect must be ascertained in applying the provisions for compensation. The use of the administrative method for these purposes, assuming due notice, proper opportunity to be heard, and that findings are based upon evidence, falls easily within the principle of the decisions sustaining similar procedure against objections under the due process clauses of the Fifth and Fourteenth Amendments.[11]

The statute provides for notice and hearing; and an award made without proper notice, or suitable opportu-

[11] *Long Island Water Supply Co.* v. *Brooklyn,* 166 U. S. 685, 695; *Crane* v. *Hahlo,* 258 U. S. 142, 147; *Federal Trade Comm.* v. *Curtis Publishing Co.,* 260 U. S. 568, 580; *Silberschein* v. *United States,* 266 U. S. 221, 225; *Virginian Ry. Co.* v. *United States,* 272 U. S. 658, 663; *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420, 442; *International Shoe Co.* v. *Federal Trade Comm.,* 280 U. S. 291, 297; *Dohany* v. *Rogers,* 281 U. S. 362, 369; *Phillips* v. *Commissioner,* 283 U. S. 589, 600. See, also, *Hardware Dealers Mutual Fire Ins. Co.* v. *Glidden,* 284 U. S. 151; *New York Central R. R. Co.* v. *White, supra,* at pp. 194, 207, 208; *Mountain Timber Co.* v. *Washington, supra,* at p. 233.

nity to be heard, may be attacked and set aside as without validity. The objection is made that, as the deputy commissioner is authorized to prosecute such inquiries as he may consider necessary, the award may be based wholly or partly upon an *ex parte* investigation and upon unknown sources of information, and that the hearing may be merely a formality. The statute, however, contemplates a public hearing and regulations are to require "a record of the hearings and other proceedings before the deputy commissioner." § 23 (b). This implies that all proceedings by the deputy commissioner upon a particular claim shall be appropriately set forth, and that whatever facts he may ascertain and their sources shall be shown in the record and be open to challenge and opposing evidence. Facts conceivably known to the deputy commissioner, but not put in evidence so as to permit scrutiny and contest, will not support a compensation order. *Interstate Commerce Commission* v. *Louisville & Nashville R. Co.,* 227 U. S. 88, 93; *The Chicago Junction Case,* 264 U. S. 258, 263; *United States* v. *Abilene & Southern Ry. Co.,* 265 U. S. 274, 288. An award not supported by evidence in the record is not in accordance with law. But the fact that the deputy commissioner is not bound by the rules of evidence which would be applicable to trials in court or by technical rules of procedure, § 23 (a), does not invalidate the proceeding, provided substantial rights of the parties are not infringed. *Interstate Commerce Comm.* v. *Baird,* 194 U. S. 25, 44; *Interstate Commerce Comm.* v. *Louisville & Nashville R. Co., supra; Spiller* v. *Atchison, T. & S. F. Ry. Co.,* 253 U. S. 117, 131; *United States* v. *Abilene & Southern Ry. Co., supra; Tagg Bros. & Moorhead* v. *United States, supra,* at p. 442.

(2) The contention based upon the judicial power of the United States, as extended "to all cases of admiralty

and maritime jurisdiction" (Const. Art. III), presents a distinct question. In *Murray's Lessee* v. *Hoboken Land and Improvement Co.,* 18 How. 272, 284, this Court, speaking through Mr. Justice Curtis, said: "To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination."

The question in the instant case, in this aspect, can be deemed to relate only to determinations of fact. The reservation of legal questions is to the same court that has jurisdiction in admiralty, and the mere fact that the court is not described as such is unimportant. Nor is the provision for injunction proceedings, § 21(b), open to objection. The Congress was at liberty to draw upon another system of procedure to equip the court with suitable and adequate means for enforcing the standards of the maritime law as defined by the Act. *The Genesee Chief,* 12 How. 443, 459, 460. Compare *Panama R. Co.* v. *Johnson, supra,* at p. 388. By statute and rules, courts of admiralty may be empowered to grant injunctions, as in the case of limitation of liability proceedings. *Hartford Accident & Indemnity Co.* v. *Southern Pacific Co.,* 273 U. S. 207, 218. See, also, *Marine Transit Corporation* v. *Dreyfus,* 284 U. S. 263. The Congress did not attempt to define questions of law, and the generality of the description leaves no doubt of the intention to reserve to the Federal court full authority to pass upon all matters which this Court had held to fall within that category. There is thus no attempt to interfere with, but rather provision is made to facilitate, the exercise by the court of its jur-

isdiction to deny effect to any administrative finding which is without evidence, or 'contrary to the indisputable character of the evidence,' or where the hearing is 'inadequate,' or 'unfair,' or arbitrary in any respect. *Interstate Commerce Comm.* v. *Louisville R. Co., supra,* at pp. 91, 92; *Tagg Bros. & Moorhead* v. *United States, supra.*

As to determinations of fact, the distinction is at once apparent between cases of private right and those which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments. The Court referred to this distinction in *Murray's Lessee* v. *Hoboken Land and Improvement Co., supra,* pointing out that "there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." Thus the Congress, in exercising the powers confided to it, may establish 'legislative' courts (as distinguished from 'constitutional courts in which the judicial power conferred by the Constitution can be deposited') which are to form part of the government of territories or of the District of Columbia,[12] or to serve as special tribunals "to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it." But "the mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals." *Ex*

[12] *American Insurance Co.* v. *Canter,* 1 Pet. 511, 546; *Keller* v. *Potomac Electric Power Co.,* 261 U. S. 428, 442–444; *Postum Cereal Co.* v. *California Fig Nut Co.,* 272 U. S. 693, 700.

parte Bakelite Corp., 279 U. S. 438, 451. Familiar illustrations of administrative agencies created for the determination of such matters are found in connection with the exercise of the congressional power as to interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions and payments to veterans.[13]

The present case does not fall within the categories just described but is one of private right, that is, of the liability of one individual to another under the law as defined. But in cases of that sort, there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges. On the common law side of the Federal courts, the aid of juries is not only deemed appropriate but is required by the Constitution itself. In cases of equity and admiralty, it is historic practice to call to the assistance of the courts, without the consent of the parties, masters and commissioners or assessors, to pass upon certain classes of questions, as, for example, to take and state an account or to find the amount of damages. While the reports of masters and commissioners in such cases are essentially of an advisory nature, it has not been the practice to disturb their findings when they are properly based upon evidence, in the absence of errors of law,[14]

[13] *Virginian Ry. Co.* v. *United States, supra; Tagg Bros. & Moorhead* v. *United States, supra; International Shoe Co.* v. *Federal Trade Comm., supra; Phillips* v. *Commissioner, supra; United States* v. *Ju Toy,* 198 U. S. 253, 263; *United States* v. *Babcock,* 250 U. S. 328, 331; *Burfenning* v. *Chicago, St. P., M. & O. Ry. Co.,* 163 U. S. 321, 323; *Bates & Guild Co.* v. *Payne,* 194 U. S. 106, 109; *Houston* v. *St. Louis Packing Co.,* 249 U. S. 479, 484; *Passavant* v. *United States,* 148 U. S. 214, 219; *Silberschein* v. *United States,* 266 U. S. 221, 225.

[14] As to masters in chancery, see *Tilghman* v. *Proctor,* 125 U. S. 136, 149, 150; *Callaghan* v. *Myers,* 128 U. S. 617, 666, 667; *Kimberly* v. *Arms,* 129 U. S. 512, 523, 524; *Davis* v. *Schwartz,* 155 U. S. 631, 636.

As to commissioners in admiralty, see *The Cayuga* (C. C. A. 6th), 59 Fed. 483, 488; *La Bourgogne* (C. C. A. 2nd), 144 Fed. 781, 782,

and the parties have no right to demand that the court shall redetermine the facts thus found. In admiralty, juries were anciently in use not only in criminal cases but apparently in civil cases also.[15] The Act of February 26, 1845 (c. 20, 5 Stat. 726), purporting to extend the admiralty jurisdiction of the Federal district courts to certain cases arising on the Great Lakes, gave the right "to trial by jury of all facts put in issue in such suits, where either party shall require it." After the decision in the case of *The Genesee Chief, supra,* holding that the Federal district courts possessed general jurisdiction in admiralty over the lakes, and navigable waters connecting them, under the Constitution and the Judiciary Act of 1789 (c. 20, § 9, 1 Stat. pp. 76, 77), this Court regarded the enabling Act of 1845 as "obsolete and of no effect, with the exception of the clause which gives to either party the right of trial by jury when requested." *The Eagle,* 8 Wall. 15, 25. And this provision, the court said, was "rather a mode of exercising jurisdiction than any substantial part of it." See R. S. 566, U. S. C., Tit. 28, § 770.[16] Chief Justice Taney, in delivering the opinion of the Court in the case of *The Genesee Chief, supra,* referring to this requirement, thus broadly stated the authority of Congress to change the procedure in courts of admiralty:

783; *The North Star* (C. C. A. 2nd), 151 Fed. 168, 177; *Western Transit Co.* v. *Davidson S. S. Co.* (C. C. A. 6th), 212 Fed. 696, 701; *P. Stanford Ross, Inc.,* v. *Public Service Corp.* (C. C. A. 3d), 42 Fed. (2d) 79, 80.

[15] 4 Chr. Robinson's Admiralty Reports, p. 74, note; Black Book of the Admiralty, Twiss' ed., vol. 1, pp. 49, 53, 245; 1 Abbott on Shipping, 5th Am. ed., pp. 283, 284; 1 Benedict's Admiralty, 5th ed., p. 304, note.

[16] As to the effect of the verdict of the jury in such cases, see *The Western States,* 159 Fed. 354, 358, 359; *Sweeting* v. *The Western States,* 210 U. S. 433; *The Nyack,* 199 Fed. 383, 389; 1 Benedict's Admiralty, 5th ed., p. 305.

"The power of Congress to change the mode of proceeding in this respect in its courts of admiralty, will, we suppose, hardly be questioned. The Constitution declares that the judicial power of the United States shall extend to 'all cases of admiralty and maritime jurisdiction.' But it does not direct that the court shall proceed according to ancient and established forms, or shall adopt any other form or mode of practice. The grant defines the subjects to which the jurisdiction may be extended by Congress. But the extent of the power as well as the mode of proceeding in which that jurisdiction is to be exercised, like the power and practice in all the other courts of the United States, are subject to the regulation of Congress, except where that power is limited by the terms of the Constitution, or by necessary implication from its language. In admiralty and maritime cases there is no such limitation as to the mode of proceeding, and Congress may therefore in cases of that description, give either party right of trial by jury, or modify the practice of the court in any other respect that it deems more conducive to the administration of justice."

It may also be noted that while on an appeal in admiralty cases "the facts as well as the law would be subjected to review and retrial," this Court has recognized the power of the Congress "to limit the effect of an appeal to a review of the law as applicable to facts finally determined below." *The Francis Wright,* 105 U. S. 381, 386; *The Connemara,* 108 U. S. 352, 359. Compare *Luckenbach S. S. Co.* v. *United States,* 272 U. S. 533, 536, 537.

In deciding whether the Congress, in enacting the statute under review, has exceeded the limits of its authority to prescribe procedure in cases of injury upon navigable waters, regard must be had, as in other cases where constitutional limits are invoked, not to mere matters of form but to the substance of what is required.

The statute has a limited application, being confined to the relation of master and servant, and the method of determining the questions of fact, which arise in the routine of making compensation awards to employees under the Act, is necessary to its effective enforcement. The Act itself, where it applies, establishes the measure of the employer's liability, thus leaving open for determination the questions of fact as to the circumstances, nature, extent and consequences of the injuries sustained by the employee for which compensation is to be made in accordance with the prescribed standards. Findings of fact by the deputy commissioner upon such questions are closely analogous to the findings of the amount of damages that are made, according to familiar practice, by commissioners or assessors; and the reservation of full authority to the court to deal with matters of law provides for the appropriate exercise of the judicial function in this class of cases. For the purposes stated, we are unable to find any constitutional obstacle to the action of the Congress in availing itself of a method shown by experience to be essential in order to apply its standards to the thousands of cases involved, thus relieving the courts of a most serious burden while preserving their complete authority to insure the proper application of the law.

(3) What has been said thus far relates to the determination of claims of employees within the purview of the Act. A different question is presented where the determinations of fact are fundamental or 'jurisdictional,' [17] in the sense that their existence is a condition precedent to the operation of the statutory scheme. These funda-

[17] The term 'jurisdictional,' although frequently used, suggests analogies which are not complete when the reference is to administrative officials or bodies. See *Interstate Commerce Commission* v. *Humboldt Steamship Co.*, 224 U. S. 474, 484. In relation to administrative agencies, the question in a given case is whether it falls within the scope of the authority validly conferred.

mental requirements are that the injury occur upon the navigable waters of the United States and that the relation of master and servant exist. These conditions are indispensable to the application of the statute, not only because the Congress has so provided explicitly (§ 3), but also because the power of the Congress to enact the legislation turns upon the existence of these conditions.

In amending and revising the maritime law,[18] the Congress cannot reach beyond the constitutional limits which are inherent in the admiralty and maritime jurisdiction.[19] Unless the injuries to which the Act relates occur upon the navigable waters of the United States, they fall outside that jurisdiction.[20] Not only is navigability itself a question of fact, as waters that are navigable in fact are navigable in law,[21] but, where navigability is not in dispute, the locality of the injury, that is, whether it has occurred upon the navigable waters of the United States, determines the existence of the congressional power to create the liability prescribed by the statute.[22] Again, it

[18] This power is distinct from the authority to regulate interstate or foreign commerce and is not limited to cases arising in that commerce. *The Genesee Chief,* 12 How. 443, 452; *The Commerce,* 1 Black 574, 578, 579; *The Belfast,* 7 Wall. 624, 640, 641; *Ex parte Boyer,* 109 U. S. 629, 632; *In re Garnett,* 141 U. S. 1, 15, 17; *London Guarantee & Accident Co.* v. *Industrial Comm.,* 279 U. S. 109, 124.

[19] *The Belfast, supra; Panama R. Co.* v. *Johnson, supra; The Genesee Chief, supra,* at p. 459; 1 Benedict's Admiralty, 5th ed., § 32, p. 47.

[20] *Cleveland Terminal & V. R. Co.* v. *Cleveland Steamship Co.,* 208 U. S. 316; *Atlantic Transport Co.* v. *Imbrovek, supra,* at pp. 59, 60; *Industrial Commission* v. *Nordenholt Corp.,* 259 U. S. 263, 273; *Washington* v. *Dawson, supra,* at pp. 227, 235; *Nogueira* v. *N. Y., N. H. & H. R. Co.,* 281 U. S. 128, 133, 138.

[21] *The Daniel Ball,* 10 Wall. 557, 563; *United States* v. *Holt State Bank,* 270 U. S. 49, 56; *United States* v. *Utah,* 283 U. S. 64, 76, 77; *Arizona* v. *California,* 283 U. S. 423, 452.

[22] *Industrial Commission* v. *Nordenholt Co., supra; Washington* v. *Dawson, supra; Nogueira* v. *N. Y., N. H. & H. R. Co., supra;* 1 Benedict's Admiralty, 5th ed., § 29, pp. 41, 42, note.

cannot be maintained that the Congress has any general authority to amend the maritime law so as to establish liability without fault in maritime cases regardless of particular circumstances or relations. It is unnecessary to consider what circumstances or relations might permit the imposition of such a liability by amendment of the maritime law, but it is manifest that some suitable selection would be required. In the present instance, the Congress has imposed liability without fault only where the relation of master and servant exists in maritime employment and, while we hold that the Congress could do this, the fact of that relation is the pivot of the statute and, in the absence of any other justification, underlies the constitutionality of this enactment. If the person injured was not an employee of the person sought to be held, or if the injury did not occur upon the navigable waters of the United States, there is no ground for an assertion that the person against whom the proceeding was directed could constitutionally be subjected, in the absence of fault upon his part, to the liability which the statute creates.

In relation to these basic facts, the question is not the ordinary one as to the propriety of provision for administrative determinations. Nor have we simply the question of due process in relation to notice and hearing. It is rather a question of the appropriate maintenance of the Federal judicial power in requiring the observance of constitutional restrictions. It is the question whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency—in this instance a single deputy commissioner [23]—for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend. The recognition of

[23] See Report of United States Employees' Compensation Commission for fiscal year ending June 30, 1931, pp. 108, 109.

the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion that there is no limitation of their use, and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the Executive Department. That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law.

In this aspect of the question, the irrelevancy of State statutes and citations from State courts as to the distribution of State powers is apparent. A State may distribute its powers as it sees fit, provided only that it acts consistently with the essential demands of due process and does not transgress those restrictions of the Federal Constitution which are applicable to State authority.[24] In relation to the Federal government, we have already noted the inappositeness to the present inquiry of decisions with respect to determinations of fact, upon evidence and within the authority conferred, made by administrative agencies which have been created to aid in the performance of governmental functions and where the mode of determination is within the control of the Congress; as, *e. g.* in the proceedings of the Land Office pursuant to provisions for the disposition of public lands, of the authorities of the Post Office in relation to postal privileges, of the Bureau of Internal Revenue with respect to taxes, and of the Labor Department as to the

[24] *Prentis* v. *Atlantic Coast Line,* 211 U. S. 210, 225; *Chicago, Rock Island & Pacific Ry. Co.* v. *Cole,* 251 U. S. 54, 56; *Missouri ex rel. Hurwitz* v. *North,* 271 U. S. 40, 42.

admission and deportation of aliens. *Ex parte Bakelite Corp., supra.*[25] Similar considerations apply to decisions with respect to determinations of fact by boards and commissions created by the Congress to assist it in its legislative process in governing various transactions subject to its authority, as for example, the rates and practices of interstate carriers, the legislature thus being able to apply its standards to a host of instances which it is impracticable to consider and legislate upon directly and the action being none the less legislative in character because taken through a subordinate body.[26] And where administrative bodies have been appropriately created to meet the exigencies of certain classes of cases and their action is of a judicial character, the question of the conclusiveness of their administrative findings of fact generally arises where the facts are clearly not jurisdictional[27] and the scope of review as to such facts has been determined by the applicable legislation. None of the decisions of this sort touch the question which is presented where the facts involved are jurisdictional[28] or where the question concerns the proper exercise of the judicial power of the United States in enforcing constitutional limitations.

Even where the subject lies within the general authority of the Congress, the propriety of a challenge by judicial proceedings of the determinations of fact deemed to be jurisdictional, as underlying the authority of executive officers, has been recognized. When proceedings are taken against a person under the military law, and enlistment is denied, the issue has been tried and determined *de novo* upon *habeas corpus. In re Grimley,* 137 U. S. 147, 154,

---

[25] *Supra,* note 13.

[26] See *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe Ry. Co.,* 284 U. S. 370.

[27] Freund, "Administrative Powers Over Persons and Property," § 154, p. 293.

[28] *Id.,* § 153, pp. 291–293.

155. See, also, *In re Morrissey,* 137 U. S. 157, 158; *Givens* v. *Zerbst,* 255 U. S. 11, 20. While, in the administration of the public land system, questions of fact are for the consideration and judgment of the Land Department and its decision of such questions is conclusive, it is equally true that if lands "never were public property, or had previously been disposed of, or if Congress had made no provision for their sale, or had reserved them, the department would have no jurisdiction to transfer them." This Court has held that "matters of this kind, disclosing a want of jurisdiction, may be considered by a court of law. In such cases the objection to the patent reaches beyond the action of the special tribunal, and goes to the existence of a subject upon which it was competent to act." *Smelting Co.* v. *Kemp,* 104 U. S. 636, 641. In such a case, the invalidity of the patent may be shown in a collateral proceeding. *Polk* v. *Wendell,* 9 Cranch 87; *Patterson* v. *Winn,* 11 Wheat. 380; *Minter* v. *Crommelin,* 18 How. 87; *Morton* v. *Nebraska,* 21 Wall. 660, 675; *Noble* v. *Union River Logging Co.,* 147 U. S. 165, 174. The question whether a publication is a 'book' or a 'periodical' has been reviewed upon the evidence received in a suit brought to restrain the Postmaster General from acting beyond his authority in excluding the publication from carriage as second class mail matter. *Smith* v. *Hitchcock,* 34 App. D. C., 521, 530–533; 226 U. S. 54, 59.[29]

[29] Where the doctrine of personal liability of an officer for acting without jurisdiction is applied, courts have received evidence to show the jurisdictional defect. Thus in *Miller* v. *Horton,* 152 Mass. 540; 126 N. E. 100, an action was brought against the members of a town board of health who had killed a horse in obedience to an order of the commissioners on contagious diseases among domestic animals, acting under the alleged authority of the state legislature. The order recited that the animal had been examined and was adjudged to have the glanders. The judge before whom the case was tried "found the horse had not the glanders" but declined to rule against the defendants. The Supreme Judicial Court sustained exceptions, holding that

In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function. The case of confiscation is illustrative, the ultimate conclusion almost invariably depending upon the decisions of questions of fact. This court has held the owner to be entitled to "a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts." *Ohio Valley Water Co.* v. *Ben Avon Borough, supra.* See, also, *Prendergast* v. *New York Telephone Co.,* 262 U. S. 43, 50; *Tagg Bros. & Moorhead* v. *United States, supra; Phillips* v. *Commissioner,* 283 U. S. 589, 600. Jurisdiction in the Executive to order deportation exists only if the person arrested is an alien, and while, if there were jurisdiction, the findings of fact of the Executive Department would be conclusive, the claim of citizenship "is a denial of an essential jurisdictional fact" both in the statutory and the constitutional sense, and a writ of *habeas corpus* will issue "to determine the status." Persons claiming to be citizens of the United States "are entitled to a judicial determination of their claims," said this Court in *Ng Fung Ho* v. *White, supra* (259 U. S., at p. 285), and in that case the cause was remanded to the Federal District Court "for trial in that court of the question of citizenship."

In the present instance, the argument that the Congress has constituted the deputy commissioner a fact-finding tribunal is unavailing, as the contention makes the untenable assumption that the constitutional courts may be

"The fact as to the horse having the disease was open to investigation in the present action, and on the finding that the horse did not have it, the plaintiff was entitled to a ruling that the defendants had failed to make out their justification." *Id.*, p. 548. See, also, *Pearson* v. *Zehr,* 138 Ill. 48, 51, 52; 29 N. E. 854.

deprived in all cases of the determination of facts upon evidence even though a constitutional right may be involved. Reference is also made to the power of the Congress to change the procedure in courts of admiralty, a power to which we have alluded in dealing with the function of the deputy commissioner in passing upon the compensation claims of employees. But when fundamental rights are in question, this Court has repeatedly emphasized "the difference in security of judicial over administrative action." *Ng Fung Ho* v. *White, supra.* Even where issues of fact are tried by juries in the Federal courts, such trials are under the constant superintendence of the trial judge. In a trial by jury in a Federal court the judge is "not a mere moderator" but "is the governor of the trial" for the purpose of assuring its proper conduct as well as of determining questions of law. *Herron* v. *Southern Pacific Co.*, 283 U. S. 91, 95. In the Federal courts, trial by jury "is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence." *Capital Traction Co.* v. *Hof,* 174 U. S. 1, 13, 14. Where testimony in an equity cause is not taken before the court, the proceeding is still constantly subject to the court's control. And while the practice of obtaining the assistance of masters in chancery and commissioners in admiralty may be regarded, as we have pointed out, as furnishing a certain analogy in relation to the normal authority of the deputy commissioner in making what is virtually an assessment of damages, the proceedings of such masters and commissioners are always subject to the direction of the court and their reports are essentially advisory, a distinction of controlling importance when questions of a fundamental character are in issue.

When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.[30] We are of the opinion that such a construction is permissible and should be adopted in the instant case. The Congress has not expressly provided that the determinations by the deputy commissioner of the fundamental or jurisdictional facts as to the locality of the injury and the existence of the relation of master and servant shall be final. The finality of such determinations of the deputy commissioner is predicated primarily upon the provision, § 19 (a), that he "shall have full power and authority to hear and determine all questions in respect of such claim." But "such claim" is the claim for compensation under the Act and by its explicit provisions is that of an "employee," as defined in the Act, against his "employer." The fact of employment is an essential condition precedent to the right to make the claim. The other provision upon which the argument rests is that which authorizes the Federal court to set aside a compensation order if it is "not in accordance with law." § 21 (b). In the absence of any provision as to the finality of the determination by the deputy commissioner of the jurisdictional fact of employment, the statute is open to the construction that the court in determining whether a compensation order is in accordance with law may determine the fact of employment which underlies the operation of the statute. And, to remove the question as to validity, we think that the statute should be so construed. Further, the Act expressly requires that

[30] *Panama R. Co.* v. *Johnson, supra,* at p. 390; *Missouri Pacific R. Co.* v. *Boone,* 270 U. S. 466, 471, 472; *Richmond Screw Anchor Co.* v. *United States,* 275 U. S. 331, 346; *Blodgett* v. *Holden,* 275 U. S. 142, 148; *Lucas* v. *Alexander,* 279 U. S. 573, 577.

if any of its provisions is found to be unconstitutional, "or the applicability thereof to any person or circumstances" is held invalid, the validity of the remainder of the Act and "the applicability of its provisions to other persons and circumstances" shall not be affected. § 50. We think that this requirement clearly evidences the intention of the Congress not only that an express provision found to be unconstitutional should be disregarded without disturbing the remainder of the statute, but also that any implication from the terms of the Act which would render them invalid should not be indulged. This provision also gives assurance that there is no violation of the purpose of the Congress in sustaining the determinations of fact of the deputy commissioner where he acts within his authority in passing upon compensation claims while denying finality to his conclusions as to the jurisdictional facts upon which the valid application of the statute depends.

Assuming that the Federal court may determine for itself the existence of these fundamental or jurisdictional facts, we come to the question,—Upon what record is the determination to be made? There is no provision of the statute which seeks to confine the court in such a case to the record before the deputy commissioner or to the evidence which he has taken. The remedy which the statute makes available is not by an appeal or by a writ of certiorari for a review of his determination upon the record before him. The remedy is "through injunction proceedings, mandatory or otherwise." § 21 (b). The question in the instant case is not whether the deputy commissioner has acted improperly or arbitrarily as shown by the record of his proceedings in the course of administration in cases contemplated by the statute, but whether he has acted in a case to which the statute is inapplicable. By providing for injunction proceedings, the Congress evidently contemplated a suit as in equity, and in such

a suit the complainant would have full opportunity to plead and prove either that the injury did not occur upon the navigable waters of the United States or that the relation of master and servant did not exist, and hence that the case lay outside the purview of the statute. As the question is one of the constitutional authority of the deputy commissioner as an administrative agency, the court is under no obligation to give weight to his proceedings pending the determination of that question. If the court finds that the facts existed which gave the deputy commissioner jurisdiction to pass upon the claim for compensation, the injunction will be denied in so far as these fundamental questions are concerned; if, on the contrary, the court is satisfied that the deputy commissioner had no jurisdiction of the proceedings before him, that determination will deprive them of their effectiveness for any purpose. We think that the essential independence of the exercise of the judicial power of the United States in the enforcement of constitutional rights requires that the Federal court should determine such an issue upon its own record and the facts elicited before it.

The argument is made that there are other facts besides the locality of the injury and the fact of employment which condition the action of the deputy commissioner. That contention in any aspect could not avail to change the result in the instant case. But we think that there is a clear distinction between cases where the locality of the injury takes the case out of the admiralty and maritime jurisdiction, or where the fact of employment being absent there is lacking under this statute any basis for the imposition of liability without fault, and those cases which fall within the admiralty and maritime jurisdiction and where the relation of master and servant in maritime employment exists. It is in the latter field that the provisions for compensation apply and that, for the reasons stated in the earlier part of this opinion, the determina-

tion of the facts relating to the circumstances of the injuries received, as well as their nature and consequences, may appropriately be subjected to the scheme of administration for which the Act provides.

It cannot be regarded as an impairment of the intended efficiency of an administrative agency that it is confined to its proper sphere, but it may be observed that the instances which permit of a challenge to the application of the statute, upon the grounds we have stated, appear to be few. Out of the many thousands of cases which have been brought before the deputy commissioners throughout the country, a review by the courts has been sought in only a small number,[31] and an inconsiderable proportion of these appear to have involved the question whether the injury occurred within the martime jurisdiction or whether the relation of employment existed.

We are of the opinion that the District Court did not err in permitting a trial *de novo* on the issue of employment. Upon that issue the witnesses who had testified before the deputy commissioner and other witnesses were heard by the District Court. The writ of certiorari was not granted to review the particular facts but to pass upon the question of principle. With respect to the facts, the two courts below are in accord, and we find no reason to disturb their decision.

Decree affirmed.

MR. JUSTICE BRANDEIS, dissenting.

Knudsen filed a claim against Benson under § 19 (a) of the Longshoremen's and Harbor Workers' Compensation Act, March 4, 1927, c. 509, 44 Stat. 1424. Benson's answer denied, among other things, that the relation of employer and employee existed between him and the claimant. The evidence introduced before the deputy

[31] *Supra*, note 10.

commissioner, which occupies 78 pages of the printed record, was directed largely to that issue and was conflicting. The deputy commissioner found that the claimant was in Benson's employ at the time of the injury, and filed an order for compensation under § 21 (a). Benson brought this proceeding under § 21 (b) to set aside the order. The district judge transferred the suit to the admiralty side of the court and held a trial *de novo,* refusing to consider upon any aspect of the case the record before the deputy commissioner. On the evidence introduced in court, he found that the relation of employer and employee did not exist, and entered a decree setting aside the compensation order. 33 F. (2d) 137; 38 F. (2d) 306. The Circuit Court of Appeals affirmed the decree. 45 F. (2d) 66. This Court granted certiorari. 283 U. S. 814. In my opinion, the decree should be reversed, because Congress did not authorize a trial *de novo.*

The primary question for consideration is not whether Congress provided, or validly could provide, that determinations of fact by the deputy commissioner should be conclusive upon the district court. The question is: Upon what record shall the district court's review of the order of the deputy commissioner be based? The courts below held that the respondent was entitled to a trial *de novo;* that all the evidence introduced before the deputy commissioner should go for naught; and that respondent should have the privilege of presenting new, and even entirely different, evidence in the district court. Unless that holding was correct the judgment below obviously cannot be affirmed.

First. The initial question is one of construction of the Longshoremen's Act. The Act does not in terms declare whether there may be a trial *de novo* either as to the issue whether the relation of employer and employee existed at the time of the injury, or as to any other issue, tried or triable, before the deputy commissioner. It provides, by § 19 (a), "that the deputy commissioner shall

have full power and authority to hear and determine all questions in respect of" a claim; by § 21 (a) that the compensation order made by the deputy commissioner "shall become effective" when filed in his office, and "unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final . . ."; and by § 21 (b) that "If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings . . . instituted in the Federal district court. . . ."

The phrase in § 21 (b) providing that the order may be set aside "if not in accordance with law" was adopted from the statutory provision, enacted by the same Congress, for review by the Circuit Courts of Appeals of decisions of the Board of Tax Appeals.[1] This Court has settled that the phrase as used in the tax statute means a review upon the record made before the Board. *Phillips* v. *Commissioner,* 283 U. S. 589, 600. The Compensation Commission has consistently construed the Longshoremen's Act as providing for finality of the deputy commissioners' findings on all questions of fact;[2] and care

[1] Revenue Act of 1926, 44 Stat. 110: "Sec. 1003. (a) The Circuit Courts of Appeals and the Court of Appeals of the District of Columbia shall have exclusive jurisdiction to review the decisions of the Board. . . .

"(b) Upon such review, such courts shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require."

[2] This opinion was expressed in regulations promulgated by the Commission, under authority conferred by § 39 (a), in the form of instructions to deputy commissioners, dated September 28, 1927; and it was repeated in the Commission's report at the close of the first year of its administration of the Act. Report of United States Employees' Compensation Commission, for fiscal year ending June 30, 1928, p. 33. See also *id.,* June 30, 1929, p. 77; *id.,* June 30, 1930, pp. 63–64; *id.,* June 30, 1931, p. 71. The instructions to deputy

has been taken to provide for formal hearings appropriate to that intention. Compare *Brown* v. *United States*, 113 U. S. 568, 571; *Mason* v. *Routzahn*, 275 U. S. 175, 178. The lower federal courts, except in the case at bar, have uniformly construed the Act as denying a trial *de novo* of any issue determined by the deputy commissioner; have held that, in respect to those issues, the review afforded must be upon the record made before the deputy commissioner; and that the deputy commissioner's findings of fact must be accepted as conclusive if supported by evidence, unless there was some irregularity in the proceeding before him.[3] Nearly all the state

---

commissioners, elaborated December 10, 1927, and May 15, 1928, required that the record of proceedings and findings of fact be prepared, and the proceedings be conducted, in consonance with this view of the law.

[3] The question of judicial review under the Act has been passed upon by the First, Second, Third, Fourth and Ninth Circuit Courts of Appeals, as well as the Fifth; by a district court in the Sixth Circuit; and by the Court of Appeals of the District of Columbia, under the Act of May 17, 1928, c. 612, 45 Stat. 600. *Pocahontas Fuel Co.* v. *Monahan*, 41 F. (2d) 48, 49 (C. C. A. 1st), aff'g 34 F. (2d) 549, 551, [1929] A. M. C. 1598 (D. Me.); *Joyce* v. *Deputy Commissioner*, 33 F. (2d) 218, 219 (D. Me.); *Jarka Corp.* v. *Monahan*, 48 F. (2d) 283, 284 (D. Mass.); *Booth* v. *Monahan*, 56 F. (2d) 168 (D. Me.); *Wilson & Co., Inc.* v. *Locke*, 50 F. (2d) 81, 82 (C. C. A. 2d); *Travelers Insurance Co.* v. *Locke*, 56 F. (2d) 443 (S. D. N. Y.); *Calabrese* v. *Locke*, 56 F. (2d) 458 (S. D. N. Y.); *W. J. McCahan Sugar Refining & Molasses Co.* v. *Norton*, 43 F. (2d) 505, 506 (C. C. A. 3d), aff'g 34 F. (2d) 499, [1929] A. M. C. 1269 (E. D. Pa.); *Independent Pier Co.* v. *Norton* (C. C. A. 3d), 54 F. (2d) 734; *Baltimore & Carolina S. S. Co.* v. *Norton*, 40 F. (2d) 271, 272 (E. D. Pa.); *Merchants' & Miners' Transp. Co.* v. *Norton*, 32 F. (2d) 513, 515 (E. D. Pa.); *Jarka Corp.* v. *Norton*, 56 F. (2d) 287 (E. D. Pa.); *Frank Marra Co.* v. *Norton*, 56 F. (2d) 246 (E. D. Pa.); *Wheeling Corrugating Co.* v. *McManigal*, 41 F. (2d) 593, 594, 595 (C. C. A. 4th); *Obrecht-Lynch Corp.* v. *Clark*, 30 F. (2d) 144, 146 (D. Md.); *Keyway Stevedoring Co.* v. *Clark*, 43 F. (2d) 983 (D.

courts have construed the state workmen's compensation laws, as limiting the judicial review to matters of law.[4] Provisions in other federal statutes, similar to

---

Md.); *Kranski* v. *Atlantic Coast Shipping Co.*, 56 F. (2d) 166 (D. Md.); *Chesapeake Ship Ceiling Co.* v. *Clark* (D. Md.), decided May 22, 1930 [oral opinion]; *Goble* v. *Clark*, 56 F. (2d) 170 (D. Md.); *Michigan Transit Corp.* v. *Brown*, 56 F. (2d) 200 (W. D. Mich.); *Northwestern Stevedoring Co.* v. *Marshall*, 41 F. (2d) 28, 29 (C. C. A. 9th); *Gunther* v. *Compensation Commission*, 41 F. (2d) 151, 153 (C. C. A. 9th); *Grays Harbor Stevedore Co.* v. *Marshall*, 36 F. (2d) 814, 815 (W. D. Wash.); *Zurich General Accident & Liability Ins. Co.* v. *Marshall*, 42 F. (2d) 1010, 1011 (W. D. Wash.); *Todd Dry Docks, Inc.* v. *Marshall*, 49 F. (2d) 621, 623 (W. D. Wash.); *Grays Harbor Stevedore Co.* v. *Marshall*, 36 F. (2d) 814 (W. D. Wash.); *Rothschild & Co.* v. *Marshall*, 56 F. (2d) 415 (W. D. Wash.), reversed on other grounds, 44 F. (2d) 546 (C. C. A. 9th); *Lea Mathew Shipping Corp.* v. *Marshall*, 56 F. (2d) 860 (W. D. Wash.); *Griffiths & Sprague Stevedoring Co.* v. *Marshall*, 56 F. (2d) 665 (W. D. Wash.); *W. R. Grace & Co.* v. *Marshall*, 56 F. (2d) 441 (W. D. Wash.); *Nelson* v. *Marshall*, 56 F. (2d) 654 (W. D. Wash.); *Grant* v. *Marshall*, 56 F. (2d) 654 (W. D. Wash.); *Zurich General Accident & Liability Co.* v. *Marshall*, 56 F. (2d) 652 (W. D. Wash.); *Ocean Accident & Guarantee Corp.* v. *Solberg*, 56 F. (2d) 607 (W. D. Wash.); compare *Lake Washington Shipyards* v. *Brueggeman*, 56 F. (2d) 665 (W. D. Wash.); *New Amsterdam Casualty Co.* v. *Hoage*, 46 F. (2d) 837 (Ct. of App. D. C.); *Hoage* v. *Murch Bros. Const. Co.*, 50 F. (2d) 983, 984 (Ct. of App. D. C.). See also the following decisions by district courts in the Fifth Circuit: *Showers* v. *Crowell*, 46 F. (2d) 361 (W. D. La.); *Howard* v. *Monahan*, 31 F. (2d) 480, 481, 33 F. (2d) 220, 221 (S. D. Tex.). Compare *T. J. Moss Tie Co.* v. *Tanner*, 44 F. (2d) 928 (C. C. A 5th); *Houston Ship Channel Stevedoring Co.* v. *Sheppeard*, 57 F. (2d) 259, [1931] A. M. C. 1605 (S. D. Tex.).

[4] The Court has been referred to no case arising under the state workmen's compensation laws recognizing a right to trial *de novo* in court. Numerous decisions declare administrative findings of fact to be conclusive. The following decisions all dealt with controversies concerning the existence of a relation of employment. *Hillen* v. *Accident Commission*, 199 Cal. 577, 580; 250 Pac. 570; *York Junction Transfer & Storage Co.* v. *Accident Commissioners*, 202 Cal. 517, 521; 261

those here in question, creating various administrative tribunals, have likewise been treated as not conferring the right to a judicial trial *de novo*.[5]

Pac. 704; *Index Mines Corporation* v. *Industrial Commission*, 82 Colo. 272, 275; 259 Pac. 1036; *Ocean Accident & Guarantee Corp.* v. *Wilson*, 36 Ga. App. 784; 138 S. E. 246; *Taylor* v. *Blackwell Lumber Co.*, 37 Idaho 707, 721; 218 Pac. 356; *Cinofsky* v. *Industrial Commission*, 290 Ill. 521, 525; 125 N. E. 286; *Franklin Coal Co.* v. *Industrial Commission*, 296 Ill. 329, 334; 129 N. E. 811; *A. E. Norris Coal Co.* v. *Jackson*, 80 Ind. App. 423, 425; 141 N. E. 227; *Murphy* v. *Shipley*, 200 Iowa 857, 859; 205 N. W. 497; *Churchill's Case*, 265 Mass. 117, 119; 164 N. E. 68; *Hill's Case*, 268 Mass. 491, 493; 167 N. E. 914; *Matter of Dale* v. *Saunders Brothers*, 218 N. Y. 59, 63; 112 N. E. 571; *Federal Mining & Smelting Co.* v. *Thomas*, 99 Okla. 24, 26; 225 Pac. 967; *Oklahoma Pipe Line Co.* v. *Lindsey*, 113 Okla. 296, 298; 241 Pac. 1092; *Belmonte* v. *Connor*, 263 Pa. 470, 472; 106 Atl. 787.

[5](a) Interstate Commerce Commission: Act of June 18, 1910, c. 309, § 1, 36 Stat. 539; see *Interstate Commerce Comm.* v. *Louisville & Nashville R. Co.*, 227 U. S. 88, 92; *United States* v. *Louisville & Nashville R. Co.*, 235 U. S. 314, 320, 321; *Louisville & Nashville R. Co.* v. *United States*, 245 U. S. 463, 466, and other cases collected in I. L. Sharfman, "The Interstate Commerce Commission II," pp. 384–393, 417 et seq.; Act of June 18, 1910, c. 309, § 13, 36 Stat. 539, 555; Act of March 1, 1913, c. 92, 37 Stat. 701, 703. See *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420, 444n.

(b) Federal Trade Commission: Act of September 26, 1914, c. 311, § 5, 38 Stat. 717, 719–20; see *Federal Trade Comm.* v. *Curtis Publishing Co.*, 260 U. S. 568, 579, 580; *Federal Trade Comm.* v. *Pacific States Paper Trade Assn.*, 273 U. S. 52, 63; *Arkansas Wholesale Grocers' Assn.* v. *Federal Trade Comm.*, 18 F. (2d) 866, 870, 871; Gregory Hankin, "Conclusiveness of the Federal Trade Commission's Findings as to Facts," 23 Mich. L. Rev. 233, 262–67; Act of October 15, 1914, c. 323, § 11, 38 Stat. 730, 735 (applicable also in appropriate cases to Interstate Commerce Commission and Federal Reserve Board); see *Federal Trade Comm.* v. *Curtis Publishing Co.*, *supra*; *International Shoe Co.* v. *Federal Trade Comm.*, 280 U. S. 291, 297.

(c) Federal Power Commission: Act of June 10, 1920, c. 285, § 20, 41 Stat. 1063, 1074.

(d) United States Shipping Board: Act of September 7, 1916, c. 451, §§ 29, 31, 39 Stat. 728, 737, 738; see *Isthmian Steamship Co.* v.

The safeguards with which Congress has surrounded the proceedings before the deputy commissioner would be without meaning if those proceedings were to serve merely as an inquiry preliminary to a contest in the courts.[6] Specific provisions of the Longshoremen's Act make clear that it was the aim of Congress to expedite the relief afforded. With a view to obviating the delays incident to judicial proceedings the Act substitutes an administrative tribunal for the court; and, besides providing for notice and opportunity to be heard, endows the proceedings before the deputy commissioner with the customary incidents of a judicial hearing. It prescribes that the parties in interest may be represented by counsel, § 19 (d); that the attendance of witnesses and the

---

United States (S. D. N. Y.), 53 F. (2d) 251; compare *U. S. Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474.

(e) Secretary of Agriculture: Act of August 15, 1921, c. 64, §§ 315, 316, 42 Stat. 159, 168; see *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420, 443, 444; *Stafford* v. *Wallace*, 258 U. S. 495, 512; Act of August 15, 1921, c. 64, § 204, 42 Stat. 159, 162; Act of June 10, 1930, c. 436, §§ 10, 11, 46 Stat. 531, 535.

(f) Board of Tax Appeals: Act of February 26, 1926, c. 27, § 1003 (a), 44 Stat. 9, 110; see *Phillips* v. *Commissioner*, 283 U. S. 589, 600.

(g) Grain Futures Commission: Act of September 21, 1922, c. 369, § 6 (b), 42 Stat. 998, 1002.

(h) District of Columbia Rent Commission: Act of October 22, 1919, c. 80, Title II, § 108, 41 Stat. 297, 301; see *Block* v. *Hirsh*, 256 U. S. 135, 158; *Killgore* v. *Zinkhan*, 274 Fed. 140, 142.

In instances in which Congress intended to permit the introduction of additional evidence in the district court it has so provided in express terms. See, *e. g.*, Act of February 18, 1922, c. 57, § 2, 42 Stat. 388, 389. Compare the provision for review of reparation orders of the Interstate Commerce Commission, Act of June 18, 1910, c. 309, 313, 36 Stat. 539, 554, and of orders for the payment of money by the Shipping Board. Act of September 7, 1916, c. 451, § 30, 39 Stat. 728, 737.

[6] Compare Freund, "Administrative Powers Over Persons and Property," p. 279.

production of documents may be compelled, § 27 (a); that the hearings shall be public, and that they shall be stenographically reported, § 23 (b); that there shall be made "a record of the hearings and other proceedings before the deputy commissioners," § 23 (b); "that the deputy commissioner shall have full power and authority to hear and determine all questions in respect of" a claim, § 19 (a); and that his order shall become final after 30 days, unless a proceeding is filed under § 21 (b) charging that it is "not in accordance with law." Procedure of this character, instead of expediting relief, would entail useless expense and delay if the proceedings before the deputy commissioner were to be repeated in court, and the case tried from the beginning, at the option of either party. The conclusion that Congress did not so intend is confirmed by reference to the legislative history of the Act.[7] Compare *Caminetti* v. *United States,* 242 U. S. 470, 490.

---

[7] Two bills providing workmen's compensation for longshoremen and harbor workers were before the Congress at the same time. H. R. 9498, which was first reported favorably to the House, declared in terms, §§ 22, 24, that "the decision of the deputy commissioner shall be final as to all questions of fact and except as provided in section 24 as to all questions of law." This bill was abandoned by the House in favor of S. 3170, in order that some legislation on the subject, under what was regarded as an emergency, might be passed at that session. H. D., 69th Cong., 1st Sess., ser. 16, pt. 2, pp. 139–141. Although the differences between the two bills were minutely examined in the hearings before the House Committee on the Judiciary, no reference was made to any change in the provisions for review of compensation orders; but on the contrary it was affirmatively stated that the Senate bill likewise enacted administrative finality upon questions of fact. *Id.,* pt. 2, p. 200. The same statement was made in the Senate hearings. *Id.,* pt. 1, pp. 53, 66. The bill was reported to the House as having been amended to "conform substantially" to the bill theretofore reported. H. Rep., No. 1767, 69th Cong., 1st Sess. Both in this report and in the brief debates in both houses, the bill was described as designed to prevent the delay and injustice incident

Second. Nothing in the statute warrants the construction that the right to a trial *de novo* which Congress has concededly denied as to most issues of fact determined by the deputy commissioner has been granted in respect to the issue of the existence of the employer-employee relation. The language which is held sufficient to foreclose the right to such a trial on some issues forecloses it as to all. Whether the peculiar relation which the fact of employment is asserted to bear to the scheme of the statute and to the constitutional authority under which it was passed, might conceivably have induced Congress to provide a special method of review upon that question, it is not necessary to inquire. For Congress expressly declared its intention to put, for purposes of review, all the issues of fact on the same basis, by conferring upon the deputy commissioner "full power to hear and determine all questions in respect of such claim," subject only to the power of the court to set aside his order "if not in accordance with law."

The suggestion that "such claim" may be construed to mean only a claim within the purview of the Act seems to me without substance. Logically applied, the suggestion would leave the deputy commissioner powerless to hear or determine any issue of asserted non-liability under the Act. For non-existence of the employer-employee relation is only one of many grounds of non-liability. Thus, there is no liability if the injury was occasioned solely by the intoxication of the employee; or if the injury was due to the wilful intention of the employee to

---

to litigation, and as affording to maritime workers the same remedies as those provided in state workmen's compensation laws. See 67 Cong. Rec. 10614; 68 Cong. Rec. 5410–5414, 5908. The state workmen's compensation statutes have, almost universally, been construed to provide for final administrative determination of questions of fact, including the fact of the existence of an employment. See note 4, *supra*.

injure or kill himself or another; or if it did not arise "out of or in the course of employment"; or if the employer was not engaged in maritime employment in whole or in part; or if the injured person was the employee of a subcontractor who has secured payment of compensation; or if the proceeding is brought against the wrong person as employer; or if the disability or death is that of a master or a member of the crew of any vessel; or if it is that of a person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or if it is that of an officer or employee of the United States or any agency thereof; or if it is that of an officer or employee of any State, or foreign government, or any political subdivision thereof; or if recovery for the disability or death through workmen's compensation proceedings may be validly provided by state law. And obviously there is no liability if there was in fact neither disability nor death. It is not reasonable to suppose that Congress intended to set up a fact-finding tribunal of first instance, shorn of power to find a portion of the facts required for any decision of the case; or that in enacting legislation designed to withdraw from litigation the great bulk of maritime accidents, it contemplated a procedure whereby the same facts must be twice litigated before a longshoreman could be assured the benefits of compensation.

The circumstance that Congress provided, in § 21 (b), for review of orders of the deputy commissioner by injunction proceedings is urged as indicative of an intention that in such proceedings the complainant should have full opportunity to plead and prove any facts showing that the case lay outside the purview of the statute. But by this reasoning, again, many other questions besides those referred to by the Court would be open to retrial upon new, and different, evidence. The simple answer is that on bills in equity to set aside orders of a federal

administrative board there is no trial *de novo* of issues of fact determined by that tribunal. As stated in *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420, 443, concerning orders of the Secretary of Agriculture under the Packers and Stockyards Act:

"A proceeding under § 316 of the Packers and Stockyards Act is a judicial review, not a trial *de novo.* The validity of an order of the Secretary, like that of an order of the Interstate Commerce Commission, must be determined upon the record of the proceedings before him—save as there may be an exception of issues presenting claims of constitutional right, a matter which need not be considered or decided now." [8]

In the review of the *quasi*-judicial decisions of these federal administrative tribunals the bill in equity serves the purpose which at common law, and under the practice of many of the States, is performed by writs of certiorari.[9] It presents to the reviewing court the record of the proceedings before the administrative tribunal in order that determination may be made, among other things, whether the authority conferred has been properly exercised.[10] Neither upon bill in equity in the fed-

[8] Congress has incorporated by reference the provisions for review of orders of the Interstate Commerce Commission in authorizing judicial review of certain orders of the Federal Power Commission and the Shipping Board, as it did in the Packers and Stockyards Act. See note 5, *supra.*

[9] In *People ex rel. New York & Queens Gas Co.* v. *McCall,* 219 N. Y. 84, 88, 90; 113 N. E. 795, it was held that the scope of the review on certiorari of an order of the Public Service Commission was the same as that of the federal court on bill in equity of the orders of the Interstate Commerce Commission as declared in *Interstate Commerce Comm.* v. *Illinois Central R. Co.,* 215 U. S. 452, 470. Compare Vanfleet, "Collateral Attack on Judicial Proceedings," §§ 2, 3.

[10] Certiorari is the historic writ for determining whether the action of an inferior tribunal has been taken within its jurisdiction; and it has sometimes been held that the writ lies only to determine this

eral courts nor writ of certiorari in the States is it the practice to permit fresh evidence to be offered in the reviewing court. There is no foundation for the suggestion that Congress intended to provide otherwise in the Longshoremen's Act.

Third. It is said that the provision for a trial *de novo* of the existence of the employer-employee relation should be read into the Act in order to avoid a serious constitutional doubt. It is true that where a statute is equally susceptible of two constructions, under one of which it is clearly valid and under the other of which it may be unconstitutional, the court will adopt the former construction. *Presser* v. *Illinois,* 116 U. S. 252, 269; *Knights Templars' Indemnity Co.* v. *Jarman,* 187 U. S. 197, 205; *Carey* v. *South Dakota,* 250 U. S. 118, 122; *Missouri Pacific R. Co.* v. *Boone,* 270 U. S. 466, 471, 472. But this Act is not equally susceptible to two constructions. The court may not, in order to avoid holding a statute unconstitutional, engraft upon it an exception or other provision. *Butts* v. *Merchants & Miners Transportation Co.,* 230 U. S. 126, 133; *The Employers' Liability Cases,* 207 U. S. 463, 500–502; *Trade-Mark Cases,* 100 U. S. 82, 99; *United States* v. *Fox,* 95 U. S. 670, 672, 673; *United States*

---

question. Compare *Jackson* v. *People,* 9 Mich. 111. But, although there is considerable divergence in the practice of the various States as to the scope of the review, the proceeding, apart from extraordinary statutory provisions, is universally upon the record and the evidence before the inferior tribunal, and not a trial *de novo. Fore* v. *Fore,* 44 Ala. 478, 484; *Los Angeles* v. *Young,* 118 Cal. 295, 298; 50 Pac. 534; *Great Western Power Co.* v. *Pillsbury,* 170 Cal. 180, 185, 186; 149 Pac. 35; *Uphoff* v. *Industrial Board,* 271 Ill. 312; 111 N. E. 128; *Tiedt* v. *Carstensen,* 61 Iowa 334, 336; 16 N. W. 214; *Lord* v. *County Commissioners,* 105 Maine 556, 561; 75 Atl. 126; *Jackson* v. *People,* 9 Mich. 111, 119, 120; *Wait* v. *Krewson,* 59 N. J. L. 71, 75; 35 Atl. 742; *Milwaukee Western Fuel Co.* v. *Industrial Commission,* 159 Wis. 635, 641, 642; 150 N. W. 998. It was so at common law. See Freund, "Administrative Powers Over Persons and Property," pp. 267–269.

v. *Reese,* 92 U. S. 214, 221. Compare *Illinois Central R. Co.* v. *McKendree,* 203 U. S. 514, 529; *Cella Commission Co.* v. *Bohlinger,* 147 Fed. 419, 423, 424. Neither may it do so to avoid having to resolve a constitutional doubt. To hold that Congress conferred the right to a trial *de novo* on the issue of the employer-employee relation seems to me a remaking of the statute and not a construction of it.

Fourth. Trial *de novo* of the issue of the existence of the employer-employee relation is not required by the due process clause. That clause ordinarily does not even require that parties shall be permitted to have a judicial tribunal pass upon the weight of the evidence introduced before the administrative body. See *Dahlstrom Metallic Door Co.* v. *Industrial Board,* 284 U. S. 594. The findings of fact of the deputy commissioner, the Court now decides, are conclusive as to most issues, if supported by evidence. Yet as to the issue of employment the Court holds not only that such findings may not be declared final, but that it would create a serious constitutional doubt to construe the Act as committing to the deputy commissioner the simple function of collecting the evidence upon which the court will ultimately decide the issue.

It is suggested that this exception is required as to issues of fact involving claims of constitutional right. For reasons which I shall later discuss, I cannot believe that the issue of employment is one of constitutional right. But even assuming it to be so, the conclusion does not follow that the trial of the issue must therefore be upon a record made in the district court. That the function of collecting evidence may be committed to an administrative tribunal is settled by a host of cases,[11] and

[11] See the statutes and cases cited in note 5, *supra.* Similar decisions have been repeatedly made, under the Fourteenth Amendment, in cases coming from the state courts. This Court has recently decided that a state workmen's compensation act may validly provide

supported by persuasive analogies, none of which justify a distinction between issues of constitutional right and any others. Resort to administrative remedies may be made a condition precedent to a judicial hearing. *Northern Pacific Ry. Co.* v. *Solum,* 247 U. S. 477, 483, 484; *First National Bank* v. *County Commissioners,* 264 U. S. 450, 454, 455; *United States Navigation Co.* v. *Cunard S. S. Co.,* 284 U. S. 474. This is so even though a party is asserting deprivation of rights secured by the Federal Constitution. *First National Bank* v. *County Commissioners, supra.* In federal equity suits, the taking of evidence on any issue in open court did not become common until 1913,[12] compare *Los Angeles Brush Mfg.*

for judicial review upon matters of law only. *Dahlstrom Metallic Door Co.* v. *Industrial Board,* 284 U. S. 594. See also *New York Central R. R. Co.* v. *White,* 243 U. S. 188, 207, 208. In *Missouri ex rel. Hurwitz* v. *North,* 271 U. S. 40, 42, it was held that a state board of health might be empowered, upon reasonable notice, specification of charges and opportunity to be heard, to revoke a physician's license, subject only to review in the courts upon certiorari. In *Washington ex rel. Oregon Railroad & Navigation Co.* v. *Fairchild,* 224 U. S. 510, 527, a statute was upheld which confined the court upon review of a public service commission's order to the evidence introduced before the commission. See also *Wadley Southern Ry. Co.* v. *Georgia,* 235 U. S. 651, 661; *New York ex rel. New York & Queens Gas Co.* v. *McCall,* 245 U. S. 345, 348, 349; *Napa Valley Electric Co.* v. *Railroad Commission,* 251 U. S. 366, 370; *Northern Pacific Ry. Co.* v. *Department of Public Works,* 268 U. S. 39, 42. In *Long Island Water Supply Co.* v. *Brooklyn,* 166 U. S. 685, 695, it was held that the findings of fact by commissioners in assessing damages in condemnation proceedings might be made final, leaving open to the court only the question whether there was any error in the basis of appraisal, or otherwise. See also *Crane* v. *Hahlo,* 258 U. S. 142, 147; *Hardware Dealers Mutual Fire Insurance Co.* v. *Glidden Co.,* 284 U. S. 151. Compare *Pacific Live Stock Co.* v. *Lewis,* 241 U. S. 440, 451, 452.

[12] See Griswold and Mitchell, "The Narrative Record in Federal Equity Appeals," 42 Harv. L. Rev. 483, 488, 491; Lane, "One Year Under the New Federal Equity Rules," 27 Harv. L. Rev. 629, 639. Compare 2 Daniell, "Chancery Practice," 2d ed., 1045–46, 1053–54, 1069 *et seq.*

Corp. v. *James,* 272 U. S. 701; and in admiralty it was not required by the Rules of this Court until 1921.[13] Compare *The P. R. R. No. 35,* 48 F. (2d) 122. On appeals in admiralty, further proof is now taken by a commission.[14] As was said concerning a similar tribunal in *Washington ex rel. Oregon Railroad & Navigation Co.* v. *Fairchild,* 224 U. S. 510, 527, the function of the deputy commissioner is like that of a master in chancery who has been required to take testimony and report his findings of fact and conclusions of law. Compare *Los Angeles Brush Corp.* v. *James, supra; Kimberly* v. *Arms,* 129 U. S. 512, 524, 525; *Armstrong* v. *Belding Bros. & Co.,* 297 Fed. 728, 729. The holding that the difference between the procedure prescribed by the Longshoremen's Act and these historic methods of hearing evidence transcends the limits of congressional power when applied to the issue of the existence of a relation of employment, as distinguished from that of the circumstances of an injury or the existence of a relation of dependency, seems to me without foundation in reality. Certainly, there is no difference to the litigant.

---

[13] Admiralty Rule 46, 254 U. S. 698. Subsequent to 1842, when the procedure in admiralty became subject to rules promulgated by this Court, and prior to 1921, no rule specifically required that evidence be taken orally in open court, and the practice in some districts appears to have been to take proofs by a commission. Compare Admiralty Rules 44, 46, 210 U. S. 558; *The Guy C. Goss,* 53 Fed. 826, 827; *The Wavelet,* 25 Fed. 733, 734. See also *The Sun,* 271 Fed. 953, 954. Under the present rules the district court may still, upon proper circumstances, refer causes in admiralty to a commissioner, without the consent of the parties, to hear the testimony and report conclusions on issues of fact and law. *The P. R. R. No. 35,* 48 F. (2d) 122; *Sorenson & Co.* v. *Liverpool, Brazil & River Plate Steam Nav. Co.,* 47 F. (2d) 332. Compare *The City of Washington,* 92 U. S. 31, 39; *Los Angeles Brush Mfg. Corp.* v. *James,* 272 U. S. 701. The commissioner's findings of fact are not disturbed unless clearly erroneous. *La Bourgogne,* 144 Fed. 781, 783, aff'd, 210 U. S. 95; *Anderson* v. *Alaska S. S. Co.,* 22 F. (2d) 532, 535.

[14] See Admiralty Rule 45, 254 U. S. 698; Rule 15, 275 U. S. 607.

Even in respect to the question, discussed by the Court, of the finality to be accorded administrative findings of fact in a civil case involving pecuniary liability, I see no reason for making special exception as to issues of constitutional right, unless it be that under certain circumstances, there may arise difficulty in reaching conclusions of law without consideration of the evidence as well as the findings of fact. See *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420, 443. Compare *Ohio Valley Water Co.* v. *Ben Avon Borough,* 253 U. S. 287. The adequacy of that reason need not be discussed. For as to the issue of employment no such difficulty can be urged. Two decades of experience in the States testify to the appropriateness of the administrative process as applied to this issue, as well as all others, in workmen's compensation controversies.

Fifth. Trial *de novo* of the existence of the employer-employee relation is not required by the Judiciary Article of the Constitution. The mere fact that the Act deals only with injuries arising on navigable waters, and that independently of legislation such injuries can be redressed only in courts of admiralty,[15] obviously does not preclude Congress from denying a trial *de novo.* For the Court holds that it is compatible with the grant of power under Article III to deny a trial *de novo* as to most of the facts

[15] The decision of the District Court, acquiesced in by the Circuit Court of Appeals and this Court, that the remedy under § 21 (b) of the Longshoremen's Act is in admiralty seems to me unfounded. The provision in that section for suspending or setting aside a compensation order by injunction clearly implies a proceeding upon bill in equity. Congress may authorize actions for maritime torts to be brought on the law side of the federal district courts, *Panama R. Co.* v. *Johnson,* 264 U. S. 375, 385; or in the state courts, *Engel* v. *Davenport,* 271 U. S. 33, 37. See also *Chelentis* v. *Luckenbach S. S. Co.,* 247 U. S. 372, 384. No constitutional objection can exist, therefore, to giving effect to the remedy in equity provided in this Act.

upon which rest the allowance of a claim and the amount of compensation. Its holding that the Constitution requires a trial *de novo* of the issue of the employer-employee relation is based on the relation which that fact bears to the statutory scheme propounded by Congress, and to the constitutional authority under which the Act was passed. The argument is that existence of the relation of employer and employee is, as a matter of substantive law, indispensable to the application of the statute, because the power of Congress to enact the legislation turns upon its existence; and that whenever the question of constitutional power depends upon an issue of fact that issue must, as a matter of procedure, be determinable independently upon evidence freshly introduced in a court.[16] Neither proposition seems to me well founded.

Whether the power of Congress to provide compensation for injuries occurring on navigable waters is limited to cases in which the employer-employee relation exists has not heretofore been passed upon by this Court and was not argued in this case. I see no justification for assuming, under those circumstances, that it is so limited.

[16] The opinion of the Court suggests that, upon similar reasoning, the issue whether the injury occurred on navigable waters must likewise be open to independent redetermination, upon the facts as well as the law, in the district court. The question whether any peculiar significance attaches to such a controversy, entitling it to be twice tried, is not before us. It has never been decided that the power of Congress to provide compensation for injuries to workmen received in the course of maritime employment depends upon the injury having occurred upon navigable waters. See Benedict, "The American Admiralty," 5th ed., § 25. Compare *Soper* v. *Hammond Lumber Co.*, 4 F. (2d) 872; *State Industrial Commission* v. *Nordenholt Corp.*, 259 U. S. 263. The Longshoremen's Act undertakes to cover only the field of admiralty jurisdiction within which the decisions of this Court have held uniformity to be required. See Stanley Morrison, "Workmen's Compensation and the Maritime Law," 38 Yale L. J. 472, 500.

Without doubt the word "employee" was used in the Longshoremen's Act in the sense in which the common law defines it. But that definition is not immutable; and no provision of the Constitution confines the application of liability without fault to instances where the relation of employment, as so defined, exists.[17] Compare *Louis Pisitz Dry Goods Co.* v. *Yeldell,* 274 U. S. 112, 116. Whether an individual is an employee or an independent contractor, depends upon criteria often subtle and uncertain of application,[18] criteria which have been developed by proc-

[17] That legislatures may abolish defenses recognized at common law and create new causes of action not so recognized is beyond question. So also is the power, under proper circumstances, to provide for liability without fault. Compare *St. Louis & San Francisco Ry. Co.* v. *Mathews,* 165 U. S. 1; *Chicago, Rock Island & Pacific Ry. Co.* v. *Zernecke,* 183 U. S. 582; *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Taylor,* 210 U. S. 281; *New York Central R. Co.* v. *White,* 243 U. S. 188. Congress may provide that a carrier shall be liable for loss or damage to goods occurring beyond its own lines. *Atlantic Coast Line R. Co.* v. *Riverside Mills,* 219 U. S. 186, 203. See also *Atlantic Coast Line R. Co.* v. *Glenn,* 239 U. S. 388, 393. "The rule," said the Court, "is adapted to secure the rights of the shipper by securing unity of transportation with unity of responsibility." That Congress might not similarly secure unity of responsibility for injuries to all persons working upon the same enterprise, irrespective of the particular relation existing of contract or employment, is not to be assumed without argument and in the absence of circumstances presenting the question. The logic upon which workmen's compensation acts have been sustained does not require insistence upon a technical master and servant relation. Compare *Ward & Gow* v. *Krinsky,* 259 U. S. 503. See also Jeremiah Smith, "Sequel to Workmen's Compensation Acts," 27 Harv. L. Rev. 235, 344.

The common law, of course, holds many examples of liability to third persons for injury sustained at the hands of an independent contractor or his servant. *e. g., Ellis* v. *Sheffield Co.,* 2 E. & B. 767; *Pickard* v. *Smith,* 10 C. B. (n. s.) 470; *Doll* v. *Ribetti,* 203 Fed. 593.

[18] See the analysis and criticism in William O. Douglas, "Vicarious Liability and Administration of Risk," 38 Yale L. J. 584, 594–604. Compare O. W. Holmes, "Agency," 5 Harv. L. Rev. 1, 14–16.

esses of judicial exclusion and inclusion, largely since the adoption of the Constitution [19] and with reference, for the most part, to considerations foreign to industrial accident litigation. It is not to be assumed that Congress, having power to amend and revise the maritime law, is prevented from modifying those criteria and enlarging the liability imposed by this Act so as to embrace all persons who are engaged or engage themselves in the work of another, including those now designated as independent contractors. In the Longshoremen's Act itself, Congress, far from declaring the relation of master and servant indispensable in all cases to the application of the statute, provided expressly that a contractor shall be liable to employees of a subcontractor who has failed to secure payment of compensation. § 4 (a). State workmen's compensation laws almost invariably contain provisions for liability either to independent contractors or to their employees, sometimes absolute and sometimes conditioned upon default by the immediate employer;[20] and these pro-

[19] See Baty, "Vicarious Liability," *passim;* Francis Bowes Sayre, "Criminal Responsibility for Acts of Another," 43 Harv. L. Rev. 689, 691–694; O. W. Holmes, "Agency," 4 Harv. L. Rev. 345, 5 *id.* 1. The first text-book on Agency did not appear until 1812. Paley, "The Law of Principal and Agent."

[20] See the digests of the statutes in L. V. Hill and Ralph H. Wilkin, "Workmen's Compensation Statute Law"; and F. Robertson Jones, "Digest of Workmen's Compensation Laws" (10th ed.). The provision in the New York Workmen's Compensation Act, § 56, is illustrative: "A contractor, the subject of whose contract is, involves or includes a hazardous employment, who subcontracts all or any part of such contract shall be liable for and shall pay compensation to any employee injured. . . ." In 1927, in recommending the extension of this provision to include owners or lessees as well as general contractors, the State Industrial Commissioner said: "From the point of view of making sure of compensation to injured workers, all the reasons for the existing obligations put upon a general contractor for a piece of building work who sublets part of the work, are equally cogent for doing the same in case of an owner or lessee of premises

visions appear to have been uniformly upheld.[21] I cannot doubt that, even upon the view of the evidence taken by the District Court, Congress might have made Benson liable to Knudsen for the injury which he sustained.

Sixth. Even if the constitutional power of Congress to provide compensation is limited to cases in which the

---

who lets part of building work in precisely the same way. The practical need for doing it has been shown by experience to be extensive owing to the large amount of building work now being done under the method above noted and which this amendment is designed to cover.

"The existing provision has proven very beneficial in the case of contractors, and it will be equally useful in the case of the type of owner-contractor, so to speak, who must now be dealt with for solution of the same problem." Annual Report of the Industrial Commissioner (1927), pp. 4, 5.

[21] See, *e. g., Industrial Commission* v. *Continental Investment Co.,* 78 Colo. 398, 401, 402; 242 Pac. 49; *Palumbo* v. *George A. Fuller Co.,* 99 Conn. 355, 358; 122 Atl. 63; *Fisk* v. *Bonner Tie Co.,* 40 Idaho 304, 308; 232 Pac. 569; *Parker-Washington Co.* v. *Industrial Board,* 274 Ill. 498, 504; 113 N. E. 976; *American Steel Foundries* v. *Industrial Board,* 284 Ill. 99, 103; 119 N. E. 902; *McDowell* v. *Duer,* 78 Ind. App. 440, 444, 445; 133 N. E. 839; *Burt* v. *Clay,* 207 Ky. 278, 281; 269 S. W. 322; *Seabury* v. *Arkansas Natural Gas Corp.,* 171 La. 199, 204, 205; 130 So. 1; *White* v. *George B. H. Macomber Co.,* 244 Mass. 195, 198; 138 N. E. 239; *Burt* v. *Munising Woodenware Co.,* 222 Mich. 699, 702, 703; 193 N. W. 895; *De Lonjay* v. *Hartford Accident & Indemnity Co.,* 35 S. W. (2d) 911, 912 (Mo.); *Sherlock* v. *Sherlock,* 112 Neb. 797, 799; 201 N. W. 645; *O'Banner* v. *Pendlebury,* 107 N. J. L. 245, 247; 153 Atl. 494; *Clark* v. *Monarch Engineering Co.,* 248 N. Y. 107, 110; 161 N. E. 436; *De Witt* v. *State,* 108 Ohio St. 513, 522–525; 141 N. E. 551; *Green* v. *Industrial Commission,* 121 Okla. 211, 212; 249 Pac. 933; *Qualp* v. *James Stewart Co.,* 266 Pa. 502; 109 Atl. 780; *Murray* v. *Wasatch Grading Co.,* 73 Utah 430, 436, 439; 274 Pac. 940; *Threshermen's Nat. Ins. Co.* v. *Industrial Commission,* 201 Wis. 303, 306; 230 N. W. 67; *Wisinger* v. *White Oil Corp.,* 24 F. (2d) 101, 102. But compare *Flickenger* v. *Accident Commission,* 181 Cal. 425, 432, 433; 184 Pac. 851. Liability to pay compensation obtains in England under circumstances in which no relation of employment exists. See *Mulrooney* v. *Todd* (1909), 1 K. B. 165; *Marks* v. *Carne* (1909), 2 K. B. 516.

employer-employee relation exists, I see no basis for a contention that the denial of the right to a trial *de novo* upon the issue of employment is in any manner subversive of the independence of the federal judicial power. Nothing in the Constitution, or in any prior decision of this Court to which attention has been called, lends support to the doctrine that a judicial finding of any fact involved in any civil proceeding to enforce a pecuniary liability may not be made upon evidence introduced before a properly constituted administrative tribunal, or that a determination so made may not be deemed an independent judicial determination. Congress has repeatedly exercised authority to confer upon the tribunals which it creates, be they administrative bodies or courts of limited jurisdiction, the power to receive evidence concerning the facts upon which the exercise of federal power must be predicated, and to determine whether those facts exist. The power of Congress to provide by legislation for liability under certain circumstances subsumes the power to provide for the determination of the existence of those circumstances. It does not depend upon the absolute existence in reality of any fact.

It is true that, so far as Knudsen is concerned, proof of the existence of the employer-employee relation is essential to recovery under the Act. But under the definition laid down in *Noble* v. *Union River Logging Co.,* 147 U. S. 165, 173, 174, that fact is not jurisdictional. It is *quasi*-jurisdictional. The existence of a relation of employment is a question going to the applicability of the substantive law, not to the jurisdiction of the tribunal. Jurisdiction is the power to adjudicate between the parties concerning the subject-matter. Compare *Reynolds* v. *Stockton,* 140 U. S. 254, 268. Obviously, the deputy commissioner had not only the power but the duty to determine whether the employer-employee relation existed. When a duly constituted tribunal has juris-

diction of the parties and of the subject-matter, that jurisdiction is not impaired by errors, however grave, in applying the substantive law. *Dennison* v. *Payne,* 293 Fed. 333, 341. Compare *Chicago, Rock Island & Pacific Ry. Co.* v. *Schendel,* 270 U. S. 611, 617; *Marin* v. *Augedahl,* 247 U. S. 142, 149; *Binderup* v. *Pathé Exchange,* 263 U. S. 291, 305–307. This is true of tribunals of special as well as of those of general jurisdiction. It is true of administrative, as well as of judicial tribunals. If errors in the application of law may not be made the basis of collateral attack upon the decision of an administrative tribunal, once that decision has become final, no "jurisdictional" defect can compel the independent re-examination in court, upon direct review, of the facts affecting such applicability.

The "judicial power" of Article III of the Constitution is the power of the federal government, and not of any inferior tribunal. There is in that Article nothing which requires any controversy to be determined as of first instance in the federal district courts. The jurisdiction of those courts is subject to the control of Congress.[22] Mat-

[22] *Turner* v. *Bank of North America,* 4 Dall. 8, 10; *United States* v. *Hudson & Goodwin,* 7 Cranch 32, 33; *Shelden* v. *Sill,* 8 How. 441, 449; *Justices* v. *Murray,* 9 Wall. 274, 280; *Insurance Co.* v. *Dunn,* 19 Wall. 214, 226; *Stevenson* v. *Fain,* 195 U. S. 165, 167; *Kline* v. *Burke Construction Co.,* 260 U. S. 226, 234. It was not until the Act of March 3, 1875, c. 137, 18 Stat. 470, that Congress extended the jurisdiction of the circuit courts to "cases arising under the laws of the United States," thus permitting to be exercised "the vast range of power which had lain dormant in the Constitution since 1789."

See Felix Frankfurter and James M. Landis, "The Business of the Supreme Court," pp. 65–68; Charles Warren, "Federal Criminal Laws and the State Courts," 38 Harv. L. Rev. 545. Large areas of the potential jurisdiction of the lower federal courts are now occupied by other tribunals. As to legislative courts, see Wilber Griffith Katz, "Federal Legislative Courts," 43 Harv. L. Rev. 894. Congress has repeatedly exercised power to exclude from the federal courts cases not involving the requisite jurisdictional amount. Cases aris-

ters which may be placed within their jurisdiction may instead be committed to the state courts. If there be any controversy to which the judicial power extends that may not be subjected to the conclusive determination of administrative bodies or federal legislative courts, it is not because of any prohibition against the diminution of the jurisdiction of the federal district courts as such, but because, under certain circumstances, the constitutional requirement of due process is a requirement of judicial process. An accumulation of precedents, already referred to,[23] has established that in civil proceedings in-

---

ing under the Federal Employers' Liability Act are triable in either the state courts or the federal district courts. See *Second Employers' Liability Cases*, 223 U. S. 1, 56, 57–59; *Douglass* v. *New York, New Haven & Hartford R. Co.*, 279 U. S. 377. So also cases under § 20 of the Seamen's Act, as amended by the Merchant Marine Act of 1920, § 33. *Engel* v. *Davenport*, 271 U. S. 33, 37; *Panama R. Co.* v. *Vasquez*, 271 U. S. 557, 562.

[23] See decisions and statutes collected in note 5, *supra*. So far as concerns the question here presented, it is immaterial whether the controversy is wholly between private parties or is between the Government and a citizen. The fact that litigation under the Longshoremen's Act is, in substance, between private parties (even though under § 21 (b) the deputy commissioner is the only necessary party respondent) does not warrant the inference that the administrative features of the Act present a question not heretofore decided. The tribunals listed in note 5, *supra*, deal with matters outside the scope of the doctrine recently examined in *Ex parte Bakelite Corporation*, 279 U. S. 438. While the opinion in that case referred to "various matters arising between the government and others" as appropriate for the cognizance of legislative courts, the reference was restricted to matters "which from their nature do not require judicial determination and yet are susceptible to it," the mode of determining which "is completely within congressional control." *Ibid.* at 451. The suggestion that due process does not require judicial process in any controversy to which the government is a party would involve a revision of historic conceptions of the nature of the federal judicial system. That all questions arising in the administration of the Interstate Commerce Act, for example, or between a taxpayer and the government under the tax laws, could be committed by Congress

volving property rights determination of facts may constitutionally be made otherwise than judicially; and necessarily that evidence as to such facts may be taken outside of a court. I do not conceive that Article III has properly any bearing upon the question presented in this case.

Seventh. The cases cited by the Court in support of its conclusion that the statute would be invalid if construed to deny a trial *de novo* of issues of fact affecting the existence of the employer-employee relation seem to me irrelevant. Most of those decisions dealt with tribunals exercising functions generically different from the function which Congress has assigned to the deputy commissioners under the Longshoremen's Act, and no question arose analogous to that now presented.

By the Longshoremen's Act, Congress created fact-finding and fact-gathering tribunals, supplementing the courts and entrusted with power to make initial determinations in matters within, and not outside, ordinary judicial purview. The purpose of these administrative bodies is to withdraw from the courts, subject to the power of judicial review, a class of controversies which experience has shown can be more effectively and expeditiously handled in the first instance by a special and expert tribunal. The proceedings of the deputy commissioners are endowed with every substantial safeguard of a judicial hearing. Their conclusions are, as a matter of right, open to reëxamination in the courts on all questions of law; and, we assume for the purposes of this discussion, may be open even on all questions of the weight of the evidence.

The administrative bodies in the cases referred to by the Court, on the contrary, are in no sense fact-gathering

---

exclusively to executive officers, in respect to issues of law as well as of fact, has never been supposed. Thus there is no indication in the opinion in *Ex parte Bakelite Corporation* that the Commerce Court was a legislative court, although instances of the creation of such courts were considered in detail. See Wilber Griffith Katz, "Federal Legislative Courts," 43 Harv. L. Rev. 894, 914, 915.

or fact-finding tribunals of first instance. They are tribunals of final resort within the scope of their authority. Their concern is with matters ordinarily outside of judicial competence,—the deportation of aliens, the enforcement of military discipline, the granting of land patents, and the use of the mails,—matters which are within the power of Congress to commit to conclusive executive determination. Compare *Ex parte Bakelite Corp,* 279 U. S. 438, 451. Their procedure may be summary and frequently is.[24] With respect to them, the function of the courts is not one of review but essentially of control—the function of keeping them within their statutory authority.[25]

[24] Compare *Miller* v. *Horton,* 152 Mass. 540; 26 N. E. 100, and *Pearson* v. *Zehr,* 138 Ill. 48; 29 N. E. 854, cited by the Court. These cases involved summary administrative action, and the complaining individuals had been given no opportunity to be heard on the question whether their property was in fact subject to the destruction ordered. The degree of finality appropriate in administrative action must always depend upon the character of the administrative hearing provided. Compare Dickinson, "Administrative Justice and the Supremacy of Law," pp. 260–261; E. F. Albertsworth, "Judicial Review of Administrative Action by the Federal Supreme Court," 35 Harv. L. Rev. 127, 152, 153. In most States, the tendency appears to be to deny the right, in a tort action against an administrative officer, to question the existence of the fact justifying his act, if a hearing was provided or if a suit for injunction could have been brought. See Freund, "Administrative Powers Over Persons and Property," pp. 248–252; *Kirk* v. *Board of Health,* 83 S. C. 372, 383; 65 S. E. 387. Compare *North American Cold Storage Co.* v. *Chicago,* 211 U. S. 306, 316, 317. In cases arising under the Workmen's Compensation Laws, where formal hearing is available, the Massachusetts and Illinois courts, in common with many others, have held the administrative finding of the fact of employment conclusive. *Churchill's Case,* 265 Mass. 117; 164 N. E. 68; *Hill's Case,* 268 Mass. 491; 167 N. E. 914; *Cinofsky* v. *Industrial Commission,* 290 Ill. 521; 125 N. E. 286; *Franklin Coal Co.* v. *Industrial Commission,* 296 Ill. 329; 129 N. E. 811.

[25] Compare Frankfurter and Davison, "Cases on Administrative Law," Preface, p. viii. See Albert Levitt, "The Judicial Review of Executive Acts," 23 Mich. L. Rev. 588, 595 *et seq.* This authority

No method of judicial review of the administrative action had been provided by Congress in any of the cases cited; and the question of the power to confine review to the administrative record accordingly did not arise. In each case, the Court held that if the administrative officer had acted outside his authority, the unwritten law supplied a remedy, and that relief could be had, according to the nature of the case, on bill in equity or habeas corpus.[26]

---

may embrace as well the determination of questions of law as of fact, depending upon the judicial construction given to the authority of the tribunal. Thus in *In re Grimley, In re Morrissey, Noble* v. *Union River Logging Co., Smith* v. *Hitchcock,* and *Bates & Guild Co.* v. *Payne,* all cited in note 26, *infra,* the Court recognized the conclusiveness of many decisions of law by the tribunals in question. Tribunals of this character are of course empowered, under ordinary circumstances, to make conclusive determinations of fact. See *e. g., Passavant* v. *United States,* 148 U. S. 214, 219; *Medbury* v. *United States,* 173 U. S. 492, 497, 498; *Silberschein* v. *United States,* 266 U. S. 221, 225; *Quon Quon Poy* v. *Johnson,* 273 U. S. 352, 358.

[26](a) In *Ng Fung Ho* v. *White,* 259 U. S. 276, the statute authorized the deportation only of aliens, without provision for judicial review of the executive order. Act of February 5, 1917, c. 29, § 19, 39 Stat. 874, 889. Upon application for a writ of habeas corpus, by a person arrested who claimed to be a citizen, it was held that he was entitled to a judicial determination of that claim. No question arose as to whether Congress might validly have provided for review exclusively upon the record made in the executive department; nor as to the scope of review which might have been permissible upon such record.

(b) *In re Grimley,* 137 U. S. 147, and *In re Morrissey,* 137 U. S. 157, deal with the action of military tribunals. Military tribunals form a system of courts separate from the civil courts and created by virtue of an independent grant of power in the Constitution. Art. I, § 8, cl. 14, 16. They have authority to determine finally any case over which they have jurisdiction; "and their proceedings . . . are not open to review by the civil tribunals, except for the purpose of ascertaining whether the military court had jurisdiction of the person and subject-matter, and whether, though having such jurisdiction, it had exceeded its powers in the sentence pronounced." *Carter v. Roberts,* 177 U. S. 496, 498; *Grafton* v. *United States,* 206 U. S. 333,

The question decided in each case was that Congress should not be taken, in the absence of specific provision, to have intended to subject the individual to the uncontrolled action of a public administrative officer. See *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 110. No comparable issue is presented here.

Reliance is also placed, as illustrative of the necessary independence of the federal judicial power, upon the decision in *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U. S. 287.[27] That case, however, involved only the ques-

---

347. As Congress did not provide any method for review by the courts of the decision of military tribunals, all questions of law concerning military jurisdiction are open to independent determinaton in the civil courts; and the cases of *In re Grimley* and *In re Morrissey*, decide nothing more. Whether Congress could make the findings of "jurisdictional facts" of military tribunals conclusive upon civil courts is a question which appears never to have been raised.

(c) In *Noble* v. *Union River Logging Co.*, 147 U. S. 165, 174, relief was granted by bill in equity to stay illegal and unauthorized action of the Secretary of the Interior in respect to the public lands, there being no method of judicial review prescribed by statute. Compare *Smelting Co.* v. *Kemp*, 104 U. S. 636, 641.

(d) In *Smith* v. *Hitchcock*, 226 U. S. 53, 58, as in *Bates & Guild Co.* v. *Payne*, 194 U. S. 106, 109, 110, and *American School of Magnetic Healing Co.* v. *McAnnulty*, 187 U. S. 94, 109, bills in equity were entertained to review acts of the Postmaster General alleged to be unauthorized, Congress not having provided any method of judicial review. In each case the question involved was stated to be one of law.

[27] The decision in the *Ohio Valley Water Company Case* has evoked extensive and varied comment. See, *e. g.*, Curtis, "Judicial Review of Commission Rate Regulation—The Ohio Valley Case," 34 Harv. L. Rev. 862; Albertsworth, "Judicial Review of Administrative Action by the Federal Supreme Court," 35 Harv. L. Rev. 127; C. W. Pound, "The Judicial Power," 35 Harv. L. 787; Brown, "The Functions of Courts and Commissions in Public Utility Rate Regulations," 38 Harv. L. Rev. 141; Wiel, "Administrative Finality," 38 Harv. L. Rev. 447; Buchanan, "The Ohio Valley Water Company Case and the Valuation of Railroads," 40 Harv. L. Rev. 1033; Beutel, "Valuation as a

tion of the scope of review, upon the administrative record, in confiscation cases. It held that the reviewing court must have power to weigh the evidence upon which the administrative tribunal entered the order. It decided nothing concerning the right to a trial *de novo* in court; and the opinion made no reference to such a trial. It could not have decided anything as to the effect of Article III of the Constitution. For the case came here from the highest court of the State, arose under the Fourteenth Amendment, and did not relate to the jurisdiction of the lower federal courts. Moreover, in no event can the issues presented in the review of rate orders alleged to be confiscatory, which involve difficult questions of mixed law and fact, be deemed parallel to those presented in the review of workmen's compensation awards.[28] Compare the issues in *Ohio Valley Water Co.* v. *Ben Avon Borough, supra,* with that in *Dahlstrom Metallic Door Co.* v. *Industrial Board,* 284 U. S. 594.

Whatever may be the propriety of a rule permitting special reëxamination in a trial court of so-called " juris-

---

Requirement of Due Process of Law in Rate Cases," 43 Harv. L. Rev. 1249; Green, The Ohio Valley Water Case, 4 Ill. L. Q. 55; Freund, " The Right to a Judicial Review in Rate Controversies," 27 W. Va. L. Q. 207; Hardman, " Judicial Review as a Requirement of Due Process in Rate Regulation," 30 Yale L. J. 681; Isaacs, " Judicial Review of Administrative Findings," 30 Yale L. J. 781. No commentator, however, appears to have understood the decision as recognizing in any manner a right to trial *de novo* in court upon confiscation issues.

[28] It is cause for regret that the Court in determining this controversy should have declared, *obiter,* that in matters of State public utility regulation involving administrative action of a special character, and raising questions under a different constitutional provision, a mode of procedure is required contrary to that almost universally established under State law (see David E. Lilienthal, " The Federal Courts and State Regulation of Public Utilities," 43 Harv. L. Rev. 379, 412, 413), and calculated seriously to embarrass the operation of the administrative method in that field.

dictional facts" passed upon by administrative bodies having otherwise final jurisdiction over matters properly committed to them, I find no warrant for extending the doctrine to other and different administrative tribunals whose very function is to hear evidence and make initial determinations concerning those matters which it is sought to reëxamine. Such a doctrine has never been applied to tribunals properly analogous to the deputy commissioners, such as the Interstate Commerce Commission, the Federal Trade Commission, the Secretary of Agriculture acting under the Packers and Stockyards Act, and the like.[29] Logically applied it would seriously impair the entire administrative process.[30]

Eighth. No good reason is suggested why all the evidence which Benson presented to the district court in this cause could not have been presented before the deputy commissioner; nor why he should have been permitted to try his case provisionally before the administrative tribunal and then to retry it in the district court upon additional evidence theretofore withheld. To permit him to do so violates the salutary principle that administrative remedies must first be exhausted before resorting to the court, imposes unnecessary and burdensome expense upon the other party and cripples the effective administration of the Act. Under the prevailing practice, by which the judicial review has been confined to questions of law, the proceedings before the deputy commissioners

[29] But see *Interstate Commerce Commission* v. *Louisville & Nashville R. Co.*, 227 U. S. 88, 92. The statement by Mr. Justice Lamar there, however, went no further than to indicate that in some circumstances the courts on review of orders of the Interstate Commerce Commission might pass an independent judgment upon the evidence adduced before the Commission. See also *Interstate Commerce Commission* v. *Northern Pacific Ry. Co.*, 216 U. S. 538, 544; *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 488–490.

[30] See Dickinson, "Administrative Justice and the Supremacy of Law," p. 310.

have proved for the most part non-controversial;[31] and relatively few cases have reached the courts.[32] To permit a contest *de novo* in the district court of an issue tried, or triable, before the deputy commissioner will, I fear, gravely hamper the effective administration of the Act. The prestige of the deputy commissioner will necessarily be lessened by the opportunity of relitigating facts in the courts. The number of controverted cases may be largely increased. Persistence in controversy will be encouraged. And since the advantage of prolonged litigation lies with the party able to bear heavy expenses, the purpose of the Act will be in part defeated.[33]

---

[31] Out of the 30,383 non-fatal cases disposed of during the fiscal year ending June 30, 1931, the deputy commissioners held hearings in only 729, according to information furnished by the United States Employees' Compensation Commission. Compensation payments were completed in 11,776 cases, or 38.8 per cent. of the total. In 17,328 cases, or 57 per cent., the injured employee failed to receive compensation because no time was lost, or less than seven days, on account of the injury. The balance of 1,279 cases, amounting to 4.2 per cent. of the whole, were dismissed because they did not come within the scope of the law. Among the 18,607 non-compensated cases, formal claims were filed by the employee in only 1,025 instances. See, also, Report of the Compensation Commission, 1930, pp. 68–70.

[32] For the fiscal year ending June 30, 1931, 101 new cases were filed in the district courts, out of a total of 30,489 cases disposed of. Report of the United States Employee's Compensation Commission, pp. 69, 71. For the three preceding years the number of cases filed in the courts was, respectively, 61, 58, and 15. Report, 1930, p. 62; *id.* 1929, p. 70; *id.* 1928, p. 34. The decision of the Circuit Court of Appeals in the case at bar declaring the right to a trial *de novo* was rendered November 17, 1930, and the first opinion of the District Court on May 27, 1929.

[33] How serious these consequences will be is a question of speculation; but it is plain that they will be aggravated by the inherent uncertainty in the scope of the doctrine announced. The determination of what facts are "jurisdictional" or "fundamental" is calculated to provoke a multitude of disputes. That there is a difference in kind, for example, between the defense that the injured claimant is not an employee, and that he was not acting as an employee when

In my opinion the judgment of the Circuit Court of Appeals should be reversed and the case remanded to the District Court, sitting as a court of equity, for consideration and decision upon the record made before the deputy commissioner.

MR. JUSTICE STONE and MR. JUSTICE ROBERTS join in this opinion.

HURLEY, SECRETARY OF WAR, *v.* KINCAID.

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

No. 457. Argued January 4, 5, 1932.—Decided February 23, 1932.

1. An owner of land lying within the proposed channel of the Boeuf Floodway, part of the plan authorized by the Mississippi River Flood Control Act, brought suit to enjoin the carrying out of the work in the floodway and specifically to enjoin the receiving of bids for the construction of the guide-levees therefor, claiming that if the work should be commenced without proceedings first having been instituted to condemn his land or the flowage rights thereon, the United States would in effect be taking his property without due process of law and without just compensation. Complainant conceded that the Act was valid and that it authorized those charged with its execution to take his lands or an easement therein. *Held*, that injunction was not the proper remedy, for if what was done, or was contemplated, constituted a taking of the property, then under the Tucker Act there was a plain, adequate and complete remedy at law. P. 104.
2. The Fifth Amendment does not entitle the owner of lands taken for public use to be paid in advance of the taking. *Id.*

---

he was injured, or that there is a difference between the latter defense and the defense that the disability, if any, from which he suffers resulted only in part, or not at all, from the employment in which he claims to have suffered it, are propositions which employers will be unlikely to accept until they have submitted them to the decision of the courts. The effectiveness of this legislation will be lessened by this opportunity for barren controversy over procedural rights and by delayed or thwarted determination of substantive ones.

3. Where large public interests are concerned and the issuance of an injunction may seriously embarrass the accomplishment of important governmental ends, a court of equity acts with caution and only upon clear showing that its intervention is necessary in order to prevent an irreparable injury. P. 104, n.

49 F. (2d) 768, reversed.

CERTIORARI, 284 U. S. 610, to review a judgment of the Circuit Court of Appeals which affirmed a decree of the District Court enjoining petitioners from carrying out a project authorized by the Mississippi River Flood Control Act. The case is stated fully in the opinion.

Solicitor General Thacher, with whom *Assistant Attorney General Richardson* and *Messrs. G. A. Iverson* and *Paul D. Miller* were on the brief, for petitioners.

The only flowage rights which § 4 of the Act requires the United States to "provide" are those which the Secretary and the Chief of Engineers have determined to be necessary.

The first paragraph of § 4 has no general application to the respondent's land. It applies only where the plan contemplates the deliberate diversion, by eliminating or diminishing existing flood protection, of destructive flood waters over lands not previously subjected to like destructive flood waters.

Neither the findings of the District Court nor the evidence establish that § 4 is applicable to the respondent's land.

Assuming that § 4 requires the acquisition of flowage rights over the respondent's land, the statute does not require that such rights must be condemned or purchased prior to the construction of the proposed levees in the Boeuf Basin.

If petitioners are acting pursuant to a lawful statute, they can not be enjoined even if their acts would result in a taking. But nothing which the petitioners have

done or propose to do constitutes a "taking." There must be "an actual invasion or appropriation of land as distinguished from consequential damage." *Sanguinetti* v. *United States,* 264 U. S. 146, 149.

The bill is not based upon actual or threatened impairment of the respondent's rights, but "upon assumed potential invasions." *Arizona* v. *California,* 283 U. S. 423, 462. Where there has been no actual appropriation or physical invasion, an injunction will not issue to interfere with the consummation of a public improvement.

If respondent is entitled to compensation, he is entitled to sue the United States upon an implied contract in the Court of Claims, or in the District Court under the Tucker Act. If the petitioners were not acting illegally, no cause of action against them as individuals existed, and the United States was an indispensable party to the suit.

Messrs. Wm. C. Dufour and *Harry H. Russell,* with whom *Messrs. T. J. Freeman, John St. Paul, Jr.,* and *G. L. Porterie* were on the brief, for respondent.

The constitutional guaranty that property shall not be taken for public use without just compensation by agents of the State to whom this power is delegated, is deemed to establish a right of so high and sacred a character that any threatened infringement of the right should be restrained without consideration of the adequacy of the legal remedy. Lewis, Eminent Domain, § 632; Pomeroy, Equitable Remedies, § 465; *McElroy* v. *Kansas City,* 21 Fed. 261; *Bass* v. *Metropolitan R. Co.,* 82 Fed. 857.

The respondent has no remedy against what in legal effect amounts to a taking of his property without just compensation, except by injunction. *Pine* v. *Mayor,* 103 Fed. 337, *St. Louis & S. F. R. Co.* v. *Tulsa,* 213 Fed. 87; *Ashland Elec. Power Co.* v. *Ashland,* 217 Fed. 158; *Toledo* v. *Toledo Rys. & Light Co.,* 259 Fed. 450; *Thornton* v.

Road Imp. Dist., 291 Fed. 518; *Wilmington Ry. Co.* v. *Taylor,* 198 Fed. 159.

Federal courts have the power to restrain unlawful, arbitrary, and unwarranted acts of federal officers.

There is no question of any claim resulting from the construction of levees as such. There is no denial of the right of the Government to construct standard levees or adequate levees at this or other points. The denial is of the right to construct what are known as guide levees—levees which will fix by design the Boeuf Diversion Channel, provided for in the adopted plan, and include respondent's land between the bounds of this designed channel. Waters from the main channel of the Mississippi will be designedly diverted through this diversion channel by what is termed a fuse-plug section, which automatically functions when the river reaches a certain stage. The purpose of this diversion channel is to protect other portions of the territory through which the Mississippi flows, and the territory outside of these guide levees. The suit is directed at the designed dedication of this and other property within these guide levees, to be flooded in the interest of the public at large.

The deprivation of its use, the elimination of its possibilities, the depreciation of its value resulting from being dedicated and enclosed in a basin to be designedly flooded, is the taking of his property. *Ambler Realty Co.* v. *Euclid,* 207 Fed. 312; *Richards* v. *Washington Terminal Co.,* 233 U. S. 546; *Peabody* v. *United States,* 231 U. S. 541; *Gibson* v. *United States,* 166 U. S. 269; *Bedford* v. *United States,* 192 U. S. 217; *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393; *United States* v. *Cress,* 243 U. S. 316; *Monongahela Nav. Co.* v. *United States,* 148 U. S. 324, 326; *United States* v. *Lynah,* 188 U. S. 445.

The Act says that the United States shall provide flowage rights, if they are necessary to carry out the plan; and as some one had to be authorized to select places for these flowage rights, the Secretary of War and Chief of

Engineers were designated; and in the present case they have selected the lands of respondent.

The fact that it may be years before this diversion channel is flooded and respondent's property absolutely destroyed has no bearing whatsoever upon respondent's right to protect himself in advance of a taking without compensation.

Immunity of the Government from suit does not extend to its officers when acting unlawfully. *Philadelphia Co.* v. *Stimpson,* 223 U. S. 605.

Mr. Justice Brandeis delivered the opinion of the Court.

On June 15, 1929, Kincaid brought this suit in the federal court for western Louisiana against the United States, the Secretary of War, the Chief of Engineers, the Mississippi River Commission and its members, to enjoin the carrying out of any work in the Boeuf Floodway under the Mississippi River Flood Control Act, May 15, 1928, c. 569, 45 Stat. 534, and specifically to enjoin the receiving of bids and awarding of contracts for the construction of certain guide-levees bounding the Floodway.

The Mississippi River Flood Control Act adopted the Jadwin Plan for protection against floods. The Act provides for raising the levees generally three feet; for improving the carrying capacity of the main channel of the river by revetment work; and for limiting the flood-waters in this channel to its safe capacity through the provision of specified diversion channels. Among these is the Boeuf Floodway, which will carry excess flood-waters from a point below the mouth of the Arkansas through the Boeuf Basin west of the Mississippi into the backwater area at the mouth of the Red River. Such diversion has taken place to some extent in the past, when flood-waters have passed over, or through crevasses in, the twenty mile section of the levee at the head of the Basin, known as the Cypress Creek levee. Before

this section was completed, in 1921, the Boeuf Basin and the parallel Tensas Basin, lying between it and the main channel, served as natural overflow areas of the Mississippi in flood periods. The Plan leaves the Cypress Creek section at its present height. But as the levees elsewhere are to be raised three feet and materially strengthened, preventing overflow at other points, the volume of water passing into the diversion channel may be greatly increased. Moreover, guide, or protection, levees running in a southerly direction are to be built on either side of the Floodway, which will direct the waters into a specified channel of a width varying from ten to twenty miles; and new levees are to be constructed which will cause this Floodway to carry waters formerly overflowing into the Tensas Basin. The maximum previous flow of water into the Boeuf Basin occurred in 1927, and is estimated at 450,000 cubic feet per second. Under the new Plan the flow may reach 1,250,000 feet per second in times of extraordinary flood. The War Department advertised for bids for the construction of guide-levees for the Boeuf Floodway, to be received June 17, 1929. To complete the project will probably require ten years.

Kincaid owns a 160-acre farm in the Boeuf Basin at a point 125 miles below the point of diversion. No part of the guide-levees is to be built on his land; but the land lies within the proposed channel of the Floodway. He alleges that the project will expose his property to additional destructive floods and thus subject it to a new servitude; that the mere "setting apart [of] this property as a flood way and diversion channel and . . . advertising for and receiving bids for . . . construction of the guide levees" casts a cloud upon his title;[1] and that the Government is proposing to com-

[1] The allegation is: "That the acts of the defendants in setting apart this property as a floodway and diversion channel and in advertising for and receiving bids for the doing of the proposed work, to wit, the construction of the guide levees and the contemplated acts

mence the work without having instituted condemnation proceedings. He charges that the acts of the defendants in advertising for bids for the construction of the guide-levees, to be followed by the letting of contracts, without having taken proceedings to condemn his land, "will mean the taking by the United States Government of complainant's lands and properties without due process of law and without just compensation."

All the defendants moved to dismiss the bill on the grounds, among others, that the United States had not consented to be sued, and that the bill disclosed no ground for equitable relief. The District Court held that the United States could not be made a party, since it had not consented to be sued; but overruled the motion to dismiss the suit, on the ground that the United States was not an indispensable party; that § 4 of the Act declares that "the United States shall provide flowage rights for additional destructive flood waters that will

---

of the defendants in the awarding of contracts therefore [*sic*], have already had the effect of casting a cloud upon the title of complainant to his said lands and properties and have materially affected his use and enjoyment of same and have materially affected and impaired the value thereof. That, [as] the result of setting apart this area as a floodway or diversion channel and the publication by defendants of said advertisements for bids for the construction of the guide levees, this property has not only deteriorated in value but complainant's title to same has been seriously clouded, his use of same has been seriously affected, and complainant would be unable to borrow money on said lands, sell or dispose of same, or interest persons in operating said lands for farms or for any other purposes, owing to the fact that the Government has indicated that it has taken possession or intends to take immediate possession of this property for a diversion channel or a floodway. That, as a result of making this area, in which complainant's lands and those of others are situated, a floodway or diversion channel, these lands will be rendered unfit for agricultural or any other purpose. That the title to complainant's lands is seriously clouded by said acts, and his ability to use said properties or obtain credit thereon is seriously affected, and, as stated above, this property is well worth the sum of $9,000.00."

pass by reason of diversion from the main channel of the Mississippi River";[2] that, on the allegations of the bill, the creation of the Boeuf Floodway would subject Kincaid's land to additional destructive flood-waters; that the Act required the Government to condemn, or otherwise to acquire flowage rights over, the property before proceeding with the flood-control project in the Boeuf Basin; and that, by starting work before acquiring such rights, the defendants were proceeding in violation of both the Act and the Constitution. 35 F. (2d) 235.

Thereupon an answer was filed and the case was heard on evidence on final hearing. The defendants showed

---

[2] The following are the provisions of the Act relevant to the payment of damages and of compensation for the taking of land.

"Sec. 3. . . . No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place: *Provided, however,* That if in carrying out the purposes of this Act it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the river are subjected to overflow and damage which are not now overflowed or damaged by reason of the construction of levees on the opposite banks of the river it shall be the duty of the Secretary of War and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands.

"Sec. 4. The United States shall provide flowage rights for additional destructive flood waters that will pass by reason of diversions from the main channel of the Mississippi River. . . .

"The Secretary of War may cause proceedings to be instituted for the acquirement by condemnation of any lands, easements, or rights of way which, in the opinion of the Secretary of War and the Chief of Engineers, are needed in carrying out this project, the said proceedings to be instituted in the United States district court for the district in which the land, easement, or right of way is located. . . . The provisions of sections 5 and 6 of the River and Harbor Act of July 18, 1918, are hereby made applicable to the acquisition of lands, easements, or rights of way needed for works of flood control. . . .

that, in the opinion of the Secretary of War and the Chief of Engineers, it was unnecessary to acquire any flowage rights over complainant's lands; insisted that these lands would be better protected under the Plan than heretofore; and claimed that § 4 of the Act was not applicable, because the Plan would not subject the property to "additional destructive flood waters." The District Court found on these issues against the Government; held that upon the evidence the Plan involved a taking of rights in respect to Kincaid's land; and that although the physical occupancy of it would not occur until the land had been overflowed in time of flood, "the process of subjecting it to that service and the taking possession in so far as is either necessary or contemplated by the act will begin with the construction of the first levee or works which are intended to direct the water upon the land." It enjoined the defendants, other than the United States, "from proceeding with the construction authorized by or carrying out the plan adopted by . . . the Mississippi River flood-control act in the Boeuf Basin flood way, . . . until the property of the said complainant has been acquired by the United States Government or the flowage rights over the same acquired either by purchase or condemnation for such purpose." 37 F. (2d) 602. The Circuit Court of Appeals affirmed the judgment of the District Court. 49 F. (2d) 768. This Court granted a writ of certiorari.

We have no occasion to determine any of the controverted issues of fact or any of the propositions of substantive law which have been argued. Kincaid concedes that the Act is valid and that it authorizes those entrusted with its execution to take his lands or an easement therein. We may assume that, as charged, the mere adoption by Congress of a plan of flood control which involves an intentional, additional, occasional flooding of complainant's land constitutes a taking of it—as soon as the Government

begins to carry out the project authorized. Compare *United States* v. *Lynah,* 188 U. S. 445, 469; *United States* v. *Cress,* 243 U. S. 316, 328; *Peabody* v. *United States,* 231 U. S. 530, 538; *Portsmouth Harbor Land & Hotel Co.* v. *United States,* 250 U. S. 1; 260 U. S. 327, 329. If that which has been done, or is contemplated, does constitute such a taking, the complainant can recover just compensation under the Tucker Act in an action at law as upon an implied contract, since the validity of the Act and the authority of the defendants are conceded. *United States* v. *Great Falls Mfg. Co.,* 112 U. S. 645, 658; *Great Falls Mfg. Co.* v. *Attorney General,* 124 U. S. 581, 600; *Tempel* v. *United States,* 248 U. S. 121, 129; *Marion & Rye Valley Ry. Co.* v. *United States,* 270 U. S. 280, 283. The compensation which he may obtain in such a proceeding will be the same as that which he might have been awarded had the defendants instituted the condemnation proceedings which it is contended the statute requires. Nor is it material to inquire now whether the statute does so require. For even if the defendants are acting illegally, under the Act, in threatening to proceed without first acquiring flowage rights over the complainant's lands, the illegality, on complainant's own contention, is confined to the failure to compensate him for the taking, and affords no basis for an injunction if such compensation may be procured in an action at law.[3] The Fifth Amendment does not entitle him to be paid in advance of the taking. *Crozier* v. *Krupp,* 224 U. S. 290, 306. Compare *Backus* v. *Fort Street Union Depot Co.,* 169 U. S. 557, 568; *Bragg*

[3] Even where the remedy at law is less clear and adequate, where large public interests are concerned and the issuance of an injunction may seriously embarrass the accomplishment of important governmental ends, a court of equity acts with caution and only upon clear showing that its intervention is necessary in order to prevent an irreparable injury. Compare *Osborne* v. *Missouri Pacific Ry. Co.,* 147 U. S. 248, 258, 259; *New York City* v. *Pine,* 185 U. S. 93, 97. No such showing was made here.

v. *Weaver,* 251 U. S. 57, 62; *Joslin Mfg. Co. v. City of Providence,* 262 U. S. 668, 677; *Dohany* v. *Rogers,* 281 U. S. 362, 366.[4]

As the complainant has a plain, adequate and complete remedy at law, the judgment is reversed with direction to dismiss the bill without prejudice.

Reversed.

PACKER CORPORATION *v.* UTAH.

APPEAL FROM THE SUPREME COURT OF UTAH.

No. 357. Argued January 20, 1932.—Decided February 23, 1932.

A statute of Utah forbids the advertising of cigarettes and other tobacco products on billboards, street car signs, and placards, but does not apply to advertising in newspapers and periodicals, this exemption having been introduced to avoid conflict with the commerce clause of the Federal Constitution as construed by the State's highest court. A billboard company was convicted for displaying a poster advertising a brand of cigarettes. Both poster and cigarettes were manufactured outside of the State and shipped into it by a foreign corporation; and the advertising was done under contract with an agency in another State. It was conceded that the regulation of the local sale and advertising of tobacco products was within the police power of the State. *Held:*

1. The amendment exempting advertising in newspapers and periodicals to avoid conflict with the commerce clause, did not produce a discrimination violative of the equal protection clause of the Fourteenth Amendment. P. 108.

2. It is a reasonable ground of classification that the State has power to legislate with respect to persons in certain situations and not with respect to those in a different one. P. 110.

3. The discrimination between billboard and newspaper advertising was not an arbitrary classification. The legislature may recognize degrees of evil and adapt its legislation accordingly. *Id.*

---

[4] See also *Cherokee Nation* v. *Southern Kansas Ry. Co.,* 135 U. S. 641, 659; *Sweet* v. *Rechel,* 159 U. S. 380, 400, 407; *Adirondack Ry. Co.* v. *New York,* 176 U. S. 335, 349; *Williams* v. *Parker,* 188 U. S. 491, 502, 503; *Manigault* v. *Springs,* 199 U. S. 473, 485, 486; *Hays* v. *Port of Seattle,* 251 U. S. 233, 238.

4. In making it illegal to carry out the contract under which the advertising was being done, the statute does not violate the due process clause of the Fourteenth Amendment, since the subject of the legislation was within the police power of the State. P. 111.

5. In preventing the display, for intrastate advertising, of posters shipped in from another State, the statute does not impose an unreasonable restraint upon interstate commerce. *Id.*

78 Utah 177; 2 P. (2d) 114, affirmed.

APPEAL from a judgment affirming a conviction for displaying a billboard poster advertising cigarettes.

Messrs. Gardner Abbott and *William H. Reeder, Jr.*, with whom *Messrs. Dan B. Shields* and *W. T. Kinder* were on the brief, for appellant.

Upon the question of discrimination they cited: *Louisville Gas Co.* v. *Coleman*, 277 U. S. 32, 37; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 558; *Power Mfg. Co.* v. *Saunders*, 274 U. S. 490, 493; *Smith* v. *Cahoon*, 283 U. S. 553, 566.

Also *Truax* v. *Corrigan*, 257 U. S. 312, 332; *Hayes* v. *Missouri*, 120 U. S. 68, 71; *Gulf, C. & S. F. Ry. Co.* v. *Ellis*, 165 U. S. 150, 155; *Cotting* v. *Kansas City Stock Yards Co.*, 183 U. S. 79, 111; *State* v. *Packer Corp.*, 297 Pac. 1013, 1022.

To make it illegal for the appellant to carry out its contract by a statute so unreasonable and arbitrary as this, is to deprive the appellant of property without due process of law. *Prudential Ins. Co.* v. *Cheek*, 259 U. S. 530, 536; *Wolff Co.* v. *Industrial Court*, 262 U. S. 522, 534; *Liberty Warehouse Co.* v. *Burley Tobacco Assn.*, 276 U. S. 71, 97; *Fairmont Creamery Co.* v. *Minnesota*, 274 U. S. 1.

The advertisements which were sent into the State from a foreign State for the purpose of being posted were articles in interstate commerce, and prohibiting their display was an undue restraint of interstate commerce. *Ramsey Co.* v. *Bill Posters Assn.*, 260 U. S. 501; *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 309; *Illinois Cent. R.*

Co. v. *Railroad Commission,* 236 U. S. 157, 163; *Western Union* v. *Foster,* 247 U. S. 105, 113; *Western Oil Rfg. Co.* v. *Lipscomb,* 244 U. S. 346, 349.

Messrs. George P. Parker, Attorney General of Utah, and *Byron D. Anderson,* Assistant Attorney General, for appellee.

Mr. Justice Brandeis delivered the opinion of the Court.

Section 2, of c. 145, Laws of Utah, 1921, as amended by c. 52, § 2, Laws of 1923, and c. 92, Laws of 1929, provides:

"It shall be a misdemeanor for any person, company, or corporation, to display on any bill board, street car sign, street car, placard, or on any other object or place of display, any advertisement of cigarettes, cigarette papers, cigars, chewing tobacco, or smoking tobacco, or any disguise or substitute of either, except that a dealer in cigarettes, cigarette papers, tobacco or cigars or their substitutes, may have a sign on the front of his place of business stating that he is a dealer in such articles, provided that nothing herein shall be construed to prohibit the advertising of cigarettes, cigarette papers, chewing tobacco, smoking tobacco, or any disguise or substitute of either in any newspaper, magazine, or periodical printed or circulating in the State of Utah."

The Packer Corporation, a Delaware corporation engaged in billboard advertising and authorized to do business in Utah, was prosecuted under this statute for displaying a large poster advertising Chesterfield cigarettes on a billboard owned by it and located in Salt Lake City. The poster was displayed pursuant to a general contract for advertising Chesterfield cigarettes, made by the defendant with an advertising agency in the State of Ohio. Both the poster and the cigarettes advertised were manufactured without the State of Utah and were shipped into

it by Liggett & Myers Tobacco Company, a foreign corporation. The defendant claimed that the statute violates several provisions of the Federal Constitution; the objections were overruled; and the defendant was convicted and sentenced. On the authority of its recent decision in *State* v. *Packer Corp.,* 297 Pac. 1013, the highest court of the State affirmed the judgment of the trial court. 2 P. (2d) 114. The case is here on appeal under § 237 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 937.

It is not denied that the State may, under the police power, regulate the business of selling tobacco products, compare *Gundling* v. *Chicago,* 177 U. S. 183, 188; *Austin* v. *Tennessee,* 179 U. S. 343, 348; and the advertising connected therewith, compare *Rast* v. *Van Deman & Lewis Co.,* 240 U. S. 342, 364, 365; *Tanner* v. *Little,* 240 U. S. 369, 384, 385. The claim is that because of its peculiar provisions the statute violates the Federal Constitution.

First. The contention mainly urged is that the statute violates the equal protection clause of the Fourteenth Amendment; that in discriminating between the display by appellant of tobacco advertisements upon billboards and the display by others of such advertisements in newspapers, magazines or periodicals, it makes an arbitrary classification. The history of the legislation shows that the charge is unfounded. In Utah no one may sell cigarettes or cigarette papers without a license.[1] Since 1890, it has been the persistent policy, first of the Territory and then of the State, to prevent the use of tobacco by minors, and to discourage its use by adults. Giving tobacco to a minor, as well as selling it, is a misdemeanor.[2]

[1] Laws of Utah, 1921, c. 145, § 1, as amended, Laws of 1923, c. 52, § 1; Laws of 1925, c. 68; Laws of 1930, c. 5, § 1.

[2] Laws of Utah, 1890, c. 65, § 1, as amended, Laws of 1911, c. 51; Laws of 1930, c. 5, § 1 (k).

So is permitting a minor to frequent any place of business while in the act of using tobacco in any form.[3] Mere possession of tobacco by the minor is made a crime.[4] And smoking by anyone in any enclosed public place (except a public smoking room designated as such by a conspicuous sign at or near the entrance) is a misdemeanor.[5] In 1921, the legislature enacted a general prohibition of the sale or giving away of cigarettes or cigarette papers to any person, and of their advertisement in any form. Laws of Utah, 1921, c. 145, §§ 1, 2. After two years, however, the plan of absolute prohibition of sale was abandoned in favor of a license system. Laws of Utah, 1923, c. 52, § 1. But the provision against advertisements was retained, broadened to include tobacco in most other forms. In 1926, this statute was held void under the commerce clause, as applied to an advertisement of cigarettes manufactured in another State, inserted in a Utah newspaper which circulated in other States. *State* v. *Salt Lake Tribune Publishing Co.,* 68 Utah 187; 249 Pac. 474. Thereupon the legislature, unwilling to abandon altogether its declared policy, amended the law by striking out the provision which prohibited advertising in newspapers and periodicals. The classification alleged to be arbitrary was made in order to comply with the requirement of the Federal Constitution as interpreted and applied by the highest court of the State. Action by a State taken to observe one prohibition of the Constitution does not entail the violation of another. *J. E. Raley & Bros.* v. *Richardson,* 264 U. S. 157, 160; *Des Moines Nat. Bank* v. *Fairweather,* 263 U. S. 103, 116, 117. Compare *Dolley*

[3] Laws of Utah, 1921, c. 145, § 3. See Laws of 1923, c. 52, § 1.

[4] Laws of Utah, 1903, c. 135, as amended, Laws of 1911, c. 51; Laws of 1913, c. 59.

[5] Laws of Utah, 1921, c. 145, § 4, as amended, Laws of 1923, c. 52, § 4.

v. *Abilene Nat. Bank*, 179 Fed. 461, 463, 464. It is a reasonable ground of classification that the State has power to legislate with respect to persons in certain situations and not with respect to those in a different one.[6] Compare *Williams* v. *Walsh*, 222 U. S. 415, 420.

Moreover, as the state court has shown, there is a difference which justifies the classification between display advertising and that in periodicals or newspapers: "Billboards, street car signs, and placards and such are in a class by themselves. They are wholly intrastate, and the restrictions apply without discrimination to all in the same class. Advertisements of this sort are constantly before the eyes of observers on the streets and in street cars to be seen without the exercise of choice or volition on their part. Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer. The young people as well as the adults have the message of the billboard thrust upon them by all the arts and devices that skill can produce. In the case of newspapers and magazines, there must be some seeking by the one who is to see and read the advertisement. The radio can be turned off, but not so the billboard or street car placard. These distinctions clearly place this kind of advertisement in a position to be classified so that regulations or prohibitions may be imposed upon all within the class. This is impossible with respect to newspapers and magazines." 297 Pac. 1013, 1019. The legislature may recognize degrees of evil and adapt its legislation accordingly.

[6]A contention was made in argument that the State had not in fact acted upon this basis of classification since the statute makes no distinction as to newspapers and magazines circulating solely in intrastate commerce. But the record does not indicate the existence of any such publications. Moreover, the administrative difficulties of any effort to make the applicability of the statute depend upon the character of the circulation of a particular newspaper or magazine would be such as to justify the exclusion of the entire class.

Miller v. *Wilson,* 236 U. S. 373, 384; *Truax* v. *Raich,* 239 U. S. 33, 43.

Second. The defendant contends that to make it illegal to carry out the contract under which the advertisement was displayed takes its property without due process of law because it arbitrarily curtails liberty of contract. The contention is without merit. The law deals confessedly with a subject within the scope of the police power. No facts are brought to our attention which establish either that the evil aimed at does not exist or that the statutory remedy is inappropriate. *O'Gorman & Young* v. *Hartford Fire Insurance Co.,* 282 U. S. 251, 257; *Hardware Dealers Mutual Fire Insurance Co.* v. *Glidden Co.,* 284 U. S. 151.

Third. The defendant contends also that the statute imposes an unreasonable restraint upon interstate commerce because it prevents the display on billboards of posters shipped from another State. It does not appear from the record that the defendant is the owner of the posters. Its interest is merely in its billboards located in the State, upon which it displays advertisements for which it is paid. So far as the posters are concerned, assuming them to be articles of commerce, compare *Charles A. Ramsay Co.* v. *Associated Bill Posters,* 260 U. S. 501, 511, the statute is aimed, not at their importation, but at their use when affixed to billboards permanently located in the State. Compare *Browning* v. *Waycross,* 233 U. S. 16, 22, 23; *General Railway Signal Co.* v. *Virginia,* 246 U. S. 500, 510. The prohibition is non-discriminatory, applying regardless of the origin of the poster. Its operation is wholly intrastate, beginning after the interstate movement of the poster has ceased. Compare *Hygrade Provision Co.* v. *Sherman,* 266 U. S. 497, 503; *Hebe Co.* v. *Shaw,* 248 U. S. 297, 304. See also *Corn Products Refining Co.* v. *Eddy,* 249 U. S. 427, 433. To sustain the

defendant's contention would be to hold that the posters, because of their origin, were entitled to permanent immunity from the exercise of state regulatory power. The Federal Constitution does not so require. Compare *Mutual Film Corp.* v. *Industrial Commission,* 236 U. S. 230, 240, 241. So far as the articles advertised are concerned, the solicitation of the advertisements, it may be assumed, is directed toward intrastate sales. Compare *Di Santo* v. *Pennsylvania,* 273 U. S. 34. Whatever may be the limitations upon the power of the State to regulate solicitation and advertisement incident to an exclusively interstate business, the commerce clause interposes no barrier to its effective control of advertising essentially local. Compare *Jell-O Co.* v. *Landes,* 20 F. (2d) 120, 121; *International Text-Book Co.* v. *District of Columbia,* 35 App. D. C. 307, 311, 312.

Affirmed.

ST. PAUL FIRE & MARINE INSURANCE CO. *v.* BACHMANN.

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

No. 311. Argued January 12, 1932.—Decided February 23, 1932.

A fire insurance policy contained a warranty exempting the insurer from liability for loss occurring while the hazard was increased by any means "within the control or knowledge of the insured," and another warranty exempting the insurer if loss occurred while there were kept on the premises certain prohibited articles, including gasoline. A rider altered this prohibition to the extent of permitting gasoline to be kept and used for the purpose of bottling automobile oils "or for other mercantile purposes not more hazardous." Fire occurred during occupancy by a tenant engaged in the illegal manufacture of intoxicating liquor who kept on the premises a large quantity of gasoline for use in that connection. *Held:*

1. A determination of the hazard involved was essential to maintaining the defense under either warranty. P. 116.

2. The increase-of-hazard warranty is not violated unless there is increase of hazard within the knowledge and control of the insured; the prohibited articles warranty may be violated irrespective of the knowledge and control of the insured. P. 116.

3. Whether the business of operating moonshine stills was or was not more hazardous than that of bottling automobile oils was a question of fact for the jury. P. 117.

4. If the illicit business was more hazardous, the prohibited articles warranty was violated. *Id.*

5. An allegation in a specification of defense under the prohibited articles warranty, charging the insured with knowledge and control, is to be regarded as surplusage. *Id.*

6. The burden of proof was upon the insurer to show that the occupancy was not one to which the gasoline permit extended. *Id.*

7. The court could not take judicial notice that the operation of the stills was more hazardous than bottling automobile oils or say that it was not a mercantile purpose. P. 118.

8. The defendant's failure to ask proper instructions does not cure the error in instructions which were given, and to which exceptions were taken. *Id.*

49 F. (2d) 158, reversed.

CERTIORARI, 284 U. S. 605, to review a judgment affirming a judgment against the insurance company in an action upon a policy of fire insurance.

Mr. James M. Guiher, with whom *Messrs. Russell L. Furbee, Philip P. Steptoe,* and *Louis A. Johnson* were on the brief, for petitioner.

Messrs. Charles J. Schuck and *Carl G. Bachmann,* with whom *Mr. J. Bernard Handlan* was on the brief, for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

This action to recover on a policy of fire insurance was brought in the federal court for northern West Virginia by Sophia C. Bachmann, a citizen of that State, against

the St. Paul Fire & Marine Insurance Company, a Minnesota corporation. The parties stipulated that the plaintiff was entitled to recover "unless the policy had been forfeited and nullified by the alleged violations as set forth in defendant's Specifications of Defense Nos. 1 and 2 filed in this case." The first specification recited the Increase of Hazard Warranty: "Unless otherwise provided by agreement in writing added hereto, this company shall not be liable for loss or damage occurring (b) while the hazard is increased by any means within the control or knowledge of the insured"; and alleged that by means "within the knowledge and control of the plaintiff and her agent or agents" the fire hazard had been increased. The second specification of defense recited the Prohibited Articles Warranty: "Unless otherwise provided by agreement in writing added hereto, this Company shall not be liable for loss or damage occurring (d) while . . . there is kept, used or allowed on the described premises . . . gasoline . . ."; and alleged that "at the time of the fire complained of, and prior thereto, large quantities of gasoline were being kept . . . upon and about the insured premises, all of which was well known to the plaintiff and her agent or agents, and was in violation of the foregoing condition and warranty."

To each defense the plaintiff replied that the warranty recited had been modified by a rider added to the policy; and also that prior to the fire she had no knowledge or control, as alleged, of the circumstances relied upon as showing breach of the warranty. The rider set forth in the reply altered the occupancy clause of the policy, which had originally described the insured building as "occupied as Produce Store," so that it read, "occupied for bottling automobile oils, offices, and other mercantile purposes not more hazardous." Another clause of the policy permitted the insured "for present and other occupancies not more hazardous" "to do such work and

to keep and use such materials as are usual in such occupancies;" and a rule of the West Virginia Fire Underwriters' Association (concededly a part of the insurance contract) provides that " the word ' materials ' as used above, includes gasoline and such other materials as are prohibited by the printed conditions of the policy, when kept and used for such purposes as are usual to the occupancies permitted." Gasoline is used in the business of bottling automobile oils.

The case was tried before a jury. The defendant introduced evidence tending to show that the premises were occupied at the time of the fire by a tenant engaged in the illegal manufacture of intoxicating liquors; and that a large quantity of gasoline was kept on the premises for use in that connection. But it failed in its effort to prove that the plaintiff had knowledge of these facts. The verdict was for the plaintiff; and the judgment entered thereon was affirmed by the Circuit Court of Appeals, 49 F. (2d) 158. The writ of certiorari was granted because of alleged conflict with decisions of this Court and of the Eighth Circuit Court of Appeals.

The only error assigned here by the Insurance Company relates to the construction of the Prohibited Articles Warranty, and to the Circuit Court of Appeals' approval of the trial court's instructions with reference thereto. It is contended that under that warranty, even as modified by the rider, the presence of gasoline in connection with the use of the premises for the illegal manufacture of intoxicating liquors was an absolute bar to liability, regardless of the plaintiff's knowledge or control of the conditions; and that the trial court, in instructing the jury that the defendant must establish the fact of such knowledge and control, confused the requirements of the Prohibited Articles Warranty with those of the Increase of Hazard Warranty, and in effect read the condition against the use of gasoline out of the policy.

In passing upon this contention, the Circuit Court of Appeals said [p. 160]:

"At the time of the inspection by the agent of the insurance company, and the attachment of the rider to the policy, the building was being used for the handling and bottling of automobile oil, and it was shown that gasoline was stored in the building, and that the agent of the insurance company saw that gasoline was being used and stored in the building. It was contended at the trial below that this rider constituted a permit for the handling of gasoline within the building, and that its effect was to remove gasoline from the prohibited articles warranty, and that the quantity of gasoline, if greater than used at the time of the issuance of the permit, brought this question into the increased hazard class. The trial court took this view of the case, and we think properly so. The agent of the insurance company knew that the rider permitted the use of gasoline, at least to some extent, and in order to show that the hazard was increased by a greater use of gasoline, as a defense to the recovery by the insured, the insurance company must under the terms of the policy, as above discussed, bring such fact 'within the knowledge and control' of the insured or her agent."

In so holding the court was in error. Because of the terms of the rider, a determination of the hazard involved was essential to maintaining the defense under the Prohibited Articles Warranty as well as that under the Increase of Hazard Warranty. But the two warranties are distinct. The latter is not violated unless there is increase of hazard within the knowledge and control of the insured. The former may be violated if a tenant keeps the prohibited article on the premises, even if this was done without the knowledge and control of the insured. *Liverpool & London Ins. Co.* v. *Gunther,* 116 U. S. 113, 128, 129; *Gunther* v. *Liverpool & London & Globe Ins. Co.,* 134 U. S. 110, 116. Compare *Imperial Fire*

Ins. Co. v. *Coos County,* 151 U. S. 452, 463, 464. The rider attached to the policy altered the prohibition against gasoline only to the extent of permitting it to be kept and used for the purpose of bottling automobile oils, or for "other mercantile purposes not more hazardous." The court could not say as a matter of law whether the business of operating moonshine stills was or was not more hazardous than that of bottling automobile oils. Compare *Royal Exch. Assur. of London* v. *Thrower,* 246 Fed. 768, 772; *Phoenix Assur. Co.* v. *Franklin Brass Co.,* 58 Fed. 166, 171; *Schaffer* v. *Hampton Ins. Co.,* 235 N. W. 618. If it was more hazardous, the presence of the gasoline constituted a violation of the warranty. The question should have been submitted to the jury.

It is urged on behalf of the respondent that the Insurance Company is not in a position to complain of this error. Stress is laid on the circumstance that in its specifications of defense the Company alleged knowledge and control by the insured of the presence of the gasoline and the operation of the stills; and it is argued that the parties are bound by the issue as thus joined. But the pleading set forth the Prohibited Articles Warranty and asserted a defense under it. Any additional matter, which might by implication be read as an attempted construction of the warranty, is to be regarded as surplusage. Compare *Lawrence* v. *Hyde,* 77 W. Va. 639, 643; 88 S. E. 45; *Lohr* v. *Wolfe,* 71 W. Va. 627, 628; 77 S. E. 71; *Jones* v. *Sanitary District,* 265 Ill. 98, 100, 101; 106 N. E. 473; *Hall* v. *Spaulding,* 42 N. H. 259, 262. When the defendant later sought instructions that proof of knowledge and control by the insured was not essential to establishment of the defense, the plaintiff made no effort to show that it had been prejudiced.

A more serious difficulty is that the defendant did not itself seek proper instructions. The burden was upon

it to prove that the occupancy was not one to which the gasoline permit extended. Compare *Logan* v. *Provident Savings Life Assurance Society,* 57 W. Va. 384, 390; 50 S. E. 529. Yet it presented no request that the jury be instructed as to the meaning of the rider. Nor did it request an instruction that the jury find whether the occupancy at or before the time of the fire was more hazardous than that of bottling automobile oils. Its request was merely that the jury be charged that the plaintiff could not recover if at and prior to the time of the fire substantial quantities of gasoline were being kept on the premises "either for the purpose of operating moonshine stills or for any other purpose not permitted by the policy." Thus, it requested the court to hold as a matter of law that operating moonshine stills was outside the scope of the permitted occupancies. The court could not take judicial notice that the operation of the stills was more hazardous than bottling automobile oils or say that it was not a mercantile purpose.

But the defendant's failure to ask proper instructions does not cure the error in the instructions which were given, and excepted to. Compare *Texas & Pacific Ry. Co.* v. *Volk,* 151 U. S. 73, 78. At the plaintiff's request the trial judge charged that "unless the plaintiff . . . had control or knowledge of the keeping and using of such gasoline or the operation of such stills, such keeping, using and operation . . . constitute no defense"; that "the defendant by the issuance of the rider . . . is estopped to avoid the policy because of the fact that quantities of gasoline were kept and used upon the premises since the said rider permitted the bottling of automobile oils which according to the uncontradicted evidence contained gasoline." These instructions, while correct insofar as they bore upon the defense under the Increase of Hazard Warranty, were erroneous in respect to that under the Prohibited Articles War-

ranty. The fact that the defendant had incorporated errors of law in the instructions which it sought upon the second defense did not justify putting the case to the jury solely upon the first. Compare *Westchester Fire Ins. Co.* v. *Fitzpatrick,* 2 F. (2d) 651, 654; *Sutherland* v. *Payne,* 274 Fed. 360, 361; *Rothe* v. *Pennsylvania Co.,* 195 Fed. 21, 25; *Audubon Bldg. Co.* v. *F. M. Andrews & Co.,* 187 Fed. 254, 260. We are constrained to reverse the judgment of the Circuit Court of Appeals, with directions that the case be remanded to the District Court for further proceedings in accordance with this opinion.

Reversed.

MR. JUSTICE MCREYNOLDS thinks the judgment should be affirmed.

WESTERN DISTRIBUTING CO. *v.* PUBLIC SERVICE COMMISSION OF KANSAS ET AL.

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

No. 337. Argued January 14, 1932.—Decided February 29, 1932.

1. Where a corporation selling natural gas locally procures its supply by agreement in interstate commerce from a pipe-line company with which it is so affiliated that the two are not at arm's length in their dealings, the reasonableness of the interstate price is subject to be inquired into by state authority when applied to by the local company for permission to increase its local rate. *Smith* v. *Illinois Bell Telephone Co.,* 282 U. S. 133. P. 123.
2. A local distributor of natural gas, in a common corporate control with an interstate pipe-line company from which it bought its supply in interstate commerce, sought to enjoin the enforcement of a local rate in a particular city which the state commission had declined to increase without proof that the interstate price was reasonable. *Held:*

   (1) Adjudications upholding the same wholesale rate in relation to other cities of the State, in suits to which the city now in question was not a party, do not make a *prima facie* case here. P. 125.

(2) Undenied allegations to the effect that the distributor, though it has tried, can not obtain its supply otherwise or at a lower price than from the pipe-line company; and that the same price is charged by that and other lines to other distributors, do not establish the reasonableness of the price in this case, in view of the affiliation of the two companies. P. 125.

(3) In view of the relations of the two corporations, and the power implicit therein arbitrarily to fix and maintain costs, as respects the distributing company, which do not represent the true value of the service rendered, the state authority is entitled to a fair showing of the reasonableness of such costs, although this may involve a presentation of evidence which would not be required in the case of parties dealing at arm's length and in the general and open market. P. 126.

Affirmed.

APPEAL from a decree of the District Court of three judges, dismissing a bill to enjoin a state commission and a city from enforcing local rates for gas, alleged to have become confiscatory.

Mr. Robert D. Garver, with whom *Mr. Robert Stone* was on the brief, for appellant.

The State of Kansas, through its regulatory body, the Public Service Commission, is without authority, directly or indirectly, to fix the price which shall be charged by a pipe-line company for gas sold in interstate commerce, notwithstanding that such pipe-line company may be affiliated with the distributing company to which it sells gas by reason of the capital stock of the pipe-line company and distributing company being owned by a common holding company. It is our contention that the law, as announced by this Court, in the cases of *Public Utilities Commission* v. *Landon,* 249 U. S. 236, and *Missouri* v. *Kansas Natural Gas Co.,* 265 U. S. 298, was not changed by the decision in *Smith* v. *Illinois Bell Tel. Co.,* 282 U. S. 133, and that the law of this case is the same as it was at the time this Court held, in *Missouri* v. *Kansas Natural Gas Co., supra,* with respect to this same pipe-line company and this same Commission, that the

rates of the pipe-line company were not subject to state regulation. Since that decision many of the distribution companies which were then unassociated with the pipe-line company have been acquired by the holding company which owns the capital stock of the pipe line company, or its subsidiaries; and this affiliation, and the decision of this Court in the *Smith* case, have been considered by the Kansas Commission and the court below as changing the law previously announced by this Court, and as having authorized and empowered the Commission to determine the reasonableness of the charges of the pipe-line company engaged in interstate commerce, and to limit the distributing company in its allowable operating expense for purchased gas to the rate which the Commission so finds to be reasonable. Congress alone has the power to regulate interstate commerce; and this is true whether the company engaged in interstate commerce sells its gas to a company with which it is affiliated or not. The Cities Service Gas Company, engaged in interstate commerce, sells its gas to some distributing companies with which it is affiliated and to others with which it is not. The rule must of necessity be the same in each instance. The requirements of the Constitution, admittedly existing before affiliation, are not changed by reason thereof, and the state commission, which admits its lack of authority to proceed against the pipe-line company engaged in interstate commerce, can not indirectly accomplish the same purpose by undertaking to determine what price it should charge and by limiting affiliated distribution companies to the payment of that price.

Mr. Earl H. Hatcher, with whom *Mr. Charles W. Steiger* was on the brief, for appellees.

Mr. Justice Roberts delivered the opinion of the Court.

The appellant, a West Virginia corporation, owns and operates a distribution system for natural gas in Eldo-

rado, Kansas. August 17, 1920, rates for supplying local consumers were fixed by order of the Court of Industrial Relations of the State of Kansas, the body then vested with authority in the premises. July 30, 1929, the company filed application with the Public Service Commission, one of the appellees, for an increase, averring that the existing rates were insufficient to produce a fair return, and asking an investigation and the establishment of such as would be just and equitable.

When the order of 1920 was made the appellant was purchasing gas, delivered at the city gate, from Cities Service Gas Company, and it still obtains its supply from the same company. The current price is forty cents per thousand cubic feet, which is paid under a day-to-day verbal contract. This rate was originally established by the Public Utilities Commission of Kansas in March, 1923, but its order in that behalf was subsequently rescinded for the reason that Cities Service Gas Company is an interstate carrier and not subject to regulation by the state. The forty cent rate, therefore, is not fixed pursuant to the order or leave of any public authority.

Cities Service Gas Company is the owner and operator of interstate pipe lines and sells natural gas therefrom to various distributing companies. The present corporate relation between appellant and Cities Service Gas Company is as follows: The common stock of appellant is owned by Gas Service Company, the capital stock of which is in turn owned by Cities Service Company. The common stock of Cities Service Gas Company is owned by Empire Gas & Fuel Company, a controlling interest in the capital stock of which is owned by Cities Service Company. In 1923, when the forty cent rate was put into effect, the distributing companies, including the appellant, were not affiliated with the pipe-line company, but in the following years Gas Service Company has acquired control of the appellant and other local distributing com-

panies which are dependent on the pipe line for their supply of natural gas.

Appellant submitted to the Commission a valuation of the property on which a fair return should be earned. The showing was that there were no net earnings on this value, but an annual loss of approximately $40,000. The total expenses of operation and maintenance of the property for the year ending November 30, 1930, according to the evidence, were $283,049.07, of which far the largest item, $176,260.32, was for gas purchased. In view of these facts, the Commission insisted that in order to determine the reasonableness of the requested increase in retail charges, inquiry must be made as to the propriety of the forty cent rate. The company declined to make any showing with respect thereto, claiming that the Commission was bound to allow it as a proper element of cost in fixing the new retail scale. The Commission dismissed the proceeding. The appellant then filed a bill in the District Court to restrain the further enforcement of the order of August 17, 1920, or the existing rates thereby established, and to enjoin the Commission from interfering with the charging of reasonable rates until such time as some lawful authority, acting in conformity with law, should approve a new schedule, and to prevent the Commission, its members and representatives, from instituting or prosecuting in any court or tribunal proceedings to litigate any of the matters involved in the hearings before the Commission. After answer by the appellees the matter was heard before a court of three judges, constituted as required by § 266 of the Judicial Code, on the pleadings and proofs submitted, and the bill was dismissed on the ground that the appellant had not exhausted its remedy before the Commission. Thereupon this appeal was taken.

First. The appellant asserts that the rate charge by the pipe-line company for gas delivered at the city gate is an interstate rate and not the subject of regulation by any

state authority. The soundness of this contention is conceded by the appellees. But the appellant argues that any inquiry by the state commission into the reasonableness of this charge amounts to an indirect attempt at regulation, an effort on the part of the state to circumvent the paramount federal authority over interstate commerce, and hence an attempt to do by indirection what is forbidden by the Federal Constitution. The appellees disclaim any intent to control rates charged for interstate service, but say that as the Commission's function is to set reasonable rates for the intrastate service rendered by appellant in the city of Eldorado, this necessarily requires a determination of the question whether the price paid for the gas distributed is fair and reasonable. To this end the Commission insists upon its authority to make such investigation as will satisfy it upon this point.

Having in mind the affiliation of buyer and seller and the unity of control thus engendered, we think the position of the appellees is sound, and that the court below was right in holding that if appellant desired an increase of rates it was bound to offer satisfactory evidence with respect to all the costs which entered into the ascertainment of a reasonable rate. Those in control of the situation have combined the interstate carriage of the commodity with its local distribution in what is in practical effect one organization. There is an absence of arm's length bargaining between the two corporate entities involved, and of all the elements which ordinarily go to fix market value. The opportunity exists for one member of the combination to charge the other an unreasonable rate for the gas furnished and thus to make such unfair charge in part the basis of the retail rate. The state authority whose powers are invoked to fix a reasonable rate is certainly entitled to be informed whether advantage has been taken of the situation to put an unreasonable burden

upon the distributing company, and the mere fact that the charge is made for an interstate service does not constrain the Commission to desist from all inquiry as to its fairness. Any other rule would make possible the gravest injustice, and would tie the hands of the state authority in such fashion that it could not effectively regulate the intrastate service which unquestionably lies within its jurisdiction.

The principles applicable in a rate investigation, where similar corporate relationship existed, were recently announced in *Smith* v. *Illinois Bell Telephone Co.*, 282 U. S. 133, 152–153, and no purpose would be served by repetition or elaboration of what was there said.

Second. It was shown that in proceedings in the state courts of Kansas and in the United States District Court for Kansas, the forty cent wholesale rate had quite recently been held reasonable with respect to sales at the gates of other cities. The decisions in those cases were put in evidence before the Commission, and the contention is that these constituted at least a *prima facie* case for the propriety of the same rate at the city gate of Eldorado. The city, though a party to this proceeding, was not such in the cases mentioned. Obviously it is not bound by the findings made with respect to other cities and towns. Nor is the Commission so bound, for it is admitted that the reasonableness of the rate as respects Eldorado was not in issue in the earlier cases. How much weight the Commission should give to these adjudications we need not here determine. What we do hold is that they do not make a *prima facie* case in support of the charge under attack.

Third. The appellant adverts to the fact that in its bill of complaint are included a number of averments not denied by the appellees. In brief these are that the company does not own or produce any natural gas; that the only source of supply for the city of Eldorado is the main

of the Cities Service Gas Company; that no supply at a lower price can be obtained from any other source; that the same rate is being charged to other distributing companies along the lines of the Cities Service Gas Company, and was being charged by another independent pipe line to another city; that an ineffectual effort had been made to find local gas available to Eldorado; and that appellant had attempted to get a lower rate from Cities Service Gas Company but could not do so. It is urged that as these averments were uncontradicted they constitute, when taken with the facts previously stated, a *prima facie* case for the reasonableness of the rate charged. This might well be true were it not for the fact of unity of ownership and control of the pipe line and the distribution system. An averment of negotiation and effort to procure a reduction in the wholesale rate means little in the light of the fact that the negotiators are both acting in the same interest,—that of the holding company which controls both. All of these facts so averred in the pleadings would be far more persuasive with respect to the propriety of the rate if the parties were independent of each other and dealing at arm's length. Where, however, they constitute but a single interest and involve the embarkation of the total capital in what is in effect one enterprise, the elements of double profit and of the reasonableness of inter-company charges must necessarily be the subject of inquiry and scrutiny before the question as to the lawfulness of the retail rate based thereon can be satisfactorily answered.

Fourth. The argument is made that the proofs demanded by the Commission will involve an extensive and unnecessary valuation of the pipe-line company's property and an analysis of its business, and that this burden should not be thrown upon appellant. Whether this is so we need not now decide. It is enough to say that in view of the relations of the parties, and the power implicit

therein arbitrarily to fix and maintain costs as respects the distributing company which do not represent the true value of the service rendered, the state authority is entitled to a fair showing of the reasonableness of such costs, although this may involve a presentation of evidence which would not be required in the case of parties dealing at arm's length and in the general and open market, subject to the usual safeguards of bargaining and competition.

The judgment of the court below was right and it is

Affirmed.

GALVESTON WHARF CO. ET AL. *v.* GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY CO. ET AL.

CERTIORARI TO THE SUPREME COURT OF TEXAS.

No. 411. Argued January 22, 25, 1932.—Decided March 14, 1932.

1. Evidence *held* sufficient to support a finding by a state court that goods constituting a through water-and-rail shipment had been delivered by the water carrier, a steamship company, to a wharf company, by being unloaded on the wharf company's pier and left there under the full control of the wharf company, to be handled and forwarded by it at its own convenience. P. 132.
2. A through bill of lading issued by the initial carrier upon an interstate shipment, governs the entire transportation and fixes the obligations of all participating carriers in so far as its terms are applicable and valid. P. 134.
3. A clause in a bill of lading issued by the initial carrier for a through shipment, providing that the carrier in possession of the goods should be liable as at common law for any loss or damages,—*held* applicable to a wharf company, an intermediate common carrier furnishing a necessary link in the transportation, although not named in the bill. P. 135.
4. The wharf company could not escape liability in such case upon the grounds (a) that, by arrangement with the connecting carrier to which it was to deliver the goods it was but the agent of the latter (*Missouri Pac. R. Co.* v. *Reynolds Co.*, 268 U. S. 366, distinguished,)

or (b) that, under its own filed tariff, it could be held only for negligence. Pp. 135–136.

Affirmed.

CERTIORARI, 284 U. S. 608, to review a judgment reversing that of the Court of Civil Appeals of Texas, and affirming that of a District Court of the State holding the petitioner Wharf Company liable for goods that were burned *in transitu* while on its pier.

Mr. George S. Wright, with whom *Messrs. Alex F. Weisberg* and *Rhodes S. Baker* were on the brief, for petitioners.

At the time of the damage the shipment was in the possession of the steamship company and not in the possession of the wharf company.

The holding of the Supreme Court of Texas to the effect that at the time of the fire the wharf company held the shipment as a connecting carrier is in direct conflict with the holding in *Missouri Pacific Ry. Co.* v. *Reynolds-Davis Grocery Co.,* 268 U. S. 366. *Texas & Pac. Ry. Co.* v. *Scoggins & Brown,* 90 S. W. 321; *St. Louis S. W. Ry. Co.* v. *Jackson,* 118 S. W. 853; *Chicago, R. I. & G. Ry. Co.* v. *Young & Ball,* 107 S. W. 127; *Rio Grande Ry. Co.* v. *Kraft & Medero,* 212 S. W. 981; *Lancaster* v. *Hollebecke,* 235 S. W. 1115; *Texas & Pac. Ry. Co.* v. *Henson,* 132 S. W. 1118; *Hooper* v. *Chicago & N. W. Ry.* Co., 9 Am. Rep. 443; *Wilbur* v. *Wabash Ry. Co.* 129 S. W. 484; *Atlanta Nat. Bank* v. *Southern Ry. Co.,* 106 Fed. 623.

If at the time of the fire the shipment was in possession of the wharf company, the provisions of its tariff filed with the Interstate Commerce Commission were a part of the contract between it and the carriers named in the bill of lading. The provision of such tariff to the effect that the wharf company should not be liable for damages to the shipment except for its negligence is valid, and as all claims of negligence were abandoned, the wharf com-

pany was not liable for the loss. Neither the steamship company, named in the bill of lading as an intermediate carrier, nor the railway company, named in the bill of lading as the delivering carrier, was required to use the services of the wharf company in transferring shipments from the steamship company's docks to the cars of the railway company. They could have made arrangements for motor trucks or some other means of transportation to transfer such shipments. The shipper named in the bill of lading made a contract with the steamship company and the railway company under the terms of which those carriers agreed to transport his property from New York to El Paso. The shipper did not make any contract with the wharf company. The wharf company filed with the Interstate Commerce Commission tariffs covering certain services it was willing to render the steamship company and the railway company at Galveston.

These tariffs were furnished to the steamship company and the railway company prior to the shipment in this case. When the carrier named in the bill of lading employed the wharf company to render the loading and switching service, such employment was under this tariff, and the tariff provision limited the liability to negligence. *Boston & Maine R. Co.* v. *Hooker,* 233 U. S. 97; *Chicago, R. I. & P. Ry. Co.* v. *Cramer,* 233 U. S. 490; *Cau* v. *Texas Pac. Ry. Co.,* 194 U. S. 427; *Arthur* v. *Texas & Pac. Ry. Co.,* 204 U. S. 506.

The principle is the same whether the limitation of the carrier's liability is contained in a tariff forming part of a switching contract or in a contract in the form of a bill of lading.

The fact that the bill of lading, to which the wharf company was not a party, does not contain any provision limiting the liability of the carrier therein named to a liability for negligence does not affect the validity of the

provision of the contract between the carriers named in the bill of lading and the wharf company.

Mr. John P. Bullington for the Galveston, Harrisburg & San Antonio Ry. Co., respondent.

Mr. Roscoe H. Hupper, with whom *Mr. Burton H. White* was on the brief, for the Mallory Steamship Co., respondent.

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

The American Grocery Company and others brought this action against the Mallory Steamship Company, the Galveston Wharf Company, and the Galveston, Harrisburg & San Antonio Railway Company to recover the value of a carload of sardines destroyed by fire at Galveston, Texas, while en route to El Paso in that State. The goods had been shipped from Maine to El Paso on a through bill of lading issued by the Seaport Navigation Company and describing the route as "Mallory, Southern Pacific." The Mallory Steamship Company had transported the goods from New York to Galveston, and at the time of the fire the goods were on the pier which that company had leased from the Galveston Wharf Company. The latter company, a chartered transportation company not named in the bill of lading, owned, in addition to certain piers, railroad trackage from these piers to connections with railroads running out of Galveston, including that of the Galveston, Harrisburg & San Antonio Railway Company, that being the Southern Pacific line described in the bill of lading as the delivering carrier. There was no attempt to prove negligence on the part of any of the defendants. The District Court, a jury being waived, held that the goods had been delivered by the Mallory Steamship Company to

the Galveston Wharf Company, that the latter was in possession of the goods as a common carrier, and that at the time of the loss they had not been delivered to the Galveston, Harrisburg & San Antonio Railway Company. The judgment, entered in the District Court against the Wharf Company, was reversed by the Court of Civil Appeals which directed judgment against the Railway Company upon the ground that the Wharf Company was acting as a transfer agent for the Railway Company and was not liable for the loss. 13 S. W. (2d) 983. The Supreme Court of the State reversed the judgment of the Court of Civil Appeals and affirmed that of the District Court. 25 S. W. (2d) 588, 36 S. W. (2d) 985. This Court granted a writ of certiorari.

The Wharf Company, petitioner, in the view that the question of the liability of carriers under an interstate bill of lading is governed by the Federal decisions,[1] contends that the state court erred in holding (1) that the possession of the shipment at the time of the fire had passed from the Steamship Company to the Wharf Company, (2) that the Wharf Company had possession as a connecting carrier and not as agent of the railroad carrier named in the bill of lading, and (3) that the Wharf Company was liable as insurer of the shipment when its filed tariff provided that it should not be liable save for its negligence. The American Grocery Company, plaintiff in the action (which joined in the Wharf Company's petition for certiorari) contends that it is entitled to recover " from some one of the three defendants in the trial court " and that it is the Steamship Company which should be held liable. The Railway Company, respondent, also urges that there had been no delivery of the goods by the Steamship Company, and further that, if

[1] *Southern Ry. Co.* v. *Prescott*, 240 U. S. 632, 636; *Georgia, Florida & Alabama Ry. Co.* v. *Blish Milling Co.*, 241 U. S. 190, 194, 195; *Missouri Pacific R. Co.* v. *Reynolds-Davis Grocery Co.*, 268 U. S. 366.

such delivery had been made, the Wharf Company held the goods as common carrier and not as the Railway Company's agent, and that the tariff of the Wharf Company was inapplicable.

First. The Court of Civil Appeals, while reversing the judgment of the District Court, did not disturb the finding that the Steamship Company had delivered the goods to the Wharf Company, but on the contrary reaffirmed it. The Supreme Court held that this finding was supported by evidence and reached its conclusion upon that basis. The petitioners insist that the three courts were in error and that the finding is opposed to the undisputed evidence. We are unable to agree with this contention. The tracks of the Wharf Company were on the pier and there the Steamship Company and the Wharf Company had adjoining offices. The Wharf Company had its own force of men on the pier to handle the shipments for rail transportation. It was the practice to have cars spotted conveniently to receive the shipments according to the routing. The Steamship Company placed the goods on the pier in convenient locations where the Wharf Company, which according to custom had already received the billing and had full information of the shipments, could load them into the waiting cars.[2] In the instant

[2] The testimony of the General Manager of the Wharf Company contains the following:

"It is our privilege to begin loading as soon as it is put on the wharf, unless a hold order is put on some specific shipment, which happens only occasionally. So that as soon as freights were deposited on the wharf by the forces of the Mallory, there was nothing to prevent our forces from immediately picking it up and trucking it to the cars. That was all left to the judgment and discretion of the Galveston Wharf Company's supervisor of forces on the docks. It was not a matter within the control of the Mallory Line. . . . As the freights were placed on the wharf by the Mallory Line, it was purely a matter of the Wharf Company to determine just how and when to load the particular shipment in the usual manner. . . . It is the Mallory Line's usual performance to deposit it on the floor, and it is picked up and loaded into the cars by the Gal-

case, it appeared that the ship had arrived early in the morning (January 13, 1926) and had been fully discharged by five-thirty o'clock in the afternoon; that, as the goods were unloaded, they were put in the usual manner in suitable locations for the picking up and loading into cars by the Wharf Company; that out of 1081 tons so discharged on that day and put in the designated places, the Wharf Company had actually loaded into cars all but 379 tons, and that carloads similarly routed, and placed in approximately the same location as the shipment here involved, had been so loaded. There was evidence that the latter shipment had been suitably placed on the wharf before four o'clock in the afternoon, and was ready by that time for loading by the Wharf Company and completely at its disposal,[3] but the Wharf Com-

---

veston Wharf Company. As to the particular time it is picked up, that is wholly in control of the Wharf Company. After it had been placed, and it was O. K.'d to go, we were at liberty to pick it up and send it forward at any time we got ready, and it was not necessary for us to ask permission of the Mallory Line about it. Unless there is some special feature connected with it, as a hold order, the usual course is to load it and get rid of it. So far as the actual physical handling of the shipment from the time it is put, and assuming that it is ready to go, that is under the control of the Wharf Company."

[3] There was testimony by the chief dock clerk of the Steamship Company as follows:

"After we placed the shipment in the designated territory, that is all we have to do with it. If we have broken cases, we set them aside, and the Mallory Line coopers come along and put them into condition, and we are through with it, and it is ready for the Wharf Company to load out. . . . Some of these packages were broken, not a large amount. They were put into condition that day. I would say that this particular carload of sardines was ready to be put on the cars before 4:00 o'clock. After that time we had nothing to do with it. The Mallory Line was through with it. As to whether any of the representatives of the Wharf Company or railroad company had examined this shipment, I say they had. When the damaged cases were recoopered, they put the O. K. mark on them after we recoopered them."

pany stopped work about six-thirty o'clock without loading it, and that it was burned that night. Questions are raised with respect to notice of readiness for loading and as to the checking of the shipment, but it cannot be said that the testimony is so clear and definite on these subjects as to preclude a finding of delivery to the Wharf Company. No receipt had been given by the Wharf Company, but the state court found, upon evidence, that the Steamship Company did not require the Wharf Company to give receipts before it removed shipments from the wharf and that receipts were often given a considerable time after such removal. On points where the testimony permitted conflicting inferences, the state court was entitled to reach its conclusion that the shipment had been placed under the complete control of the Wharf Company to be handled according to its own convenience and hence should be deemed to have been delivered to the Wharf Company.[4]

Second. The Wharf Company did not dispute that it was a common carrier. As such, it had facilities and rendered service. It is also manifest that it received the goods for transportation to the connection with the Railway Company that was to take them to destination. This service of the Wharf Company was that of a common carrier furnishing a necessary link in the transportation under the through bill of lading. The Wharf Company was thus in fact and in law a connecting carrier, and that it was not named in the bill of lading is unimportant. The bill of lading, required to be issued by the

[4] See *Pratt* v. *Railway Co.*, 95 U. S. 43, 46; *Merriam* v. *Hartford & New Haven R. Co.*, 20 Conn. 354; *Converse* v. *Norwich & New York Transportation Co.*, 33 Conn. 166; *Washburn Crosby Co.* v. *Boston & Albany R. Co.*, 180 Mass. 252; 62 N. E. 590; *Texas & Pacific Ry. Co.* v. *Clayton*, 173 U. S. 348; *Texas & Pacific Ry. Co.* v. *Reiss*, 183 U. S. 621; *Texas & Pacific Ry. Co.* v. *Callender*, 183 U. S. 632; *Oregon-Washington R. & N. Co.* v. *McGinn*, 258 U. S. 409, 413.

initial carrier upon an interstate shipment, 'governs the entire transportation and thus fixes the obligations of all participating carriers to the extent that the terms of the bill of lading are applicable and valid.' *Georgia, Florida & Alabama Ry. Co.* v. *Blish Milling Co.,* 241 U. S. 190, 194, 195. See, also, *Kansas City Southern Ry. Co.* v. *Carl,* 227 U. S. 639, 648; *Great Northern Ry. Co.* v. *Galbreath Cattle Co.,* 271 U. S. 99, 102. Under such a bill of lading, each connecting carrier may be sued for damages occurring while the goods are in its possession, and its liability 'is fixed by the applicable valid terms of the original bill.' It may not vary the terms of the through bill. *Missouri, Kansas & Texas Ry. Co.* v. *Ward,* 244 U. S. 383, 387; *Texas & Pacific Ry. Co.* v. *Leatherwood,* 250 U. S. 478, 480; *Cobb* v. *Brown,* 193 Fed. 958. In this instance, the bill of lading provided that the carrier in possession of the property described "shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided." The Wharf Company became subject to this liability and did not bring itself within any of the exceptions stated in the bill.

The Wharf Company was not entitled to escape this liability upon the ground that it was acting as the agent of the Railway Company. The case of *Missouri Pacific R. Co.* v. *Reynolds-Davis Grocery Co.,* 268 U. S. 366, upon which the petitioners rely, is not in point. There, the Missouri Pacific, the delivering carrier named in the bill of lading, had employed the St. Louis-San Francisco to perform a switching service in making the required delivery at the place of destination. The court held that the Missouri Pacific was the delivering carrier and was liable as such; it could not defeat that liability by the employment of an agent for service at the terminal. In the present case, the Wharf Company was the connecting carrier in possession of the goods at the time of the loss and was responsible accordingly.

Third. Equally unavailing is the Wharf Company's defense based upon the provision of its filed tariff, that it should be liable only for negligence. The respondent, the Railway Company, insists that this limitation was by its terms applicable only in connection with the rate for the handling of traffic after it had been loaded into cars and that another rate without such limitation related to the service in loading the goods from the wharf into the cars. Apart from this contention, which is not without force, it is sufficient to say that the attempted limitation of liability in any event did not affect the plaintiffs who were entitled to the transportation of the goods under the conditions set forth in the through bill of lading pursuant to which the Wharf Company was performing its service. As we have said, the Wharf Company was not entitled to vary the liability, as determined by the terms of the through bill, by its arrangements with the Railway Company. *Judgment affirmed.*

BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* LEININGER.

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

No. 426. Argued February 16, 1932.—Decided March 14, 1932.

1. Findings of fact of the Board of Tax Appeals, when not challenged as unsupported by evidence, are conclusive on review. P. 138.
2. A husband who was a member of a partnership agreed with his wife that she should be an "equal partner" with him in his interest in the company and should share equally with him the profits and losses. *Held:*

   (1) The agreement did not make the wife a member of the partnership without the consent of the other partners, but amounted at most to an equitable assignment of one-half of what her husband should receive from the partnership, she in turn agreeing to make good to him one-half of the losses he might sustain by reason of his membership in the firm. P. 139.

(2) The husband's distributive share of the net income of the partnership was taxable to him individually under the Revenue Acts of 1918 and 1921. *Lucas* v. *Earl,* 281 U. S. 111. P. 141.

(3) The wife's interest being derived from and dependent upon the husband's distributive share, taxation of the whole as his income is not unconstitutional. *Hoeper* v. *Tax Commission,* 284 U. S. 206, distinguished. P. 142.

51 F. (2d) 7, reversed.

19 B. T. A. 621, affirmed.

CERTIORARI, 284 U. S. 608, to review a judgment reversing an order of the Board of Tax Appeals.

Mr. Claude R. Branch, with whom *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Sewall Key, John H. McEvers,* and *Wilbur H. Friedman* were on the brief, for petitioner.

Mr. Irwin N. Loeser, with whom *Messrs. Levi Cooke* and *George R. Beneman* were on the brief, for respondent.

The Board of Tax Appeals found as a fact that respondent's wife owned the corpus which produced the income; the findings of fact made by the Board are, for the purposes of this case, conclusive.

Income is taxable only to the equitable owner of the corpus which produces it. The cases upon which the Government relies involve only an assignment or attempted assignment of income *in futuro.* Such cases have no application to the facts of this one. *Mitchel* v. *Bowers,* 15 F. (2d) 287; *Bing* v. *Bowers,* 26 F. (2d) 1017, s. c., 22 F. (2d) 450. Cf. *Commissioner* v. *Marshall Field,* 42 F. (2d) 820, 822; *Copland* v. *Commissioner,* 15 B. T. A. 238, s. c., 41 F. (2d) 501, 504; Parshall *v.* Commissioner, 7 B. T. A. 318; Thomas *v.* Commissioner, 8 B. T. A. 118; Hallahan *v.* Commissioner, 14 B. T. A. 584.

Section 218 (a) of the Revenue Acts of 1918 and 1921 merely prescribes that partnership income is taxable directly to its owners whether distributed or not. The word "partner" is used as synonymous with "owner."

The rule heretofore discussed applies where the assigned corpus is part of a partnership interest.

The construction urged by petitioner is unconstitutional. *O'Malley-Keyes* v. *Eaton,* 24 F. (2d) 436, 438; dissenting opinion in *Mitchel* v. *Bowers,* 15 F. (2d) 287, 289–292; *Hoeper* v. *Tax Commission,* 284 U. S. 206.

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

The respondent sought a redetermination of deficiencies in income taxes for the years 1920 to 1923. The question related to the income earned on respondent's share in a partnership known as the Eagle Laundry Company, doing business in Cleveland, Ohio. By virtue of an agreement made with his wife, respondent insisted that she was 'a full equal partner with him in his interest in the partnership', and that each should return and pay tax upon one-half of the income attributable to that interest. The Commissioner determined that respondent was taxable upon the whole of the income earned on his share in the partnership, and the Board of Tax Appeals affirmed that decision. 19 B. T. A. 621. The Circuit Court of Appeals reversed the order of the Board, 51 F. (2d) 7, and this Court granted a writ of certiorari.

The question arises under § 218 (a) of the Revenue Acts of 1918 and 1921 (40 Stat. 1070; 42 Stat. 245) which provided:

"That individuals carrying on business in partnership shall be liable for income tax only in their individual capacity. There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year . . ."

There is no challenge to the findings of fact made by the Board of Tax Appeals as being unsupported by evidence, and they must be treated as conclusive. *Phillips* v.

Commissioner, 283 U. S. 589, 599, 600. Upon these findings, which are set forth in the margin,[1] it cannot be maintained that the agreement between the respondent and his wife made her a member of the partnership. That result could not be achieved without the consent of the

[1] The findings of the Board of Tax Appeals are as follows:

"In 1898 a partnership known as Eagle Laundry Company was organized by petitioner and one M. G. Monaghan, each owning a one-half interest. In 1904 Monaghan died and his wife, Mary T. Monaghan, succeeded to his interest in the firm and on the books of the company. In 1920 Mary T. Monaghan transferred by bill of sale her interest to her children. The entire Monaghan interest was thereafter carried on the books in the name of Marcus A. Monaghan. The partnership returns for the years 1921, 1922 and 1923 filed by Eagle Laundry Company disclose the partners to be petitioner and M. T. Monaghan and the income to be distributable one-half to each. Each of the three children of Mary T. Monaghan, however, returned a proportionate part of the income for taxation.

"During the latter part of 1920 a written agreement confirmatory of a pre-existing oral agreement, was entered into between petitioner and his wife, wherein it was acknowledged that petitioner's wife had been and was a full equal partner with him in the interest in the Eagle Laundry Company, entitled to share equally in the profits and obligated to bear equally any losses. The contract was effective from the beginning of 1920. The written agreement was not produced, probably having been lost in a fire at the plant. The fact of this transfer was communicated to Marcus A. Monaghan, who represented the owners of the other one-half interest in the Eagle Laundry Company. The Leininger interest always stood in the name of C. P. Leininger on the partnership books but Mrs. C. P. Leininger returned one-half of the profits of the Leininger interest for taxation.

"Petitioner and his wife maintained prior to and throughout the period here involved a joint bank account on which each could draw unrestrictedly. The profits received from the partnership were deposited in this account by Leininger, no checks on the partnership being drawn to the wife. After the execution of the agreement the wife also maintained a small personal account in which were deposited checks received on account of earnings on her personal investments. Mrs. Leininger took no part in the management of the business and made no contribution to its capital. There was never any formal accounting between petitioner and his wife."

other partner or partners,[2] and there is no finding of such consent. The mere communication of the fact that the agreement had been made was not enough. It does not appear that there was any attempt to change the ownership of the partnership assets or the control of the partnership enterprise. It was the husband's interest that was the subject of the agreement.[3] His wife was to be an 'equal partner with him' in that interest. The business of the firm was continued as before. Complying with the statute,[4] the partnership returns, verified by the husband for the years in question, stated that the names of the partners were 'C. P. Leininger and M. T. Monaghan, each owning one-half.' 19 B. T. A. at p. 623. The 'Leininger interest' remained in the name of the respondent on the partnership books. His wife took no part in the management of the business and made no contribution to its capital. The profits received from the partnership went to the respondent, no checks on the firm being drawn to the wife. Upon the facts as found, the agreement with Mrs. Leininger cannot be taken to

---

[2] *Channel* v. *Fassitt,* 16 Ohio 166; *Pagel* v. *Creasy,* 6 Ohio App. 199, 207, 208; *McNamara* v. *Gaylord,* 3 Ohio Fed. Dec. 543, 546, 1 Bond 302; *Bank* v. *Carrollton Railroad,* 11 Wall. 624, 628, 629; *Burnett* v. *Snyder,* 76 N. Y. 344, 349; *Cohan* v. *Commissioner,* 39 F. (2d) 540, 542.

[3] See *Nixon* v. *Nash,* 12 Ohio St. 647, 650; *Bank* v. *Carrollton Railroad, supra; Case* v. *Beauregard,* 99 U. S. 119, 124; *Burnett* v. *Snyder, supra; Rockafellow* v. *Miller,* 107 N. Y. 507, 510; 14 N. E. 433; *Mitchel* v. *Bowers,* 15 F. (2d) 287, 288; *Cohan* v. *Commissioner, supra; Harris* v. *Commissioner,* 39 F. (2d) 546, 547.

[4] Section 224 of the Revenue Acts of 1918 and 1921 (40 Stat. 1074, 42 Stat. 250) provided:

"That every partnership shall make a return for each taxable year, stating specifically the items of its gross income and the deductions allowed by this title, and shall include in the return the names and addresses of the individuals who would be entitled to share in the net income if distributed and the amount of the distributive share of each individual. The return shall be sworn to by any one of the partners."

have amounted to more than an equitable assignment of one-half of what her husband should receive from the partnership, she in turn agreeing to make good to him one-half of the losses he might sustain by reason of his membership in the firm.

The respondent urges that the assignment to his wife was of one-half of the '*corpus*' of his interest and that this '*corpus*' produced the income in question. The characterization does not aid the contention. That which produced the income was not Mr. Leininger's individual interest in the firm, but the firm enterprise itself, that is, the capital of the firm and the labor and skill of its members employed in combination through the partnership relation in the conduct of the partnership business. There was no transfer of the *corpus* of the partnership property to a new firm with a consequent readjustment of rights in that property and management. If it be assumed that Mrs. Leininger became the beneficial owner of one-half of the income which her husband received from the firm enterprise, it is still true that he, and not she, was the member of the firm and that she had only a derivative interest.

The statute dealt explicitly with the liability of partners as such. Applying to this case, the statute provided that there should be included in computing the net income of Leininger his distributive share of the net income of the partnership. That distributive share, as he himself stated in his return on behalf of the partnership, was one-half. In view of the clear provision of the statute, it cannot be said that Leininger was required to pay tax upon only a part of this distributive share because of the assignment to his wife. The case of *Lucas* v. *Earl*, 281 U. S. 111, is analogous. There the husband made a contract with his wife by which his salary and fees were to be "received, held, taken and owned" by them as joint tenants. The Court recognized that a forcible argument

was presented "to the effect that the statute seeks to tax only income beneficially received, and that taking the question more technically the salary and fees became the joint property of Earl and his wife on the very first instant in which they were received." But the case was deemed to turn on the import and reasonable construction of the taxing act. "There is no doubt" said the Court, "that the statute could tax salaries to those who earned them and provide that the tax could not be escaped by anticipatory arrangements and contracts however skilfully devised to prevent the salary when paid from vesting even for a second in the man who earned it. That seems to us the import of the statute before us and we think that no distinction can be taken according to the motives leading to the arrangement by which the fruits are attributed to a different tree from that on which they grew." *Id.*, pp. 114, 115. This ruling was not disturbed by *Poe* v. *Seaborn,* 282 U. S. 101, which pointed out the distinction. *Id.*, p. 117.

We find no reason to doubt the validity of the tax. The Congress, having the authority to tax the net income of partnerships, could impose the liability upon the partnership directly, as it did under the Revenue Act of 1917 (40 Stat. 300, 303), or upon the 'individuals carrying on business in partnership', as in the statutes here involved. The Congress could thus tax the distributive share of each partner as such, as in *Lucas* v. *Earl, supra,* it taxed the salary and fees of the person who earned them. A different situation was presented in *Hoeper* v. *Tax Commission of Wisconsin,* 284 U. S. 206, where the question related to the earnings of the wife and the income which she received from her separate estate. For that which thus belonged to her the Court held that her husband could not be taxed. In the instant case, the right of the wife was derived from the agreement with her husband and

rested upon the distributive share which he had, and continued to have, as a member of the partnership.

The decree of the Circuit Court of Appeals is reversed and the order of the Board of Tax Appeals affirmed.

Circuit Court of Appeals reversed.
Board of Tax Appeals affirmed.

ATLANTIC COAST LINE RAILROAD CO. *v.* TEMPLE, ADMINISTRATRIX.

CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA.

No. 453. Argued February 17, 18, 1932.—Decided March 14, 1932.

Evidence touching the cause of the derailment of a train *held* insufficient to warrant a finding of negligence on the part of the railroad company. P. 147.

165 S. C. 201; 163 S. E. 644, reversed.

CERTIORARI, 284 U. S. 611, to review the affirmance of a judgment for damages in an action under the Federal Employers' Liability Act.

Messrs. Thomas W. Davis and *Douglas McKay* for petitioner.

Messrs. John F. Williams and *R. E. Whiting* for respondent.

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

Judgment recovered by plaintiff (respondent here), in an action under the Federal Employers' Liability Act for the death of her intestate, was affirmed by the Supreme Court of the State. This Court granted a writ of certiorari. The question is whether there was sufficient

evidence of negligence on the part of defendant to justify the submission of the case to the jury.

Plaintiff's intestate was employed by defendant as locomotive engineer of a train running between Augusta, Georgia, and Sumter, South Carolina, in the early morning of May 20, 1921. At a point near Augusta, and about one and three-tenths miles north of a station called Beech Island, the train was derailed, the engine overturned, and the engineer killed. The accident took place on the line of the Charleston & Western Carolina Railway Company over which defendant, the Atlantic Coast Line, had trackage rights, and the negligence charged was that the employees of the former company working on the roadbed had failed properly to spike and bolt one of the rails, causing it to spread. There were two witnesses for plaintiff. One of these, who lived near Beech Island station, testified that, while driving across the railroad at that station on the afternoon before the accident, he had seen section hands working on the railroad, apparently fixing a rail, at a point between that station and a gravel pit which was not far from the place of the accident. He 'did not pay much attention'; he 'just saw them working'. It was conclusively shown by the evidence that there was a curve on the track a little less than a mile above Beech Island station and that by reason of the contour of the land, with an intervening bluff, it was impossible for one at the crossing at the station to see the place where the wreck occurred or within at least a quarter of a mile of it. The witness knew nothing of the wreck and there was no evidence that the men whom he described had been working at the place of the accident or had any connection with the cause of the derailment. The other witness for the plaintiff had visited the scene shortly after the wreck occurred. He testified that the rail was 'torn up', that spikes and bolts were 'laying on the cross ties', that three or four ties were 'taken loose',

that there was no doubt the spikes had been 'pulled', that 'it was not a matter of fixing the track and leaving them out', that the bolts and angle bars 'had been removed certain', that there was a dent about the middle of the rail indicating that the rail 'had been pushed in', and that one end of the rail had been 'pulled in' and 'spiked in from the outside' making the track 'too narrow' so that a train coming from Augusta would be derailed. Thinking that 'it looked like it had been wrecked and there might be some tools,' the witness made a search, and following tracks leading to a gravel pit about fifty or sixty feet away, he found behind some bushes a crowbar used for pulling spikes and a wrench for loosening bolts; that these tools had identification marks showing that they belonged to the Southern Railway Company whose line was five or six miles distant.

The testimony for defendant gave a more extended description of the conditions at the place of the wreck, confirming the testimony as to the pulling out of the spikes, the removal of the bolts and angle bar, and the displacement of the rail. One of the witnesses, a planter living at Beech Island, testified that, on examining the place of the wreck on the same morning, he found that several spikes had been drawn, that the rail had been 'set in' and 'spiked down on the outside,'—that 'the rail was pushed in and then driven down in new place.' Another witness, a passenger on the wrecked train and also an inspector and special investigator for the Interstate Commerce Commission, who had made an immediate examination of the track, testified that, at the point of derailment, one rail was out of place and that the angle bars had been removed from each end of the rail; that 'the bolts and nuts indicated that they had been removed by some one on purpose' and the condition of the bolts showed that they had not been stripped in any way; that there was no indication that the condition of the

track had caused the rail to spread; that an inspection of the locomotive and cars showed no defect that would contribute in any way to the derailment; that the road apart from the wreck was in 'good condition'; that the ties, rails and angle bars were those of 'the regular and proper strength'; that the inspection in that territory compared favorably with the inspection of railroads in general; that it appeared that 'the spikes had been pulled directly upward' and that 'had they been crushed out upon the flooring of the rail, it would naturally have made a slanting pull or splintered the tie, but they were pulled out straight.' The testimony of the roadmaster was that he had made a careful inspection of the track in question as late as five-thirty in the afternoon before the accident. The section foreman testified that the track was in good condition, that the section men had not worked at the place of the wreck for several weeks, that during the week of the accident they had not been at work within a mile and a half of that place, and that on the previous day they were working about two miles to the south; that they had no tools branded with the name of the Southern Railway Company. The section foreman of the Southern Railway Company testified that on the morning of the accident he had missed a 'claw bar and wrench' which he had put in the tool house the evening before, and that he found that the tool house had been broken into. There was evidence that these were the tools found near the wreck. Several trains passed over the track in question between the afternoon before and the time of the wreck and the engineers testified that they observed nothing unusual. Two trains passed on the way to Augusta only about one hour and a half before the accident; the point is made that there was testimony that the position and condition of the rail were such that this might be possible despite the displacement of the rail, although a train running in the

opposite direction (like the one in question) after the rail had worked out of alignment, would be derailed. But the argument with respect to the time when the displacement might have been effected, which in any event could not have been very long before the accident, and the contention based on the position of the nuts and bolts, are unavailing in view of the lack of evidence tending to show that the defendant was in any way responsible for the condition which caused the derailment.

There are many details which it is unnecessary to review as they do not affect the essential question. It is sufficient to say that upon a careful examination of the entire record we are unable to discover any basis for a finding of negligence on the part of defendant. The motion for the direction of a verdict in its favor should have been granted. *Atlantic Coast Line R. Co.* v. *Davis,* 279 U. S. 34; *Gunning* v. *Cooley,* 281 U. S. 90; *Atchison, Topeka & Santa Fe Ry. Co.* v. *Saxon,* 284 U. S. 458.

The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed.

EASTERN AIR TRANSPORT, INC. *v.* SOUTH CAROLINA TAX COMMISSION ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA.

No. 504. Argued February 25, 1932.—Decided March 14, 1932.

A state tax of six cents per gallon on sales of gasoline was added by the seller to gasoline bought by an air-transport company for use in its planes, which traversed the State in interstate commerce and stopped at several places there, but transported no passengers or freight between those places. *Held:*

Whether viewed as a tax on property or as an excise, the tax is not a direct burden on interstate commerce and is within the power of the State. P. 152.

52 F. (2d) 456, affirmed.

APPEAL from a decree of the District Court of three judges denying an interlocutory injunction in a suit to restrain collection of a state tax.

Mr. William Henry White, Jr., with whom *Mr. Christie Benet* was on the brief, for appellant.

Appellant is engaged in the transportation of passengers exclusively by airplanes between Newark, N. J., and Miami, Florida, and, in addition, United States mail between Newark, N. J., and other points, under contract with the Post Office Department, with stops at intermediate points.

Because of the state of the art of flying, and present type of airplane construction, it is impossible for an airplane to make the flight from Newark to Miami, or even a much shorter flight, without refueling at intermediate points. The necessities of appellant's transportation instrumentalities require it, therefore, to fuel in the State of South Carolina, for without so doing, it could not complete its flight or carry the United States mail as required by its contract with the Post Office Department.

The tax is imposed upon the seller, but in fact is passed along to the purchaser, and all of it is remitted by the seller to the State and used solely for state and county highways. Appellant has paid this tax on all gasoline purchased in the State, and has never been able to purchase gasoline in South Carolina except upon its payment. The amount paid is $5,000.00 or more a year.

The highest court of South Carolina declares the tax to be an "excise" tax. And since it is the public policy of the State to rest the burden upon the ultimate consumer, the practical effect of enforcement is the same as if the law in so many words laid the tax on the ultimate consumer. *Panhandle Oil Co.* v. *Mississippi*, 277 U. S. 218.

It needs little imagination to perceive that such a burden in one State, if repeated in other States through

which appellant must operate its airplanes under its contract to carry the mails of the United States, would soon become so heavy as to be prohibitive. The burden of the tax, though imposed upon the seller by law, falls upon the consumer, and such burden is a direct burden. *Texas Co.* v. *Brown,* 258 U. S. 466; *Panhandle Oil Co.* v. *Mississippi,* 277 U. S. 218; *Indian Motocycle Co.* v. *United States,* 283 U. S. 570.

A tax intended to fall, and which does fall, upon the ultimate consumer, has precisely the same effect as if laid upon use rather than sale. There can be no use without a previous sale, or purchase. The one leads to the other.

In seeking to treat "sale" as separate and distinct from subsequent use, the court below overlooks the principle decided in such cases as *Lemke* v. *Farmers Grain Co.,* 258 U. S. 50; *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282; and *Shafer* v. *Farmers Grain Co.,* 268 U. S. 189, where the act of buying, though performed wholly within a State, was treated as a part of the interstate transaction of shipment. In those cases there was a regular and established business of buying grain in one State for shipment to another State, and the grain so bought was shipped in interstate commerce. The analogy to the present case is complete. Here the appellant buys a special type of gasoline intended for use in airplanes; it intends to use that gasoline, and does in fact use it, only in airplanes engaged exclusively in interstate commerce.

The purchase is a mere incident in the course of regular and consistent interstate business. *Board* v. *Olsen,* 262 U. S. 1, 35.

The exigencies of a trade determine what is essential to the business or process of interstate commerce in that trade. *Thames & Mersey Ins. Co.* v. *United States,* 237 U. S. 19.

The purchase of gasoline in South Carolina is just as indispensable to the uninterrupted conduct of appellant's interstate business as the sales at the Chicago stockyards—which *per se* were local transactions but were held by the Court in *Stafford* v. *Wallace,* 258 U. S. 495, to be so intimately associated with interstate commerce as to be a part thereof—were essential to the continuity of the flow of cattle from the ranges in the west to the markets in the east. The State of South Carolina, therefore, had no power to tax these sales, just as in *Norfolk & W. R. Co.* v. *Pennsylvania,* 136 U. S. 114, 120, the State of Pennsylvania could not impose a license tax upon a railroad company engaged in interstate commerce for the privilege of maintaining an office in the State.

That an event subsequent to a sale may convert the sale into an interstate transaction is decided by *Federal Trade Comm.* v. *Trade Assn.,* 273 U. S. 52.

Cf. *Helson* v. *Kentucky,* 279 U. S. 245; *Station WBT, Inc.* v. *Poulnot,* 46 F. (2d) 671; *U. S. Airways, Inc.* v. *Shaw,* 43 F. (2d) 148; *Mid-Continent Air Express* v. *Lujan,* 47 F. (2d) 266; *Boeing Air Transport* v. *Edelman,* 51 F. (2d) 130; *Central Transfer Co.* v. *Commercial Oil Co.,* 45 F. (2d) 400; *N. J. Bell Tel. Co.* v. *State Board,* 280 U. S. 338.

Messrs. John M. Daniel, Attorney General of South Carolina, and *J. Fraser Lyon* were on the brief for appellees.

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

This suit was brought to restrain the collection of a tax, imposed by the State of South Carolina, of six cents a gallon with respect to gasoline purchased by complainant in that State and used by complainant in interstate commerce. The complainant charged that the state Act

placed a direct burden upon interstate commerce and hence was repugnant to the commerce clause of the Federal Constitution. Art. I, § 8. The District Court, composed of three judges as required by statute, denied an interlocutory injunction, 52 F. (2d) 456, and the complainant appeals to this Court. Jud. Code, § 266; U. S. C., Tit. 28, § 380.

From the findings of the District Court it appears that the complainant is a Delaware corporation operating, in interstate commerce, air transport lines across the State of South Carolina; that its planes make regular stops at various points in the State but do not carry freight or passengers between such points, and practically its entire business is interstate in character; that it purchases gasoline in South Carolina for the use of its planes and that the seller adds to the price the amount of the state gasoline tax which the seller is required to pay under the Act in question, and thus complainant has to pay six cents a gallon more than it otherwise would, the excess amounting to about $5,000 a year.

The tax is described in the statute [1] as a license tax, which, as applied in the instant case against the dealer,

---

[1] Act of February 23, 1922, as amended (South Carolina Acts, 1922, pp. 835–838; 1929, pp. 107–112). Section 1 provides: "That every oil company, person, firm or corporation doing domestic or intra-state business within this State, and engaging in the business of selling, consigning, using, shipping, or distributing for the purpose of sale within this State, any gasoline or any substitute therefor, or combination thereof, for the privilege of carrying on such business shall be subject to the payment of a license tax, which tax shall be measured by and graduated in accordance with the volume of sales of such oil company within the State. Every such oil company shall pay to the State an amount of money equal to six (6) cents per gallon on all gasoline, combinations thereof, or substitute therefor, sold or consigned, used, shipped or distributed for the purpose of sale within the State. . . ."

is for the privilege of carrying on the business of selling gasoline within the State. The tax is thus imposed upon the seller and the sales in question are intrastate sales. The appellant emphasizes the fact that the tax has been construed by the Supreme Court of the State to be an excise tax and not a property tax. *Gregg Dyeing Co.* v. *Query,* 166 S. C. 117; 164 S. E. 588, decided April 13, 1931. So far as the present question is concerned, the distinction is not important. If such a license tax for the privilege of making sales within the State were regarded as in effect a tax upon the goods sold,[2] its validity could not be questioned in the circumstances here disclosed, as in that aspect the tax would be upon a part of the general mass of property within the State and hence subject to the State's authority to tax, although the property might actually be used in interstate commerce.[3] "It is elementary," said the Court in *New Jersey Telephone Co.* v. *Tax Board,* 280 U. S. 338, 346, "that a State may tax property used to carry on interstate commerce." Treating the tax as an excise tax upon the sales[4] does not change the result in the instant case, as the sales are still purely intrastate transactions. *Superior Oil Co.* v. *Mississippi,* 280 U. S. 390, 395. Undoubtedly, purchases of goods within a State may form part of trans-

[2] *Brown* v. *Maryland,* 12 Wheat. 419, 444; *Welton* v. *Missouri,* 91 U. S. 275, 278; *Kehrer* v. *Stewart,* 197 U. S. 60, 65.

[3] *Coe* v. *Errol,* 116 U. S. 517, 525; *Adams Express Co.* v. *Ohio,* 165 U. S. 194, 220; 166 U. S. 185, 218; *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Texas,* 210 U. S. 217, 227; *Wells, Fargo & Co.* v. *Nevada,* 248 U. S. 165, 167; *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245, 259; *Sonneborn Bros.* v. *Cureton,* 262 U. S. 506, 509, 515; *New Jersey Telephone Co.* v. *Tax Board,* 280 U. S. 338, 346; *Superior Oil Co.* v. *Mississippi,* 280 U. S. 390, 395.

[4] *Panhandle Oil Co.* v. *Knox,* 277 U. S. 218, 222; *Indian Motocycle Co.* v. *United States,* 283 U. S. 570, 574, 575.

actions in interstate commerce and hence be entitled to enjoy a corresponding immunity.[5] But the mere purchase of supplies or equipment for use in conducting a business which constitutes interstate commerce is not so identified with that commerce as to make the sale immune from a non-discriminatory tax imposed by the State upon intrastate dealers. There is no substantial distinction between the sale of gasoline that is used in an airplane in interstate transportation and the sale of coal for the locomotives of an interstate carrier, or of the locomotives and cars themselves bought as equipment for interstate transportation. A non-discriminatory tax upon local sales in such cases has never been regarded as imposing a direct burden upon interstate commerce and has no greater or different effect upon that commerce than a general property tax to which all those enjoying the protection of the State may be subjected.

In *Helson* v. *Kentucky,* 279 U. S. 245, upon which the appellant relies, the tax was laid by Kentucky with respect to gasoline purchased by the plaintiffs in error in Illinois and used within Kentucky in the operation of a ferry boat on the Ohio River between the two States. The Court found that the tax was laid directly upon the *use* of the gasoline in interstate transportation. The Court said that "The tax is exacted as the price of the privilege of using an instrumentality of interstate commerce." *Id.,* p. 252. Such a tax is manifestly different from a general property tax or a tax upon purely local sales.

Decree affirmed.

---

[5] *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282, 290, 291; *Lemke* v. *Farmers Grain Co.,* 258 U. S. 50; *Stafford* v. *Wallace,* 258 U. S. 495, 516; *Shafer* v. *Farmers Grain Co.,* 268 U. S. 189, 198.

DANIEL, TRUSTEE IN BANKRUPTCY, *v.* GUARANTY TRUST CO. OF NEW YORK.

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

No. 179. Argued December 11, 1931.—Decided March 14, 1932.

1. The filing of a petition for reclamation before a referee in bankruptcy does not submit the petitioner to the summary jurisdiction of the referee in matters having no immediate relation to such claim.
   So *held* where the referee attempted to adjudicate and enforce a counterclaim for money alleged to belong to the trustee in bankruptcy against a trust company which had sought the return of certain bonds, of which, it was alleged, the bankrupt had gained possession by fraud. P. 161.
2. In No. XXXVII of General Orders in Bankruptcy, the provision that "In proceedings in equity, instituted for the purpose of carrying into effect the provisions of the act, or for enforcing the rights and remedies given by it, the rules of equity practice established by the Supreme Court of the United States shall be followed as nearly as may be," does not apply to summary proceedings before a referee for the restoration of specific property. P. 162.

49 F. (2d) 866, affirmed.

CERTIORARI, 284 U. S. 602, to review a judgment of reversal on an appeal from an order of the District Court modifying and affirming an order of a referee in bankruptcy.

Mr. Winthrop B. Lane, with whom *Messrs. Halleck F. Rose, Arthur R. Wells,* and *Paul L. Martin* were on the brief, for petitioner.

A referee in bankruptcy has summary jurisdiction to order a person holding property of the bankrupt estate without adverse claim, to deliver the property to the trustee in bankruptcy. Bankrutcy Act, §§ 2, 23, 33, 36, 38; *Mueller* v. *Nugent,* 184 U. S. 1; *Harrison* v. *Chamberlain,* 271 U. S. 191.

A mere assertion of an adverse claim does not oust this jurisdiction. The court may inquire for the purpose of ascertaining whether the claim is substantial or merely colorable or frivolous. If the claim is of the latter class, the court may proceed the same as though no adverse claim had been asserted. *Mueller* v. *Nugent, supra; Gamble* v. *Daniel,* 39 F. (2d) 447; *May* v. *Henderson,* 268 U. S. 111.

A claimant cannot acquire an adverse interest in property of the bankrupt estate that comes into his possession after adjudication in bankruptcy. *May* v. *Henderson, supra; Reed* v. *Barnett Nat. Bank,* 250 Fed. 983; *Knapp & Spencer Co.* v. *Drew,* 160 Fed. 413; *Eppley* v. *Baylor,* 293 Fed. 305; *Harrison* v. *Chamberlain,* 271 U. S. 191.

The court has the same summary jurisdiction to order the delivery of money or bank deposits as it has to order the delivery of tangible property, real or personal. *May* v. *Henderson,* 268 U. S. 111; *Knapp & Spencer Co.* v. *Drew, supra; Reed* v. *Barnett Nat. Bank, supra; In re Davis,* 119 Fed. 950; *In re Walker Grain Co.,* 295 Fed. 120; *In re Radley Steel Const. Co.,* 212 Fed. 462.

The court has jurisdiction to adjudicate adverse claims on property in its possession. Bankruptcy Act, § 70 (a); *Murphy* v. *Hofman Co.,* 211 U. S. 562; *Whitney* v. *Wenman,* 198 U. S. 539; *U. S. Fidelity & G. Co.* v. *Bray,* 225 U. S. 205; *Isaacs* v. *Hobbs Tie & Timber Co.,* 282 U. S. 734; *Straton* v. *New,* 283 U. S. 318; *Taubel-Scott-Kitzmiller Co.* v. *Fox,* 264 U. S. 426.

The presentation by the trustee of the cross-demand and the power of the court to determine the issue so presented, are sanctioned by Equity Rule 30 and General Order in Bankruptcy XXXVII. *Buffalo Specialty Co.* v. *Vancleef,* 217 Fed. 91; *Champion Spark Plug Co.* v. *Champion Ignition Co.,* 247 Fed. 200; *Marconi Wireless Co.* v. *National Elec. Signaling Co.,* 206 Fed. 295; *Electric Boat Co.* v. *Lake Torpedo Boat Co.,* 215 Fed. 377; *Goodno*

v. *Hotchkiss,* 230 Fed. 514; *Harper Bros.* v. *Klaw,* 232 Fed. 609; *Dykes* v. *Widdows,* 31 F. (2d) 745; *Champlain Realty Co.* v. *Brattleboro,* 260 U. S. 366.

The respondent, by coming into the bankruptcy court and seeking affirmative summary relief, thereby gave the court jurisdiction of its person, as to such issue, and all such defenses, including affirmative claims, that might be properly litigated in that summary proceeding. Consent thus given can not be withdrawn so as to deprive the court of jurisdiction so obtained. *Operative Piano Co.* v. *First Wisconsin Trust Co.,* 283 Fed. 904; *In re Bennett,* 285 Fed. 351; *In re Pennsylvania Coffee Co.,* 8 F. (2d) 98; *Triangle Electric Co.* v. *Foutch,* 40 F. (2d) 353; *In re Dernburg & Son, Inc.,* 5 F. (2d) 37; *In re Barnett,* 12 F. (2d) 73; *Wiswall* v. *Campbell,* 93 U. S. 347.

Equitable terms may be imposed by a court as a condition of granting an order of reclamation. *In re Hooven-Owens-Rentschler Co.,* 195 Fed. 424; Remington on Bankruptcy, vol. 5, p. 602.

Respondent's withdrawal did not defeat the jurisdiction to determine the issue raised by the answer. *Vidal* v. *Securities Co.,* 276 Fed. 855; *Buffalo Specialty Co.* v. *Vancleef,* 217 Fed. 91.

The speedy administration of the bankruptcy law requires the application of the modern equity practice which permits the adjudication of all controversies between the same parties in one suit. *Mueller* v. *Nugent,* 184 U. S. 1; *May* v. *Henderson,* 268 U. S. 111; *Harrison* v. *Chamberlain,* 271 U. S. 191.

Courts of bankruptcy, in the exercise of their equity powers, act *in personam* and have summary jurisdiction where a party voluntarily appears or can be served with process, regardless of the location of the *res* or domicile of the party. *Robertson* v. *Howard,* 229 U. S. 254; *Isaacs* v. *Hobbs Tie & Timber Co.,* 282 U. S. 734; *Alco Film*

Corp. v. *Alco Film Service,* 234 Fed. 55; *Orinoco Iron Co.* v. *Metzel,* 230 Fed. 40; *In re Britannia Mining Co.,* 197 Fed. 459; *In re Small Shoe Co.,* 5 F. (2d) 956; *Staunton* v. *Wooden,* 179 Fed. 61.

Ancillary jurisdiction does not bar the court of primary jurisdiction from acting if the non-resident party voluntarily appears before it.

Mr. Porter R. Chandler, with whom *Messrs. John W. Davis* and *Wm. C. Dorsey* were on the brief, for respondent.

Irrespective of whether respondent had an adverse interest in the balance of the demand loan account claimed by the trustee, the referee had no jurisdiction to entertain such a counterclaim. *Weidhorn* v. *Levy,* 253 U. S. 268, 271; *General Phonograph Corp.* v. *Fanning,* 6 F. (2d) 115; *Hebert* v. *Crawford,* 228 U. S. 204; *Murphy* v. *Hofman Co.,* 211 U. S. 562; *White* v. *Schloerb,* 178 U. S. 542; *Isaacs* v. *Hobbs Tie & Timber Co.,* 282 U. S. 734.

Courts have frequently and uniformly held that General Order XXXVII is not applicable to a summary proceeding. *In re Cunney,* 225 Fed. 426; *International Harvester Co.* v. *Carlson,* 217 Fed. 736, 739; *In re Hughes,* 262 Fed. 500; *Bradley* v. *Huntington,* 277 Fed. 948; *In re Kenney & Greenwood,* 23 F. (2d) 681.

Assuming that the referee did not err in overruling respondent's motion to strike out paragraph 8 of the trustee's answer, the referee should nevertheless have subsequently dismissed the counterclaim when it appeared that the subject matter of the counterclaim was not a specific *res,* or an admitted bank deposit, but was in effect merely an alleged debt. *In re Haley,* 158 Fed. 74, appeal dismissed 209 U. S. 546; *In re Howe Mfg. Co.,* 193 Fed. 524; *In re Ballou,* 215 Fed. 810; Remington on Bankruptcy vol. 5, § 2350.

Assuming that the counterclaim of the trustee is for property existing in tangible form, the referee is neverthe-

less bound to make inquiry as to whether the respondent has an adverse interest in such property. The record discloses that the respondent has an adverse interest which precluded the referee from proceeding further on the counterclaim. If the adverse interest asserted by the party in possession of the property is found to be substantial and not colorable, the jurisdiction of the referee thereupon terminates. A plenary suit must then be instituted. *May* v. *Henderson,* 268 U. S. 111; *In re Selfridge,* 33 F. (2d) 800; *Shea* v. *Lewis,* 206 Fed. 877; *Board* v. *Leary,* 236 Fed. 521; *Priest* v. *Weaver,* 43 F. (2d) 57; *Johnston* v. *Spencer,* 195 Fed. 215; *Gamble* v. *Daniel,* 39 F. (2d) 447.

Mr. Justice McReynolds delivered the opinion of the Court.

December 10, 1929, The Peters Trust Company, of Omaha, Nebraska, was adjudged bankrupt by the United States District Court for that State. March 17, 1930, Herbert S. Daniel, petitioner here, became trustee of the estate.

In April, 1930, the Guaranty Trust Company of New York presented to the same court a petition for the reclamation of designated bonds. It alleged that, while insolvent and without intent to pay for them, the Peters Company had fraudulently ordered and received these bonds from the Guaranty Company of New York; that title thereto had not passed to the Peters Company; that no part of the purchase price had been paid. Also " that on the dates said bonds were shipped by the Guaranty Company of New York, said Guaranty Company of New York, sold, assigned and set over to your petitioner, Guaranty Trust Company, for a valuable consideration, the accounts against the said Peters Trust Company for said bonds, and your petitioner is now the owner of said bonds "; and that they were unlawfully withheld by the

trustee. The prayer was "that an order be entered instructing and directing, Herbert S. Daniel, Trustee of said Peters Trust Company, Bankrupt, to deliver to your petitioner the bonds described above and that your petitioner have such other and further relief as may seem just and proper."

The trustee answered. He denied that the bankrupt had acted fraudulently. He asserted that title to the bonds had vested in it and petitioner had no right to recover them.

After such denials and allegations, the trustee (Answer, par. 7) stated that customers of the Peters Trust Company had placed orders with it to buy the bonds; that they had an interest in the controversy and should be made parties to the proceeding. Also (par. 8)—

"Your trustee further alleges, that the Guaranty Trust Company of New York, the petitioner and applicant herein, has in its possession, on deposit, approximately the sum of $31,224.60 which belongs to the bankrupt estate, and which was accumulated by the Receiver and Trustee of said bankrupt estate since the date it was adjudicated bankrupt. The trustee has made due demand upon the petitioner for delivery of the said money, but the Guaranty Trust Company of New York, has refused to deliver the said funds or any part thereof, and should be required to account for all funds collected by it on behalf of the receiver or trustee of Peters Trust Company, Bankrupt, or the bankrupt estate, and be directed to deliver the same forthwith to Herbert S. Daniel, Trustee."

The answer concludes—

"The trustee further prays for an order directing the Guaranty Trust Company of New York to account to him for all funds collected or now held by it belonging to the bankrupt estate, and be ordered to deliver the same [forthwith] to your trustee, and for such other relief as to the Court may seem just and equitable."

The matter went to the referee. The Guaranty Trust Company moved that paragraphs 7 and 8 be stricken from the answer because they pertained to an issue entirely separate from the one submitted by its petition. This was overruled. Thereupon, counsel for the Trust Company asked that the reclamation proceeding be dismissed, and then withdrew.

The referee took testimony concerning the relationship and dealings among the parties. He found that the reclamation proceedings should be dismissed only insofar as they sought to obtain the securities. Also, "the court further finds that the Guaranty Trust Company has in its hands the sum of $23,724.60 in cash, belonging to Herbert S. Daniel, trusteee of the above named bankrupt; that said sum was accumulated by Herbert S. Daniel as receiver subsequent to February 12th, 1930, said moneys having been collected by said Guaranty Trust Company for and on behalf of said bankrupt estate from the Prudential Insurance Company of America on mortgages made by the bankrupt and sold to the Prudential Insurance Company of America, and that said Guaranty Trust Company has not made herein any claim to the said fund of $23,724.60, and has no claim to the said fund, or to any part thereof, and is merely holding the said sum of $23,724.60 as custodian and agent of Herbert S. Daniel, as trustee of the above named bankrupt, and that said sum should be delivered forthwith to said trustee."

The referee's final order directed the trustee to deliver the bonds to specified customers of the Peters Trust Company upon stated conditions, and further "That the Guaranty Trust Company of New York, the applicant herein, be, and it is hereby ordered and directed to forthwith pay over to Herbert S. Daniel, as trustee of the above bankrupt estate, the sum of $23,724.60, of moneys in the hands of said Guaranty Trust Company of New

York, belonging to Herbert S. Daniel, trustee of said bankrupt estate, with interest thereon at the rate of 7 per cent per annum from this date."

The District Court modified the referee's order as to interest and then affirmed it. The Guaranty Trust Company appealed. The Circuit Court of Appeals upheld the objection offered to the jurisdiction of the referee and upon that ground reversed the District Court. 49 F. (2d) 866. It said—

". . . The petition of appellant for reclamation and the portion of the trustee's answer which asked for affirmative relief were, in fact, petitions by the parties asking the referee to exercise his summary jurisdiction in proceedings in bankruptcy. The two proceedings were quite distinct. Appellant sought to recover certain bonds to which it claimed title. The trustee sought an order that appellant should pay over money of the bankrupt estate received by appellant, after bankruptcy. The proceedings would not have been more unrelated to each other, if the trustee had sought an order on appellant for the delivery of books and papers such as was asked in *Babbitt* v. *Dutcher,* 216 U. S. 102, or an order for the examination of witnesses such as was asked in *Elkus, Petitioner,* 216 U. S. 115. We have been cited to no authority for the proposition that a creditor or other petitioner asking specific relief against a bankrupt's estate, as provided by the Bankruptcy Act, thereby becomes subject to summary orders by the referee in matters entirely disconnected from the subject matter of such claim or petition, and no such authority is believed to exist."

The conclusion of the Circuit Court of Appeals is correct and its decree must be affirmed.

In the circumstances, Did the referee have jurisdiction to enter the turnover order against the Trust Company?

The answer must be "No" unless that Company by filing its petition for reclamation entered its general appearance and in effect consented to submit itself to summary proceedings before that officer in respect of matters having no immediate relation to the claim which it had presented.

In practice such a rule might lead to unfortunate complications and deprive owners of property of fair opportunity to recover. The risk incident to a general appearance and consent to adjudication of claims of all kinds might easily deter where the right to recover is clear. Moreover, the choice would not be between tribunals merely, but between the ordinary processes in a plenary suit and a summary hearing. We are not cited to any opinion by an appellate court which definitely approves the view advanced by the petitioner. We cannot conclude that the demand for speedy administration of bankrupt estates is enough to justify such a radical departure from ordinary procedure. And the suggestion that it is possible to impose equitable terms as a condition to an order of reclamation is not helpful. No such conditional order was proposed or entered.

The petitioner maintains that, read together and properly construed, General Order XXXVII and Equity Rule 30 applied in the circumstances and invested the referee with jurisdiction to act as he did.

General Order XXXVII—General Provisions: "In proceedings in equity, instituted for the purpose of carrying into effect the provisions of the act, or for enforcing the rights and remedies given by it, the rules of equity practice established by the Supreme Court of the United States shall be followed as nearly as may be. In proceedings at law, instituted for the same purpose, the practice and procedure in cases at law shall be followed as nearly as may be. But the judge may, by special order in any case, vary the time allowed for return of process,

for appearance and pleading, and for taking testimony and publication, and may otherwise modify the rules for the preparation of any particular case so as to facilitate a speedy hearing."

No. 30, Rules of Practice for the Courts of Equity of the United States, provides—". . . The answer must state in short and simple form any counter-claim arising out of the transaction which is the subject matter of the suit and may, without cross-bill, set out any set-off or counter-claim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counter-claim, so set up, shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit both on the original and the cross-claims."

Section 2, Bankruptcy Act, grants to bankruptcy courts "such jurisdiction in law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings to . . . (7) cause the estates of bankrupts to be collected, reduced to money and distributed and determine controversies in relation thereto, except as herein otherwise provided." And § 38 extends to referees "jurisdiction to . . . (4) perform such part of the duties, except as to questions arising out of the applications of bankrupts for compositions or discharges, as are by this Act conferred on courts of bankruptcy of their respective districts, except as herein otherwise provided; . . ."

Counsel for petitioner assert: Bankruptcy proceedings constitute a branch of equity jurisdiction; a court sitting in bankruptcy is a court of equity. *Fidelity Trust Co.* v. *Gaskell* (8th C. C. A.), 195 Fed. 865, 871. Remington on Bankruptcy, Vol. 1, p. 48, § 23.

And then they say: "Obviously, except as the privilege of modification is granted to facilitate speedy hearings, the rules of equity practice are applicable, without limitation or reservation, to all equitable proceedings in

courts of bankruptcy," including of course summary proceedings before referees.

Without regard to other objections to the reasoning offered to support petitioner's view, it is obviously unsound unless the words "proceedings in equity," in General Order XXXVII apply to summary proceedings before a referee like those here in question. And we think no such intendment can be attributed to them.

This Order contains general provisions designed to bring about prompt settlement of bankrupt estates. To that end it directs that in proceedings in equity and at law instituted for the purpose of carrying the Bankruptcy Act into effect and enforcing rights and remedies given thereby, the rules which govern practice in equity and law courts shall be observed, but that the judge may modify them "so as to facilitate a speedy hearing."

Many of the equity rules are inapplicable to summary proceedings before referees. Such proceedings are not in equity as that term is commonly understood. General Order IV—Conduct of Proceedings—uses the words "Proceedings in bankruptcy" when referring to the practice to be followed by Bankruptcy courts—other orders use the word "proceedings."

The distinction between summary proceedings and plenary suits is adverted to in *Weidhorn* v. *Levy,* 253 U. S. 268, 271, 273. There it is also suggested that "proceedings in equity" and "proceedings at law," as used in General Order XXXVII, refer to something other than "proceedings in bankruptcy."

Our conclusion accords with what has been held by other Federal courts. *In re Cunney,* 225 Fed. 426; *International Harvester Co.* v. *Carlson,* 217 Fed. 736, 739; *In re Hughes,* 262 Fed. 500; *Bradley* v. *Huntington,* 277 Fed. 948; *In re Kenney & Greenwood,* 23 F. (2d) 681.

The decree of the Circuit Court of Appeals is

Affirmed.

LEACH, EXECUTOR, *v.* NICHOLS, FORMERLY COLLECTOR OF INTERNAL REVENUE.

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

No. 468. Argued February 23, 1932.—Decided March 14, 1932.

1. Question of law, as to whether a state tax should have been deducted in computing a federal estate tax,—*held* properly raised in the courts below. P. 166.
2. The tax imposed in Massachusetts upon the passing of property by will or intestate succession, though paid in the first instance by the personal representative, is in effect a succession tax, the burden falling ultimately on the legatee or other beneficiary. P. 169.
3. Such a tax, when paid by an executor, was not deductible under the federal Revenue Act of 1916, § 203, as one of the "charges against the estate," in computing the transfer tax imposed by that statute. *Id.*

50 F. (2d) 787, affirmed.

CERTIORARI, 284 U. S. 613, to review a judgment reversing a judgment for overpayment of taxes recovered by the present petitioner in an action against the Collector.

Mr. O. Walker Taylor for petitioner.

Assistant Attorney General Rugg, with whom *Solicitor General Thacher,* and *Messrs. Sewall Key, Hayner N. Larson, Bradley B. Gilman,* and *Erwin N. Griswold* were on the brief, for respondent.

By leave of Court, *amici curiae* briefs were filed by *Mr. Joseph E. Warner,* Attorney General of Massachusetts, and *Messrs. Clarence W. DeKnight* and *Frederick Schwertner.*

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

William E. Walker, of Taunton, Massachusetts, died testate November 9, 1918. Petitioner, as executor of the

estate, paid the taxes imposed by the State in respect of the property which passed from the decedent. He also paid to respondent the federal estate taxes prescribed by the Revenue Act 1916, 39 Stat. 756, 778, which the Commissioner reckoned without deducting from the gross estate the taxes exacted by the State. The Circuit Court of Appeals denied his right to recover the alleged overpayment—the difference between the sum demanded and what would have been due if the claimed deduction had been allowed. 50 F. (2d) 787. The District Court had held otherwise. 42 F. (2d) 918.

Here the insistence is that to ascertain the net estate under § 203, Revenue Act, September 8, 1916, it was necessary to deduct from the gross estate the tax paid to Massachusetts as required by c. 65 of her General Laws. Also, that in the circumstances the Circuit Court of Appeals should not have decided this question of law.

The record shows that the court below properly considered and ruled upon the point of law. The District Court—where the cause was tried without a jury—had said of the state tax, "there can be no question that it was legally deductible." The amended declaration alleges that the Commissioner wrongfully refused to allow the deduction. The answer contains a general denial. The agreed statement of facts points out—"That in arriving at the value of the net estate upon which the said total tax was computed the Commissioner did not make any deduction or allowance for the amount required to pay the Massachusetts inheritance tax, which the estate was required to pay and did pay to the Commonwealth of Massachusetts." And the defendant asked the court to find as matter of law—"Plaintiff is not entitled to recover anything of the defendant and his declaration must be dismissed with judgment for the defendant for his costs." The trial court misconstrued the federal statute.

With his petition for appeal from its judgment, the defendant presented, among others, the following assignment of error: The District Court erred in holding: "It is obvious that the United States had demanded and received a tax levied upon the estate of the plaintiff's testator in excess of the amount lawfully due. It is not the correct tax measured by the net estate in view of decisions of the court."

The Revenue Act of 1916 (amended as to rates March 3, 1917, 39 Stat. 1000, 1002, and October 3, 1917, 40 Stat. 300, 324) imposed a graduated tax upon the transfer of the net estate, ascertained as directed by § 203, of every person dying thereafter.

"Sec. 203. That for the purpose of the tax the value of the net estate shall be determined—

"(a) In the case of a resident, by deducting from the value of the gross estate—

"(1) Such amounts for funeral expenses, administration expenses, claims against the estate, unpaid mortgages, losses incurred during the settlement of the estate arising from fires, storms, shipwreck, or other casualty, and from theft, when such losses are not compensated for by insurance or otherwise, support during the settlement of the estate of those dependent upon the decedent, and such other charges against the estate, as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is being administered; . . ."

The General Laws of Massachusetts (1921) vol. 1, c. 65, provide—

"Section 1. All property within the jurisdiction of the Commonwealth, corporeal or incorporeal, and any interest therein, whether belonging to inhabitants of the Commonwealth or not, which shall pass by will, or by laws regulating intestate succession . . . shall be subject to a

tax at the percentage rates fixed by the following table: . . .

"Section 6. Administrators, executors and trustees, grantees or donees under conveyances or gifts made during the life of the grantor or donor, and persons to whom beneficial interests shall accrue by survivorship, shall be liable for the taxes imposed by this chapter, with interest, until the same have been paid.

"Section 7. Taxes imposed by this chapter upon property or interests therein, passing by will or by laws regulating intestate succession, shall be payable to the state treasurer by the executors, administrators or trustees at the expiration of one year from the date of the giving of bond by the executors, administrators or trustees first appointed; . . .

"Section 9. Property of which a decedent dies seized or possessed, subjected to taxes as aforesaid, in whatever form of investment it may happen to be, and all property acquired in substitution therefor, shall be charged with a lien for all taxes and interest thereon which are or may become due on such property. . . .

"Section 17. An executor, administrator or trustee holding property subject to the tax imposed by this chapter shall deduct the tax therefrom or collect it from the legatee or person entitled to said property; and he shall not deliver property or a specific legacy subject to said tax until he has collected the tax thereon. An executor or administrator shall collect taxes due upon land passing by inheritance or will which is subject to said tax from the heirs or devisees entitled thereto, and he may be authorized to sell said land, in the manner prescribed by section twenty-one, if they refuse or neglect to pay said tax."

Manifestly, the state taxes paid by the executor were not permissible deductions unless they were such "charges against the estate, as are allowed by the laws of the juris-

diction, . . . under which the estate is being administered." Charges against an estate are only such as affect it as a whole. They do not include taxes on the rights of individual beneficiaries. *New York Trust Co.* v. *Eisner,* 256 U. S. 345, 350.

The Massachusetts statute by plain words places the real burden of the tax upon the legatee or other person who receives a decedent's property. Payments required of an executor are only preliminary; ultimately they must be met by the beneficiaries.

Decisions of the Massachusetts Supreme Court show with adequate certainty that the right of succession is the real object of the charge laid because of property which passes by will or under the laws relative to intestacy. The thing burdened is the right to receive. *Attorney General* v. *Stone,* 209 Mass. 186, 190; 95 N. E. 395; *Magee* v. *Commissioner,* 256 Mass. 512; 153 N. E. 1; *Boston Safe Deposit & Trust Co.* v. *Commissioner,* 267 Mass. 240; 166 N. E. 729; *Coolidge* v. *Commissioner,* 268 Mass. 443, 447; 167 N. E. 757. See *Saltonstall* v. *Saltonstall,* 276 U. S. 260.

It is unnecessary for us to consider whether the petitioner filed a proper claim for refund within the period prescribed by the statute.

The challenged judgment is

Affirmed.

HARTFORD ACCIDENT & INDEMNITY CO. *v.* BUNN ET AL.

APPEAL FROM THE SUPREME COURT OF MISSISSIPPI.

No. 333. Argued January 14, 1932.—Decided March 14, 1932.

1. After the time for appeal as fixed by statute has expired, this Court has not jurisdiction to permit a party below to join in an appeal taken in time by another party. P. 177.

2. To review a judgment against two parties jointly (in this case a party and the surety upon its appeal bond in the court below) both must join in the appeal or there must be a summons and severance. P. 180.
3. For applying this rule, a judgment is deemed joint if joint on its face. Pp. 178–182.

161 Miss. 198, appeal dismissed.

APPEAL from a judgment against the Hartford Company and the surety on its appeal bond in the court below. The judgment granted recoveries to numerous materialmen in a suit on a building contractor's bond. For opinions of the court below at successive stages, see 155 Miss. 31 (119 So. 366); 132 So. 535; 135 *id.* 497.

Messrs. Marion Smith and *L. Barrett Jones,* with whom *Messrs. W. Calvin Wells, Max F. Goldstein,* and *Arthur G. Powell* were on the brief, for appellant.

Whether a judgment is such a joint judgment that all parties against whom it is rendered must unite in the appeal depends not on the form of the judgment, but upon considerations of substance. *Hanrick* v. *Patrick,* 119 U. S. 156; *The New York,* 104 Fed. 561; *Love* v. *Export Storage Co.,* 143 Fed. 1, 11; *Clarke* v. *Boysen,* 39 F. (2d) 800, 821.

The nature of judgments rendered in the State of Mississippi and the relations of parties thereto is a matter of local law as to which the decisions of the highest courts of that State are controlling. *Central Loan & Tr. Co.* v. *Campbell Commission Co.,* 173 U. S. 84, 90. The scope and effect of a judgment of a state court is peculiarly a question of state law. *Kenney* v. *Craven,* 215 U. S. 125, 130.

The Supreme Court of Mississippi has held (*Wilson* v. *Lexington,* 153 Miss. 209) that though an intermediate appellate court includes the surety on the appeal to that court in the judgment it renders against the appellant, the surety on this first appeal is not a necessary party to

a further appeal of the case to a higher court. The rule of joinder on appeal is the same in that State as it is in this Court, with the exception of the manner in which summons and severance is had as to a non-joining party.

We have then, a construction of the effect of judgments in that State—a construction that the relations of the principal appellant and his surety to the judgment are not joint but are severable; and that the relation of the surety to the judgment is not absolute, as it appears on the face of it to be, but is contingent only. The earlier case of *Thomas* v. *Wyatt,* 17 Miss. 308, cited by appellee, was overruled in *Wilson* v. *Lexington, supra.* To the same effect: *National Surety Co.* v. *LeFlore County,* 262 Fed. 325; *National Surety Co.* v. *Austin Machinery Co.,* 35 F. (2d) 842, 845.

In Mississippi the common-law rule as to joint contracts has been abolished by statute, so that all liabilities, by contracts, express or implied, including judgments, are now several. *J. B. White's Garage* v. *Boyd,* 149 Miss. 383; Code, 1930, §§ 2027, 2028.

This is peculiarly so as to bonds on appeal; since all appellants do not have to join in the appeal bond, and judgment on appeal may be entered against the surety, though his immediate principal be held not liable, if liability is adjudged against any of the other appellants—thus showing a complete severability of liability. Code, 1930, § 37; *Wise* v. *Cobb,* 135 Miss. 673.

A joint judgment, if we look to common-law definition, is such that if either party pay it, he is entitled to contribution against the other; and in a judgment against one as principal and another as surety, no contribution ever exists. The principal, if he pays, can not recover anything from the surety; and the surety, if it pays, can recover the entire amount from the principal.

Neither reason nor precedent supports the proposition that where, under statute or the rules of court, judgment

is automatically and without further hearing rendered against the surety on appeal or similar bond, the surety is a necessary party to an appeal from that judgment, where the appeal is solely on the merits of the controversy. *The New York,* 104 Fed. 561. See same case, 189 U. S. 363. Cf. *Erie R. Co.* v. *Erie & W. Transp. Co.,* 204 U. S. 220, 224; *The Glide,* 72 Fed. 200; *Evans* v. *Cheyenne Cement Stone Co.,* 20 Wyo. 188.

The judgment appealed from in *Estis* v. *Trabue,* 128 U. S. 225, was, as Judge Lurton points out (*The New York, supra*), a judgment in a suit which was in substance a suit on the bond itself.

In *Columbia River Packers Assn.* v. *McGowan,* 217 Fed. 196, also, it is held that sureties on an injunction bond need not be joined in an appeal from a judgment in which they were included with their principal. Cf. *Hart* v. *Wiltse,* 16 F. (2d) 838; *Pease* v. *Rathburn-Jones Engineering Co.,* 243 U. S. 273; *Babbitt* v. *Shields,* 101 U. S. 7.

A surety not interested in the controversy on the merits can not appeal, though included in the judgment. *Davis* v. *Preston,* 280 U. S. 406.

If, as is said in *Ex parte Chetwood,* 165 U. S. 443, 461, "according to the practice in this Court, a writ of error [now appeal] has been treated rather as a continuation of the original litigation than the commencement of a new action," how can one whose function in the case is not to conduct litigation, but merely to abide the result of litigation, prosecute the appeal, or join in prosecuting it or in shaping and controlling the litigation on appeal?

In the *Glide* case, 72 Fed. 200, it is said that the surety need not be joined in the further appeal, because his interests are represented by his principal. In *Clinchfield Fuel Co.* v. *Titus,* 226 Fed. 574, the court refused to dismiss the appeal for the non-joinder of certain persons, on

the ground that another person representative of their interest had been joined.

The surety's relation to the case and to the judgment is analogous to that of a co-defendant against whom a decree pro confesso or a default has been taken where the other defendant defends. It is held that in appealing from such a judgment the defendant who litigated need not join the defaulting co-defendants included in the same judgment. *Winters* v. *United States,* 207 U. S. 564; *Federal Intermediate Bank* v. *L'Herrisson,* 33 F. (2d) 841; *Clarke* v. *Boysen,* 39 F. (2d) 800, 820.

Even if the surety is a necessary or proper party, the motion of the appellant to make it a party, to which the surety has consented, should be granted. *The Mary B. Curtis,* 250 Fed. 9; *The Seguranca,* 250 Fed. 19; *The City of Naples,* 69 Fed. 794; *Hart* v. *Wiltse,* 16 F. (2d) 838; *Rininger* v. *Puget Sound Elec. Ry.,* 220 Fed. 419; *Hill* v. *Western Electric Co.,* 214 Fed. 243; *Kelly* v. *Allen,* 49 F. (2d) 876.

Messrs. Gerard Brandon, S. B. Laub, and *Garner W. Green,* with whom *Messrs. L. T. Kennedy, E. H. Ratcliff, Joseph E. Brown,* and *Marcellus Green* were on the brief, for appellees.

There being a joint judgment, there is no jurisdiction of an appeal by the Indemnity Company alone. *Hardee* v. *Wilson,* 146 U. S. 180; Hughes Federal Practice §§ 5430, 6153; *Maytin* v. *Vela,* 216 U. S. 598; *Babcock* v. *Norton,* 5 F. (2d) 154, certiorari denied, 268 U. S. 688; *Inglehart* v. *Stansbury,* 151 U. S. 71; *Davis* v. *Mercantile Trust Co.,* 152 U. S. 588; *Sipperly* v. *Smith,* 155 U. S. 86; *Downing* v. *McCartney,* 131 U. S. appendix xcviii; *Winters* v. *United States,* 207 U. S. 564. The claim of each appellee—materialmen—is severally and separately determinable in this Court. *Seaver* v. *Bigelow,* 5 Wall. 208; *Stewart* v. *Dunham,* 115 U. S. 61.

The requirement that application for appeal must be made within three months is jurisdictional and can not be avoided by consent, waiver or order of the court. *Rust* v. *Jackson,* 250 U. S. 76; *Scale Co.* v. *Scale Co.,* 261 U. S. 399; *Robie* v. *Hart, Shaffner & Marx,* 40 F. (2d) 871; *American Baptist Society* v. *Barnett,* 26 F. (2d) 350, certiorari denied, 278 U. S. 626.

Joinder can not be permitted, and the case must be dismissed. *Williams* v. *Bank,* 11 Wheat. 414; *Estis* v. *Trabue Davis & Co.,* 128 U. S. 225; *Lamon* v. *Speer Hardware Co.,* 190 Fed. 734; *Humes* v. *Chattanooga Third Nat. Bank,* 54 Fed. 917; *Thomas* v. *Wyatt,* 17 Miss. 308; *American Baptist Society* v. *Barnett, supra; Wilson* v. *Life & Fire Ins. Co.,* 12 Pet. 140; *Hilton* v. *Dickenson,* 108 U. S. 165, 168.

The Supreme Court of Mississippi has never allowed this appeal to Aetna Casualty & Surety Company and consent does not confer jurisdiction. *Mills* v. *Brown,* 16 Pet. 525.

Mr. Justice McReynolds delivered the opinion of the Court.

October 18, 1926, J. V. & R. T. Burkes agreed with the Investment Company, owner of certain land in Natchez, Mississippi, to construct a hotel thereon. The contract contains the following clauses—

"Article 30. Guaranty Bond.—The Owner shall have the right, prior to the signing of the contract, to require the Contractor to furnish bond covering the faithful performance of the Contract and the payment of all obligations arising thereunder, in such form as the Owner may prescribe with such sureties as he may approve. If such bond is required by instructions given previous to the submission of bids, the premium shall be paid by the Contractor; if subsequent thereto it shall be paid by the Owner.

"Obligations of Bondsmen.—The Contractor's bondsmen shall obligate themselves to all the terms and covenants of these specifications, and of the contracts covering the work executed hereunder, and the Owner and the Architect reserve the right to make all desired changes, alterations, and additions, under the conditions and in the manner hereinbefore described, without in any measure affecting the liability of the bondsmen or releasing them from any of their obligations hereunder."

October 20, 1926, the Burkes gave a bond for $316,822.00, payable to the Investment Company, with appellant as surety. Among other things this provides—

"Whereas, the Principal and the Obligee have entered into a certain written contract (hereinafter called the contract) dated October 18th, 1926, To construct 'Eola Hotel' building as per plans and specifications #640 as prepared by Weiss & Dreyfus, Architects, New Orleans, La., a copy of which is or may be attached hereto, and is hereby referred to and made a part hereof. Now, therefore, the condition of this obligation is such that if the principal shall indemnify the obligee against loss or damage directly caused by the failure of the principal faithfully to perform the contract, then this obligation shall be null and void; otherwise it shall remain in force; provided, however, this bond is executed by the surety, upon the following express conditions, which shall be precedent to the right of recovery hereunder. . . .

"11. No right of action shall accrue upon or by reason hereof, to or for the use or benefit of any one other than the obligee named herein; and the obligation of the surety is and shall be construed strictly as one of suretyship only."

Payments to the contractors were made as required by the building contract but they failed to satisfy claims for material furnished by Bunn Electric Company and others. The latter notified the Investment Company. There-

upon, it instituted a proceeding in the Chancery Court, Adams County, Mississippi, against the contractors, the appellant Hartford Accident & Indemnity Company, and many unpaid materialmen. The bill prayed for a decree declaring the indemnity bond to be one for faithful performance of the building contract and subject to the rights and liabilities provided by § 3,* c. 128, Mississippi Laws of 1918 (§ 2598, Hemingway's Miss. Code 1927); also for judgments in favor of those who had furnished materials, etc.

The materialmen answered. Also by cross bill and interventions they set up their claims and asked for judgments against the contractors and appellant here, surety upon the bond. The Chancellor gave judgments in favor of the cross-complainants as prayed. The Indemnity Company appealed. The Supreme Court approved, upon the view that § 3, c. 128, Mississippi Laws 1918, applied and controlled the obligation of the bond. [132 So. 535.] It ordered that the materialmen severally "do have and recover of and from the appellant Hartford Accident & Indemnity Company, and of Aetna Casualty & Surety

* Chapter 128, Mississippi Laws of 1918. "Sec. 3. That when any contractor or subcontractor entering into a formal contract with any person, firm or corporation, for the construction of any building or work or the doing of any repairs, shall enter into a bond with such person, firm or corporation guaranteeing the faithful performance of such contract and containing such provisions and penalties as the parties thereto may insert therein, such bond shall also be subject to the additional obligations that such contractor or subcontractor, shall promptly make payments to all persons furnishing labor or material under said contract; and in the event such bond does not contain any such provisions for the payment of the claims of persons furnishing labor or material under said contract, such bond shall nevertheless inure to the benefit of such person furnishing labor or material under said contract, the same as if such stipulation had been incorporated in said bond; . . ."

Company, surety in the appeal bond," the sums found to be due them.

Upon petition of the Hartford Accident & Indemnity Company alone, the Chief Justice of Mississippi allowed an appeal to this Court, July 25, 1931. The Aetna Casualty & Surety Company did not join in the appeal; there was no summons and severance nor any notice equivalent thereto.

The assignment of errors challenges the validity, under the Federal Constitution, of § 3, c. 128, Mississippi Laws, above cited, as construed and applied.

December 4, 1931, the appellees entered a motion here to dismiss the appeal. They maintain that the judgments in the Mississippi Supreme Court against appellant and Aetna Casualty & Surety Company were joint; the latter company did not join in the appeal; there was no summons and severance; consequently this Court is without jurisdiction.

December 23, 1931, appellant and the Aetna Company asked that the latter be made party to the appeal and for proper amendments to that end.

The motion to amend must be overruled. The motion to dismiss is sustained.

The challenged judgment became final June 15, 1931, more than six months before the Aetna Company applied here for permission to become a party to the pending appeal. If this application and the accompanying motion to amend were granted, the practical effect would be to permit an appeal by a party to a judgment after the prescribed time had expired.

The statute (Act of Feb. 13, 1925, c. 229, § 8, 43 Stat. 940; U. S. C. A. Title 28, § 350) provides—"No writ of error, appeal, or writ of certiorari, intended to bring any judgment or decree before the Supreme Court for re-

view shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree, . . ." Passage of the three months' period extinguished the right to grant an appeal. *Rust Land Co.* v. *Jackson,* 250 U. S. 71, 76; *Toledo Scale Co.* v. *Computing Scale Co.,* 261 U. S. 399, 418.

The judgment is joint in form and no reason appears why either or both of the parties defendant therein might not have appealed to this Court and submitted claims of error for our determination. In matters of this kind we may not disregard the face of the record and treat the judgment as something other than it appears to be. So to do probably would lead to much confusion and uncertainty.

Haseltine v. *Central Bank*, 183 U. S. 130, 131—"We have frequently held that a judgment reversing that of the court below, and remanding the case for further proceedings, is not one to which a writ of error will lie. . . . While the judgment may dispose of the case as presented, it is impossible to anticipate its ultimate disposition. It may be voluntarily discontinued, or it may happen that the defeated party may amend his pleading by supplying some discovered defect, and go to trial upon new evidence. To determine whether, in a particular case, this may or may not be done, might involve an examination, not only of the record, but even of the evidence in the court of original jurisdiction, and lead to inquiries with regard to the actual final disposition of the case by the Supreme Court, which it might be difficult to answer. We have, therefore, always made the face of the judgment the test of its finality, and refused to inquire whether, in case of a new trial, the defeated party would stand in a position to make a better case. The plaintiffs in the case under consideration could have secured an immediate review by this court, if the

court as a part of its judgment of reversal had ordered the Circuit Court to dismiss their petition, when, under *Mower* v. *Fletcher* [114 U. S. 127], they might have sued out a writ of error at once."

Norfolk Turnpike Co. v. *Virginia,* 225 U. S. 264, 268, 269. The question was: To which state court should the writ of error run? This Court said—" The difference between the cases, however, is not one of principle, but solely depends upon the significance to be attributed to the particular form in which the action of the court below is manifested. In other words, the apparent want of harmony between the rulings of this court has undoubtedly arisen from the varying forms in which state courts have expressed their action in refusing to entertain an appeal from or to allow a writ of error to a lower court and the ever-present desire of this court to so shape its action as to give effect to the decisions of the courts of last resort of the several States on a subject peculiarly within their final cognizance. A like want of harmony resulted from similar conditions involved in determining what was a final judgment of a state court susceptible of being reviewed here, and the confusion which arose ultimately led to the ruling that the face of the judgment would be the criterion resorted to as the only available means of obviating the great risk of confusion which would inevitably arise from departing from the face of the record and deducing the principle of finality by a consideration of questions beyond the face of the alleged judgment or decree which was sought to be reviewed. The wisdom of that rule as applied to a question like the one before us is, we think, apparent by the statement which we have made concerning the rule in the *Crovo Case* [220 U. S. 364, 366] and the previous decisions."

See *Estis* v. *Trabue,* 128 U. S. 225, 229; *Schlosser* v. *Hemphill,* 198 U. S. 173, 175; *Louisiana Navigation Co.* v. *Oyster Commission,* 226 U. S. 99, 101; *Second Nat. Bank*

v. *First Nat. Bank,* 242 U. S. 600, 602; *Bruce* v. *Tobin,* 245 U. S. 18, 19; *Matthews* v. *Huwe,* 269 U. S. 262, 264.

Masterson v. *Herndon,* 10 Wall, 416, 417, held—"It is the established doctrine of this court that in cases at law, where the judgment is joint, all the parties against whom it is rendered must join in the writ of error; and in chancery cases, all the parties against whom a joint decree is rendered must join in the appeal, or they will be dismissed. There are two reasons for this: 1. That the successful party may be at liberty to proceed in the enforcement of his judgment or decree against the parties who do not desire to have it reviewed. 2. That the appellate tribunal shall not be required to decide a second or third time the same question on the same record. . . . One of the effects of this judgment of severance was to bar the party who refused to proceed, from prosecuting the same right in another action, as the defendant could not be harassed by two separate actions on a joint obligation, or on account of the same cause of action, it being joint in its nature."

In *Estis* v. *Trabue,* 128 U. S. 225, an attachment was levied upon certain personalty. After the return, Estis, Doan & Co. claimed the property, and they gave a forthcoming bond with two sureties. The challenged judgment ruled "that the plaintiffs recover of the claimants and C. F. Robinson and John W. Dillard, their sureties in their forthcoming bond, the sum of six thousand and three hundred dollars, together with the costs, etc." This Court held [p. 229]—"The judgment is distinctly one against 'the claimants, and C. F. Robinson and John W. Dillard, their sureties in their forthcoming bond,' jointly, for a definite sum of money. There is nothing distributive in the judgment, so that it can be regarded as containing a separate judgment against the claimants and another separate judgment against the sureties, or as containing a judgment against the sureties payable and en-

forceable only on a failure to recover the amount from the claimants; and execution is awarded against all of the parties jointly. In such a case the sureties have the right to a writ of error. *Ex parte Sawyer,* 21 Wall. 235, 240. It is well settled that all the parties against whom a judgment of this kind is entered must join in a writ of error, if any one of them takes out such writ; or else there must be a proper summons and severance, in order to allow of the prosecution of the writ by any less than the whole number of the defendants against whom the judgment is entered."

Mason v. *United States,* 136 U. S. 581. A postmaster and the sureties on his official bond were sued jointly. He and some of the sureties appeared and defended. The suit was abated as to two of the sureties, who had died. The others defaulted, and judgment of default went against them. On the trial there was a verdict for the plaintiff, whereupon, July 14, 1886, judgment was entered against the principal and all the sureties. The sureties who had appeared sued out a writ of error to this judgment, without joining the principal or the sureties who had made default, and the record came here. May 5, 1890, and after expiration of the two years within which the statute then permitted the suing out of such writs, the plaintiff in error moved to amend the writ by adding the omitted parties as complainants, or for a severance of the parties, and it was held that the motion must be denied and the writ of error be dismissed.

Hardee v. *Wilson,* 146 U. S. 179, 180, cited earlier cases and declared—"Undoubtedly the general rule is that all the parties defendant, where the decree is a joint one, must join in the appeal." See also *Davis* v. *Mercantile Trust Co.,* 152 U. S. 590; *Garcia* v. *Vela,* 216 U. S. 598, 601; Hughes' Federal Practice, § 6153.

The New York, 104 Fed. 561, (Court of Appeals, Sixth Circuit, October 13, 1900) is said to support the view that in the circumstances here presented summons and sever-

ance was unnecessary. The proceeding was a cause in admiralty. The surety upon a stipulation for release of the vessel did not join in the appeal. Upon motion to dismiss, the court said—"It is well settled that all parties against whom a joint judgment or decree is rendered must join in proceedings for review in an appellate court, or that it must appear that those who have not joined had notice of the application for the appeal or writ of error, and refused or neglected to join therein." But, it ruled that, though joint in form, the decree was separable in law and fact and, therefore, the surety was not a necessary party to the appeal.

Considering former opinions of this Court and the long established practice, we cannot accept as applicable to appeals here the doctrine approved in *The New York*. It is out of harmony with *Estis* v. *Trabue, supra,* and other cases cited above. We cannot undertake to explore the record to ascertain what issues were relied upon in courts below. So to do would lead to uncertainty and unfortunate confusion. We must accept the terms of the judgment as entered. As pointed out above, this is the approved practice when it becomes necessary to determine whether a judgment is final or to what court a writ of error should run. Like reasons apply and control here.

The appeal must be dismissed.

Dismissed.

BOWERS, EXECUTOR, *v.* LAWYERS MORTGAGE CO.

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

No. 355. Argued January 18, 19, 1932.—Decided March 14, 1932.

1. A corporation which paid the capital stock tax laid generally on domestic corporations by § 1000, Revenue Act of 1921, and which claims a refund upon the ground that it should have been taxed under the special provisions of § 246 relating to certain classes of

insurance companies, must show clearly that it is an insurance company within the meaning of the Act. P. 186.

2. The question whether a corporation chartered under and subject to state insurance laws was taxable under § 246 of the Revenue Act of 1921 as an "insurance company" is determined by the character of the business actually done in the tax years. P. 188.
3. Guaranties of payment of interest and principal of mortgage loans, *held* contracts of insurance. P. 189.
4. Of "premiums" and "investment income," the only classes of income covered by § 246, *supra*, the former is characteristic of the business of insurance and the latter is generally essential to it. P. 189.
5. The taxpayer, although organized under and subject to the New York insurance laws, with power to insure titles and loans on mortgage, confined itself mainly to a business which could also be carried on under the banking laws, viz., the business of lending money on bonds and mortgages, selling the bonds and mortgages with its guaranty, and using the purchase money to make additional loans. Its "premiums" covered agency and other services not generally performed under contracts of insurance, in addition to the charges for guaranties; the income from guaranties was less than one-third of its entire income and no "investment income" was shown. *Held:*

That as the element of insurance was no more than an incident of the lending business, the taxpayer was not an "insurance company" in the common understanding of that term and within the meaning of the Revenue Act, *supra*. P. 190.

50 F. (2d) 104, reversed.

CERTIORARI, 284 U. S. 606, to review the affirmance of a recovery on a claim for a refund of money paid as taxes. The action was against the executor of a former collector of internal revenue. Dist. Ct., 34 F. (2d) 504.

Mr. Claude R. Branch, with whom *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. J. Louis Monarch, J. P. Jackson, Francis H. Horan, Clarence M. Charest, E. H. Horton,* and *Walter W. Mahon* were on the brief, for petitioner.

Mr. Harry W. Forbes, with whom *Mr. John A. Garver* was on the brief, for respondent.

Mr. JUSTICE BUTLER delivered the opinion of the Court.

Respondent voluntarily paid the capital stock tax imposed on domestic corporations by § 1000, Revenue Act of 1921, 42 Stat. 294, for the fiscal years ending June 30 in 1922 and 1923. Thereafter it applied for refund on the ground that it was an insurance company taxable only under § 246, 42 Stat. 262. The claim was denied. It brought this action in the federal court for the southern district of New York to recover the amount so paid. The parties by written stipulation waived a jury and submitted the case on an agreed statement of facts. The district court gave judgment for respondent. 34 F. (2d) 504. The Circuit Court of Appeals affirmed. 50 F. (2d) 104.

The question is whether on the admitted facts respondent was an insurance company subject to the tax imposed by § 246 and therefore not taxable under §§ 230 and 1000.

Respondent was incorporated in 1893 under §170 (1) of Article V of the Insurance Law of New York [1] as the "Lawyers Mortgage Insurance Company" to examine titles, procure and furnish information in relation thereto and guarantee or insure bonds and mortgages and the owners of real estate against loss by reason of defective titles. In 1903, "insurance" was dropped from its name. In 1905, its certificate of incorporation was amended to include the making, and guarantee of the correctness, of searches for instruments, liens and charges affecting real estate and the guarantee of payment of bonds and mortgages.[2] In 1913,[3] the certificate of incorporation was further amended to include authority to insure payment of notes of individuals and partnerships and bonds and other evidences of indebtedness of corporations, when se-

[1] Laws 1890, c. 690.

[2] Laws 1904, c. 543.

[3] Laws 1913, c. 215. And see Laws 1911, c. 525.

cured by real estate mortgages, and to "invest in, purchase and sell, with such guarantee [of payment] or with guarantee only against loss by reason of defective title or incumbrances, bonds and mortgages, and notes of individuals or partnerships secured by mortgages . . . and bonds, notes, debentures and other evidences of indebtedness of solvent corporations secured by deed of trust or mortgages . . ." It was subject to supervision by the state superintendent of insurance and to the laws applicable to title and credit guaranty corporations and was required to file with such superintendent statements of its condition at the end of each year.

Respondent never has insured titles. In the tax years, it carried on business as follows: Upon receiving an application for a loan it caused an appraisal of the proposed real estate security to be made and procured a title insurance company to survey the property, make a report as to title and insure the same. The borrower, having executed and delivered a bond and mortgage to respondent, received from it the amount specified therein less charges for title insurance, survey, disbursements and recording tax and less a lending fee which included the charge for appraisal. Respondent sold the mortgage loans. On the sale of a bond and mortgage as a whole, it delivered an assignable contract called "policy of mortgage guarantee" to the purchaser. On the sale of part of a loan, it issued a participation certificate assignable by indorsement and registration on respondent's books and containing substantially the same provisions as the policy. By every such policy or certificate the purchaser appointed respondent his agent to collect the principal and interest, and the latter agreed to keep the title guaranteed and the premises insured against fire and to require the owner to pay taxes, assessments, water rates and fire insurance premiums. Respondent guaranteed payment of principal, as and when collected but in any event within 18 months following written demand made after maturity,

and payment of interest regularly at an agreed rate usually one-half of one per cent. less than that specified in the bond. Respondent kept the difference and called it "premium." Respondent also retained the interest accruing between the making of the loans and the sale of the securities. For renewals of loans it charged extension fees.

It issued some policies of guaranty as to mortgage loans which were not made or sold by it. While substantial in amount, that part of its business constituted but a small percentage of the total. It made no assignment or apportionment of assets to the different parts of its business, but used them indiscriminately in its different activities. It kept on hand sufficient bonds and mortgages to maintain the guaranty fund required by the Insurance Law. Corporations organized under the New York banking laws and subject to its banking department are authorized to make loans and sell bonds, mortgages and participations therein with their guaranties under the same general method of doing business as that of respondent. And at least two companies so organized and supervised are carrying on that business.

Pertinent provisions of the Act are printed in the margin.[4] The general rule declared by § 1000 (a) is broad

[4] "Sec. 1000 (a). . . . (1) Every domestic corporation shall pay annually a special excise . . . equivalent to $1 for each $1,000 of . . . its capital stock . . .

"(b) The taxes imposed by this section shall not apply . . . to any insurance company subject to the tax imposed by section . . . 246.

"Sec. 246 (a). That, in lieu of the taxes imposed by sections 230 and 1000, there shall be levied, collected and paid . . . upon the net income of every insurance company (other than a life or mutual insurance company) a tax as follows:

"(1) In the case of such a domestic insurance company the same percentage of its net income as is imposed upon other corporations by section 230; . . .

"(b) . . . (1) The term 'gross income' means the combined gross amount, earned during the taxable year, from investment income

enough to include respondent. But, if it was an insurance company taxable under § 246, it was excepted from the general rule by subsection (b). As such corporations constitute a special class, respondent must be held liable for the capital stock tax unless clearly shown to have been an insurance company within the meaning of the Act. *Bank of Commerce* v. *Tennessee,* 161 U. S. 134, 146. *Heiner* v. *Colonial Trust Co.,* 275 U. S. 232, 235. *Choteau* v. *Burnet,* 283 U. S. 691, 696. The Act does not define "insurance company" or definitely indicate criteria by which corporations meant to be so specially dealt with may with certainty be identified. General definition is not necessary in order to determine whether, having regard to the purpose of the classification and the considerations on which it probably was made, respondent's business brought it within the special class.

Under § 230, Revenue Act of 1918, 40 Stat. 1075, insurance companies were taxed as were other business corporations. The applicable definition of gross income was comprehensive and included gains, profits and income derived from any source whatever. § 213, p. 1065. It was substantially the same in the 1921 Act. § 213, 42 Stat. 237. But § 246 of the latter Act dealt with certain classes of insurance companies separately and defined

---

and from underwriting income as provided in this subdivision, computed on the basis of the underwriting and investment exhibit of the annual statement approved by the National Convention of Insurance Commissioners;

"(2) The term 'net income' means the gross income as defined in paragraph (1) of this subdivision less the deductions allowed by section 247;

"(3) The term 'investment income' means the gross amount of income earned during the taxable year from interest, dividends and rents . . .

"(4) The term 'underwriting income' means the premiums earned on insurance contracts during the taxable year less losses incurred and expenses incurred; . . ."

gross income to be "investment income," *i. e.*, interest, dividends and rents, and "underwriting income," *i. e.*, premiums earned less losses and expenses. Capital gains and income from other sources were omitted.

A statement showing respondent's lending fees, extension fees, interest and premiums follows:

Year	*Lending Fees*	*Extension Fees*	*Interest*	*Premiums* [5]
1922.....	$655,283.70	$214,303.56	$372,795.12	$619,986.38
1923.....	990,855.37	73,745.71	426,842.31	750,803.21

While name, charter powers, and subjection to state insurance laws have significance as to the business which a corporation is authorized and intends to carry on, the character of the business actually done in the tax years determines whether it was taxable as an insurance company. *United States* v. *Phellis*, 257 U. S. 156, 168. *Weiss* v. *Stearn*, 265 U. S. 242, 254. Evidently that was the basis of the classification. Congress did not intend to exempt from the capital stock tax under § 1000 (a) and the income tax under § 230 corporations not doing insurance business even though organized under and subject to state insurance laws.

The dropping of "insurance" from respondent's name and the extension of charter powers to the purchase and sale of mortgage loans suggest purpose to carry on an investment rather than an insurance business. Respondent did not consider itself an insurance company taxable under § 246 until after it had twice made and paid capital stock taxes under § 1000(a) and income taxes under § 230. The lending of money on real-estate security, the sale of bonds and mortgages given by borrowers and use of the money received from purchasers to make addi-

[5] These amounts are derived from interest collected by respondent from borrowers in excess of the rates payable to purchasers under the contract of sale and from charges on policies covering mortgage loans not made or sold by it.

tional loans similarly secured constituted its principal business. Undoubtedly the guaranties contained in the policies and participation certificates were in legal effect contracts of insurance. *Tebbets* v. *Mercantile Credit Guarantee Co.*, 73 Fed. 95, 97. *Guarantee Co.* v. *Mechanics' Bank & Trust Co.*, 80 Fed. 766, 772. *State ex rel. Peach Co.* v. *Bonding & Surety Co.*, 279 Mo. 535, 553, 556; 215 S. W. 20. *People* v. *Potts*, 264 Ill. 522, 527; 106 N. E. 524. *People* v. *Rose*, 174 Ill. 310; 51 N. E. 246. *Commonwealth* v. *Wetherbee*, 105 Mass. 149, 160. *Shakman* v. *United States Credit System Co.*, 92 Wis. 366, 374; 66 N. W. 528. *Young* v. *American Bonding Co.*, 228 Pa. 373, 380; 77 Atl. 623. These guaranties furnished purchasers additional security and were calculated to make the loans desirable as investments and readily saleable at a profit.

The lending fees, extension fees and accrued interest appertain to the business of lending money rather than to insurance, and may not reasonably be attributed to the subordinate element of guaranty in respondent's mortgage loan business. The so-called premiums amount to about one-third of total income, but they cover agency and other services which generally are not performed under contracts of insurance. There is no showing that these amounts do not include profits arising from such sales or that they are justly chargeable or were intended to apply only to the risks covered. Respondent has not established any basis upon which the interest so retained may reasonably be charged or apportioned to the element of insurance involved in such transactions. And the stipulation in respect of policies issued on loans not made by respondent is too vague to be given weight.

"Premiums" are characteristic of the business of insurance, and the creation of "investment income" is generally, if not necessarily, essential to it. Section 246 does not cover any other class of income. It is not shown that

respondent had any investment income within that section. Evidently its guaranties produced less than one-third of its income.

Respondent's business is one which may be and is in fact carried on by corporations organized under the New York banking laws. The element of insurance may not properly be regarded as more than an incident thereof; it certainly is not sufficient to make respondent an "insurance company" within the meaning of that phrase as it is commonly used and understood. There is no warrant for holding that Congress intended to use the expression in any other sense. *Miller* v. *Robertson,* 266 U. S. 243, 250. *Sacramento Navigation Co.* v. *Salz,* 273 U. S. 326, 329–330.

This case is not, as respondent contends, ruled against the Government by *United States* v. *Loan & Bldg. Co.,* 278 U. S. 55. The opinion in that case shows that loan and building associations exempt from taxes under Revenue Acts of 1918 and 1921 are not strictly confined to the raising of funds by subscription of members, for the making of advances to members to enable them to build or buy houses of their own; that the outside operations of the association there considered were not so related to mere money-making as to constitute a gross abuse of the name, and that the receiving of deposits on interest and making of loans to non-members did not disqualify it for the exemption.

In the case before us, respondent's charter authority extended not only to the business of insurance but also to other lines, including that of investment, with or without guaranties as it might choose. As above shown, the element of guaranty involved in its transactions in the tax years was not sufficient to make it an insurance company.

Judgment reversed.

UNITED STATES *v.* HOME TITLE INSURANCE CO.

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

No. 356. Argued January 19, 1932.—Decided March 14, 1932.

1. The guaranty of payment of principal and interest of mortgage loans is insurance. *Bowers* v. *Lawyers Mortgage Co., ante,* p. 182. P. 195.
2. A corporation, organized under the insurance laws of New York, and deriving more than three-fourths of its income from insurance of titles and guaranties of mortgages sold by itself and from services incident to that business, including title examinations and appraisals,—*held* an "insurance company" within the meaning of that term as commonly understood and as used in § 246 of the Revenue Acts of 1921 and 1924. Cf. *Bowers* v. *Lawyers Mortgage Co., supra.* P. 195.

50 F. (2d) 107, affirmed.

CERTIORARI, 284 U. S. 606, to review a judgment reversing a judgment for the United States, 41 F. (2d) 793, in an action against it to recover money paid under protest as capital stock taxes.

Mr. Claude R. Branch, with whom *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. J. Louis Monarch, J. P. Jackson, Francis H. Horan, Clarence M. Charest, E. H. Horton,* and *Walter W. Mahon* were on the brief, for the United States.

Mr. Hugh Satterlee, with whom *Mr. I. Herman Sher* was on the brief, for respondent.

MR. JUSTICE BUTLER delivered the opinion of the Court.

Respondent filed returns in respect of capital stock taxes for the years ending June 30 in 1923, 1924 and 1925 under § 1000 of the Revenue Act of 1921 and § 700 of the Revenue Act of 1924.[1] The first two reported taxes

[1] Section 1000 of the Act of 1921 is the same as § 700 of the Act of 1924. Section 246 is the same in both Acts. Pertinent provisions of

due. In the other, respondent claimed to be an insurance company taxable under § 246, and consequently exempt from the capital stock tax. It made returns and paid income taxes for the calendar years 1921 to 1925 inclusive. In February, 1926, respondent paid under protest the capital stock taxes. It made application for refund and, that being denied, brought this action in the district court for eastern New York to recover the amounts so exacted. The parties submitted the case on an agreed statement of facts. The court gave judgment for the United States. 41 F. (2d) 793. The Circuit Court of Appeals reversed. 50 F. (2d) 107.

The question is whether during the periods for which the capital stock taxes were paid, respondent was an insurance company taxable only under § 246.

Respondent was organized in 1906 under Article V of the New York Insurance Law. It was formed to examine and guarantee title to real estate, to lend money on real estate mortgages and to guarantee such mortgages as to payment of principal and interest and to do the work generally of a title insurance company. It is under the supervision of the state superintendent of insurance, subject to the laws applicable to title and credit guaranty corporations, and maintains the required guaranty fund.

Its business has always consisted of issuing two kinds of contracts: (1) those in which it merely guarantees title and (2) those in which it guarantees (a) title to real estate covered by a mortgage and (b) payment of principal and interest of the debt. Preliminary to the issue of title insurance policies first mentioned, respondent prepared abstracts and made examination of the title. Its charges were based upon a scale dependent upon the amounts of the policies, and included fees for examina-

---

both are printed in the margin of our opinion in *Bowers* v. *Lawyers Mortgage Co., ante,* p. 182, and need not be repeated here.

tions, searches and other service incident to the transaction. Policies guaranteeing both title and payment of such mortgage debts were issued substantially as follows: When respondent received an application for a loan, it made an appraisal of the property and an examination of the title. Upon its approval of the application, it received from the borrower his bond and mortgage and paid him the amount of the bond, less charges for services incidental to title insurance and also for inspection and appraisal of the property. The fee covering title insurance was made a condition of every loan. Respondent did not charge any lending fee.

It sold the loans at face value and delivered to the purchaser of each a mortgage guaranty or, in case of the sale of part of a loan, a participation certificate. By every such guaranty or certificate, the purchaser appointed respondent his agent to collect principal and interest of the loan, and the latter guaranteed (1) the mortgage to be a valid first lien upon a good and marketable title in fee, (2) payment of principal when collected and in any event within 12 months after maturity and (3) payment of interest at a rate usually one-half of one per cent. less than that specified in the bond. The difference was called premium. Generally, about two months elapsed between the making of loans and their sale. The interest for that period was retained by respondent and constituted a part of its gross income.

It never held nor sold mortgages that were not acquired and guaranteed as above stated and never guaranteed other than those controlled by it. Its expenses were not assigned to its different classes of business, and its assets were used indiscriminately in connection with all its activities. Corporations organized under New York banking laws and subject to the supervision of the banking department are authorized to make mortgage loans and sell them with guaranties such as those given by respondent,

and from 1921 to 1925 at least two companies thus organized and supervised were engaged in that business.

Respondent's policies merely guaranteeing title amounted to more than six times its mortgage guaranties. A tabular statement in the margin makes the comparison.[2] Its title insurance, not connected with mortgage guaranties, outstanding in each of the five years amounted to more than $100,000,000. Another table [3] states its gross income from sources other than interest, rents, dividends and profits on sale of bonds, and classifies such income so as to show: (1) the difference between interest received and that guaranteed by respondent; (2) fees and charges attributable to mortgage guaranties; (3) fees and charges attributable to title insurance where respondent did not

[2] Column 1 shows the amount of policies merely guaranteeing titles and column 2 shows the amount of mortgage guaranties.

	1	2
1921	$29,090,650	$4,359,346
1922	46,050,180	7,319,246
1923	67,138,820	7,989,950
1924	69,442,530	11,341,239
1925	87,965,580	13,214,092

[3]

	1921	1922	1923	1924	1925
(1) Mortgage guaranty premiums	$90,449.14	$105,750.03	$134,349.66	$175,641.39	$227,869.93
(2) Inspection and appraisal fees	88,679.75	139,830.45	115,658.86	133,549.10	149,830.35
(3) Title insurance fees where no mortgage guaranty	270,030.79	406,019.93	565,155.86	576,771.36	714,949.06
(4) Title insurance fees where mortgage guaranty also	131,243.75	206,945.45	171,172.14	197,649.23	221,745.05
(5) Mortgage renewals	28,940.83	30,123.35	30,557.75	24,745.35	44,779.75
(6) Conveyancing fees	13,544.25	26,008.93	27,779.00	33,668.40	35,340.67
(7) Charges for searches	3,693.77	6,497.46	7,945.91	11,398.30	14,749.09
(8) Recording fees	3,316.28	4,094.43	6,723.69	6,133.14	9,252.70
(9) Charges for surveys	392.45	326.80	569.20	1,339.65	1,993.25
Total	630,291.01	925,596.83	1,059,912.07	1,160,895.92	1,420,509.85
Other income	75,167.80	103,223.94	156,721.05	209,926.81	240,544.43
Total income	705,458.81	1,028,820.77	1,216,633.12	1,370,822.73	1,661,054.28

make nor guarantee mortgages or loans; (4) compensation for guaranteeing mortgages to be first liens upon titles in fee; (5) income from mortgage renewals; etc.

The guaranty of payment of the principal and interest of mortgage loans constitutes insurance. *Bowers* v. *Lawyers Mortgage Co., ante,* p. 182. The amounts received as compensation for insuring title, for guaranteeing that mortgages are first liens and for guaranteeing payment constitute the larger part of respondent's income. And, when there are added the fees and charges for examination of title, appraisals, and other services incident to its insurance business, the total properly assignable to that business amounts to more than 75 per cent. of all respondent's income. Undeniably insurance is its principal business. Indeed, it does not appear that any substantial part of its transactions was not connected with or the outgrowth of insurance. The admitted facts clearly show that in the tax years above mentioned respondent was an " insurance company " within the meaning of that phrase as commonly understood and as used in the Revenue Acts of 1921 and 1924. It was taxable under § 246 and therefore exempt from capital stock taxes.

Judgment affirmed.

STEVENS *v.* THE WHITE CITY.

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

No. 217. Argued January 6, 1932.—Decided March 14, 1932.

1. An ordinary towage contract does not create a bailment, but surrenders to the tug only such control over the tow as is necessary for the performance of the tug's engagement. P. 200.
2. This is so even where the owner of the tow has no one aboard her, or where his boatman, on board at the beginning, leaves before the voyage is ended. P. 201.

3. A suit by the owner of a tow against her tug to recover for an injury to the tow caused by negligence on the part of the tug is a suit *ex delicto* and not *ex contractu.* P. 201.
4. The tug is not liable as an insurer or as a common carrier. Its duty is to exercise such reasonable care and maritime skill as prudent navigators employ for the performance of similar service. P. 202.
5. In a suit against the tug for injury to the tow, the burden is upon the tow's owner to show that the injury was caused by a breach of that duty. *Id.*
6. The mere fact that the tow was in good order when received by the tug and in damaged condition when delivered by it does not raise a presumption of negligence against the tug. *Id.*

   So *held* where the injury occurred while no one was with the flotilla save the owners of the tug, who could not explain when, how, or where the injury happened, and where there was nothing about the injury itself to warrant an inference that it resulted from fault or negligence on the part of the tug.
7. The burden of proving negligence in such a case is not satisfied by evidence which leaves the time, place, and cause of the injury in the realm of conjecture, and which is as consistent with an hypothesis that the tug was not negligent as with one that it was. P. 203.
8. The party causing unnecessary parts of the record to be printed may be charged with the cost of printing them, under Rule 13, par. 9. P. 204.

48 F. (2d) 557, affirmed.

CERTIORARI, 284 U. S. 602, to review the reversal of a decree in admiralty awarding damages against a tug for injury to her tow. For opinion of the District Court see 35 F. (2d) 1006.

Mr. Neil P. Cullom, with whom *Mr. William F. Purdy* was on the brief, for petitioner.

A tug performing a simple towage contract is a bailee for hire, particularly where the tow is manned only by a servant or bargee, who is not present during the period when the injury to the tow takes place. *Maryland Transp. Co.* v. *Dempsey,* 279 Fed. 94; *The Margaret,* 94 U. S. 494; *The Dayton,* 120 U. S. 337; *Clark* v. *United*

States, 95 U. S. 539; *Sun Printing Assn.* v. *Moore,* 183 U. S. 642; *Doherty* v. *Pennsylvania R. Co.,* 269 Fed. 959, 962; *McWilliams Bros.* v. *Director General,* 271 Fed. 931, 932; Hughes on Admiralty, 2nd ed., p. 129; 38 Cyc., Towage, p. 563; *Brinton and Drifting Barges,* 48 F. (2d) 559; *Washington ex rel. Lumber Co.* v. *Kuykendall,* 275 U. S. 207; *The Webb,* 14 Wall. 406 (dist.); *Transportation Line* v. *Hope,* 95 U. S. 297 (dist.); *Alexander* v. *Greene,* 3 Hill (N. Y.) 9; *The Princeton,* 19 Fed. Cas. 11,433, p. 1342; *Bust* v. *Cornell,* 24 Fed. 188; *The D. Newcomb,* 16 Fed. 274; *Sturgis* v. *Boyer,* 24 How. 110; *The Delaware,* 43 F. (2d) 852; *The Genesee,* 139 Fed. 549; *The Seven Sons,* 29 Fed. 543; *Newport News S. B. & D. D. Co.,* 34 Fed. (2d) 100.

Where a bailee for hire receives property in good condition and delivers it damaged, a *prima facie* case of negligence is made, which casts upon the bailee the burden of showing the circumstances of the damage. *Southern Ry. Co.* v. *Prescott,* 240 U. S. 632, 640; *Cummings* v. *Pennsylvania R. Co.,* 45 F. (2d) 153; *Wintringham* v. *Hayes,* 144 N. Y. 5; *Strauss* v. *Canadian Pacific Ry. Co.,* 254 N. Y. 407; *Oppenheim* v. *Kridel,* 236 N. Y. 156; *Susquehanna Coal Co.* v. *Eastern Dredging Co.,* 200 Fed. 317; *Gilchrist Transp. Co.* v. *Great Lakes Towing Co.,* 237 Fed. 432; *The Mason,* 249 Fed. 718; *Vessel Owners Towing* v. *Wilsa,* 63 Fed. 626; *The Delaware,* 43 F. (2d) 852.

There was ample proof of negligence on the part of the owners of the *White City* as well as facts from which the court could reasonably infer that the damage was caused by a negligent act.

Mr. Chauncey I. Clark, with whom *Messrs. Florence J. Sullivan, Sanford H. Cohen* and *Frederic Conger* were on the brief, for respondent.

Mr. Justice Butler delivered the opinion of the Court.

Petitioner, the assignee of the owner of a forty-five foot motorboat, the *Drifter,* filed a libel in admiralty in

the southern district of New York against respondent to recover for injury sustained by the former while being towed by the latter. The court held that the tug was a bailee of the tow and that, it having been shown by the evidence that the former received the latter in good condition and delivered it damaged without being able to account for the injury, there was a presumption of negligence on the part of the tug and that she must be held liable. 35 F. (2d) 1006. The Circuit Court of Appeals held the towage contract did not put the tow in bail to the tug and that the mere fact of injury created no presumption of negligence, and reversed the decree. 48 F. (2d) 557.

Petitioner maintains that the tug was bailee for hire and that, by proving the tug received the tow in good order and delivered it in a damaged condition, he made a prima facie case of negligence which cast upon such bailee the burden of showing the circumstances surrounding the damage. And he insists that, even if the presumption did not so arise, there was ample proof of negligence on the part of the owners of respondent.

The facts supported by the evidence, so far as they are material to these contentions, may be stated briefly as follows:

October 13, 1925, Roos, an employee of the Consolidated Shipbuilding Corporation, which had just completed the *Drifter,* made an agreement with Alexander Simpson for its towage from the builder's plant at Morris Heights in New York City to Port Newark alongside the steamer *Suscalanco* on which it was to be shipped. Later, Simpson told Roos that the *White City,* an excursion boat owned by Herbert Simpson and one Rhodes, would do the towing. Roos told Simpson that the boat should be at the plant at six o'clock in the morning. Her owners brought her about eight and were the only persons aboard at any time here involved. Employees of the builder as-

sisted in attaching the *Drifter,* then in good condition, to the *White City* by a forty foot rope. A cradle in which the former was to be stowed on the deck of the *Suscalanco* was attached by another rope about the same length to the stern of the *Drifter.* The builder put an employee, one Weston, on the *Drifter,* merely, as petitioner maintains, to tend lines when she was brought alongside the *Suscalanco.*

Respondent took the tow down the East River; the cradle became detached at Hell Gate; reattaching it caused delay of fifteen or twenty minutes, but no damage occurred to the *Drifter* at that time. Respondent continued down the river, across the Upper Bay, through Kill van Kull and into Newark Bay, where, about five o'clock in the afternoon, she sighted the *Suscalanco* going out to sea. Then the tug went to Fisher's Dock in Bayonne, and her owners having learned by telephone that the shipment could be made on a later steamer, remained there over night. The *Drifter* was tied alongside the pier with fenders to prevent injury. Weston, with the acquiescence of the owners of the tug, went home for the night but did not return. Simpson testified that on the morning following he went aboard the *Drifter* to steer her while she and the cradle were being towed to destination; that before leaving the dock he inspected her and that she was in the same condition as when received. When they arrived at Port Newark, about eight in the morning, the *Drifter's* hull planking was broken or damaged amidships on the starboard side just above the water line causing a dish-shaped depression about three-quarters of an inch deep, roughly circular and about twelve or fourteen inches in diameter. At the trial it was suggested by way of explanation that the hole might have been made by a piece of driftwood, of which there was much in the bay. But there was no evidence to show, and the trial court found that neither Rhodes nor Simp-

son could explain, when, how or where the damage happened.

Decisions of this Court show that under a towage contract the tug is not a bailee of the vessel in tow or its cargo. And it is established here and by numerous rulings of lower federal courts that evidence showing a tug's receipt of a tow in good order and delivery in damaged condition raises no presumption of negligence.

The supplying of power by a vessel, usually one propelled by steam, to tow or draw another is towage. Many vessels, such as barges and canal boats, have no power of their own and are built with a view to receiving their propelling force from other sources. And vessels having motive power often employ auxiliary power to assist them in moving about harbors and docks. Benedict on Admiralty, 5th ed., § 100.

The tug does not have exclusive control over the tow but only so far as is necessary to enable the tug and those in charge of her to fulfill the engagement. They do not have control such as belongs to common carriers and other bailees. They have no authority over the master or hands of the towed vessel beyond such as is required to govern the movement of the flotilla. In all other respects and for all other purposes the vessel in tow, its cargo and crew, remain under the authority of its master; and, in emergency the duty is upon him to determine what shall be done for the safety of his vessel and her cargo. In all such cases the right of decision belongs to the master of the tow and not to the master of the tug. A contract merely for towage does not require or contemplate such a delivery as is ordinarily deemed essential to bailment. *The Steamer Webb,* 14 Wall. 406, 414. *Transportation Line* v. *Hope,* 95 U. S. 297, 299. *The L. P. Dayton,* 120 U. S. 337, 351. *The Propeller Burlington,* 137 U. S. 386, 391. *The J. P. Donaldson,* 167 U. S. 599, 603, 604. *Alexander* v. *Greene,* 3 Hill 1, 19. *Wells* v. *Steam Navigation*

Co., 2 Comstock 204, 208. Cf. *American Ry. Express Co.* v. *American Trust Co.,* 47 F. (2d) 16, 18. *Bertig* v. *Norman,* 101 Ark. 75, 81; 141 S. W. 201; *Sawyer* v. *Old Lowell National Bank,* 230 Mass. 342, 346; 119 N. E. 825; *Blondell* v. *Consol. Gas Co.,* 89 Md. 732, 746; 43 Atl. 817; *Gilson* v. *Pennsylvania R. Co.,* 86 N. J. L. 446, 449; 92 Atl. 59. *Fletcher* v. *Ingram,* 46 Wis. 191, 202; 50 N. W. 424. The owner of the *Drifter* did not surrender to respondent any right of control that does not pass in virtue of a contract merely for towage. The fact that the man put aboard by the builder did not remain to the end, or that the owner did not choose to keep some one on the tow, is immaterial.

Petitioner's claim against respondent is not for breach of contract but one in tort. His allegations and proof in respect of the agreement between the parties were made by way of inducement to his real grievance, which was the damage to the *Drifter* claimed to have been caused by negligence of the respondent. It has long been settled that suit by the owner of a tow against her tug to recover for an injury to the tow caused by negligence on the part of the tug is a suit *ex delicto* and not *ex contractu. The Quickstep,* 9 Wall. 665, 670. *The Steamer Syracuse,* 12 Wall. 167, 171. *The J. P. Donaldson, supra,* 603. *The John G. Stevens,* 170 U. S. 113, 125. *The Brooklyn,* Fed. Cas. No. 1,938; 2 Ben. 547. *The Deer,* Fed. Cas. No. 3,737; 4 Ben. 352. *The Arturo,* 6 Fed. 308. In the case last cited Judge Lowell said (p. 312): "These cases of tow against tug are, in form and fact, very like collision cases. The contract gives rise to duties very closely resembling those which one vessel owes to others which it may meet." In *The John G. Stevens, supra,* this court cited *The Arturo,* approvingly and said (p. 126): "The essential likeness between the ordinary case of a collision between two ships, and the liability of a tug to her tow for damages caused to the latter by a collision with a

third vessel, is exemplified by the familiar practice in admiralty . . . which allows the owner of a tow, injured by a collision caused by the conduct of her tug and of another vessel, to sue both in one libel, and to recover against either or both, according to the proof at the hearing." And the rule that the lien for damages occasioned by negligent towage takes precedence of liens for supplies previously furnished the offending vessel rests upon the ground that the claim, like those in case of collision, is one in tort arising out of duty imposed by law and independently of any contract or consideration for the towage. *The John G. Stevens, supra,* 126. *The Arturo, supra.*

While respondent was not an insurer or liable as a common carrier, it owed to the owner of the *Drifter* the duty to exercise such reasonable care and maritime skill as prudent navigators employ for the performance of similar service. The burden was upon petitioner to show that the loss for which he sought recovery was caused by a breach of that duty. The mere fact that the *Drifter* was in good order when received by respondent and in damaged condition when delivered does not raise any presumption of fault. As said by this court in *The L. P. Dayton, supra,* (p. 351): "To hold otherwise would require that in every case, as between the tow and its tug, the latter should be required affirmatively to establish its defence against the presumption of its negligence. . . . [p. 352.] Neither is it material that the facts of the case and the causes of the collision are peculiarly within the knowledge of the respondents. It is alleged in the present case, as one of the inconveniences of the libellant's situation, that it would be compelled, in order to establish the allegations of the libel, to resort to the testimony of those navigating the respective tugs, and thus call witnesses interested to exonerate the vessel to which they were attached. We are not aware, however, of any ground on which such an inconvenience can affect the rule of law which governs

the rights of the parties." See *The Steamer Webb, supra; Transportation Line* v. *Hope, supra.* The rule has been applied in numerous cases in the lower federal courts.[1] There is nothing about the injury itself to warrant any inference that it resulted from fault or negligence on the part of respondent.

There is no support for petitioner's contention that, without regard to the asserted presumption, the evidence shows that the injury to the *Drifter* was caused by negligence of respondent. The facts to which he refers are these: The tug arrived at the plant two hours late; respondent remained over night at Bayonne without authority and left the *Drifter* without a watchman; on the following morning, without effort to obtain the services of Weston or another, the tug proceeded to Port Newark. He calls attention to the absence of evidence further to show how the *Drifter* was moored at Bayonne and whether she was lighted during the night. On that basis he argues that it is possible that the injury occurred during the night; that the *Drifter* "might have been rammed by some other boat or if the lines were not slackened and the tide receded she might have been hanging on the side of the dock as the result whereof, a pile might have stove a hole in her side." The burden of proof as to respondent's negligence remained upon petitioner throughout the trial. His contentions clearly show that the evidence leaves the time, place and cause of the injury

[1] *Wilson* v. *Sibley* (S. D. Ala.) 36 Fed. 379. *The A. R. Robinson* (Wash.) 57 Fed. 667. *The W. H. Simpson* (C. C. A.) 80 Fed. 153. *Pedersen* v. *Spreckles* (C. C. A. 9) 87 Fed. 938, 944–5. *El Rio* (S. D. Ala.) 162 Fed. 567. *The Kunkle Bros.* (N. D. Ohio) 211 Fed. 540, 543. *The R. B. Little* (C. C. A. 2) 215 Fed. 87. *The Atlantic City* (C. C. A. 4) 241 Fed. 62, 64. *The Clarence L. Blakeslee* (C. C. A. 2) 243 Fed. 365. *Aldrich* v. *Pennsylvania R. Co.* (C. C. A. 2) 255 Fed. 330. *The Greenwich* (C. C. A. 2) 270 Fed. 42. *The W. H. Baldwin* (C. C. A. 2) 271 Fed. 411, 513. *The Ashwaubemie* (C. C. A. 4) 3 F. (2d) 782. *The Buttercup* (E. D. La.) 8 F. (2d) 281. *Southgate* v. *Eastern Transp. Co.* (C. C. A. 4) 21 F. (2d) 47, 49.

in the realm of conjecture. The evidence is consistent with an hypothesis that the tug was not negligent and with one that it was, and therefore has no tendency to establish either. *Gunning* v. *Cooley,* 281 U. S. 90, 94, and cases cited.

We find that respondent caused unnecessary parts of the record to be printed amounting in all to 186 pages. This is admitted in a statement filed by counsel for respondent. The cost of such printing will be charged to respondent. Rule 13, par. 9.

Decree affirmed.

D. GINSBERG & SONS, INC. *v.* POPKIN.

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

No. 429. Argued February 16, 1932.—Decided March 14, 1932.

A court of bankruptcy has no authority under § 2 (15) of the Bankruptcy Act or § 261 of the Judicial Code to issue a writ of *ne exeat* against an absconding officer of a bankrupt corporation to the end that he may be examined in the bankruptcy proceedings. P. 206. 50 F. (2d) 693, affirmed.

CERTIORARI, 284 U. S. 609, to review the reversal of an order sustaining the issuance of a writ of *ne exeat* in bankruptcy proceedings. Dist. Ct., 47 F. (2d) 276.

Mr. Leo J. Linder, with whom *Mr. Raymond J. Mawhinney* was on the brief, for petitioner.

Mr. Louis Jersawit for respondent.

MR. JUSTICE BUTLER delivered the opinion of the Court.

The district court in the eastern district of New York adjudged the Foster Construction Corporation a bankrupt, and in June, 1930, a trustee was appointed. Respondent was president and petitioner was a creditor of

the corporation. December 4, 1930, petitioner presented to one of the judges in the southern district of New York a petition, the brief substance of which follows:

In 1929, about the time the petition in bankruptcy was filed, respondent withdrew, and has failed to account for, a large amount of cash belonging to the corporation. He fled to Canada in order to avoid examination and did not return until January, 1930. About that time the court in the eastern district issued an order of *ne exeat* against him, but he fled again and later returned to the borough of Manhattan, where he was then concealing himself with the intention of immediately leaving the United States to avoid examination. The petition stated that respondent's testimony would be in aid of creditors and that, had he been requested so to do, the trustee would have refused to apply for his arrest, and that therefore the petitioner made the application for an ancillary order of examination and arrest in aid of itself and other creditors. It was shown that a judge in the eastern district authorized petitioner to apply for this order in the southern district.

On these representations the judge made an order of examination and arrest. And on the same day he signed another order, under the caption "Writ Ne Exeat," commanding the marshal to apprehend respondent, take him into custody and bring him before the judge for examination " or, at his option, cause him to give sufficient bail or security in the sum of $10,000 . . . that he the said Joseph Popkin will not depart from or go . . . beyond the territorial jurisdiction of this court without its leave, and will at all times and in all manner, respect and things, obey and comply with the lawful orders and decrees of the court herein for his examination, in default of which he is to be lodged in New York County Jail . . . ." In obedience to that command the marshal arrested respondent. He gave the prescribed bail and

the clerk released him from custody. Then respondent applied to a judge in the southern district to have the order vacated on the ground that it was made without jurisdiction. The motion was denied. 47 F. (2d) 276. The Circuit Court of Appeals reversed. 50 F. (2d) 693.

The petitioner contends that clause (15) of § 2 empowers district judges in bankruptcy cases, upon the application of a creditor, to issue orders directing the arrest of officers of bankrupt corporations.

The words of § 2 relied on are: "The courts of bankruptcy . . . are hereby invested . . . with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings . . . to . . . (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this Act."

Clause (15) is to be construed having regard to the other parts of § 2, to the provisions of the Act in respect of examinations concerning the business and property of bankrupts, and to § 261 of the Judicial Code relating to writs of *ne exeat*.

Section 2 creates courts of bankruptcy and in general terms, by twenty separately numbered clauses, confers upon them authority in respect of at least as many matters relating to bankruptcies. By clause (13) bankruptcy courts are empowered by means of fine or imprisonment to enforce obedience by bankrupts and others to all lawful orders, and by clause (16) to punish persons for contempts committed before referees. Section 7a (9) makes it the duty of the bankrupt, when present at the first meeting of creditors and at such other times as the court shall order, to submit to examination concerning his business, acts and property. Section 21a empowers the court upon the application of a creditor to require any designated person, including the bankrupt, to appear for simi-

lar examination. Section 9a exempts the bankrupt from arrest upon civil process issued from a court of bankruptcy except for contempt or disobedience of its lawful orders. And § 9b specifically governs arrests and detention of bankrupts about to leave the district in order to avoid examination. It is as follows:

"The judge may, at any time after the filing of a petition by or against a person, and before the expiration of one month after the qualification of the trustee, upon satisfactory proof by the affidavits of at least two persons that such bankrupt is about to leave the district in which he resides or has his principal place of business to avoid examination, and that his departure will defeat the proceedings in bankruptcy, issue a warrant to the marshal, directing him to bring such bankrupt forthwith before the court for examination. If upon hearing the evidence of the parties it shall appear to the court or a judge thereof that the allegations are true and that it is necessary, he shall order such marshal to keep such bankrupt in custody not exceeding ten days, but not imprison him, until he shall be examined and released or give bail conditioned for his appearance for examination, from time to time, not exceeding in all ten days, as required by the court, and for his obedience to all lawful orders made in reference thereto."

Section 261 of the Judicial Code provides that writs of *ne exeat* may be granted by any district judge in cases where they might be granted by the district court of which he is a judge, and declares: "But no writ of ne exeat shall be granted unless a suit in equity is commenced, and satisfactory proof is made to the court or judge granting the same that the defendant designs quickly to depart from the United States."

In view of the general exemption of bankrupts from arrest under § 9a and the carefully guarded exception made by § 9b as to those about to leave the district to

avoid examination, there is no support for petitioner's contention that the general language of § 2 (15) is a limitation upon § 9 (b) or grants additional authority in respect of arrests of bankrupts. General language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment. *United States* v. *Chase,* 135 U. S. 255, 260. Specific terms prevail over the general in the same or another statute which otherwise might be controlling. *Kepner* v. *United States,* 195 U. S. 100, 125. *In re Hassenbusch,* 108 Fed. 38. *United States* v. *Peters,* 166 Fed. 613, 615. The construction contended for would violate the cardinal rule that, if possible, effect shall be given to every clause and part of a statute. *Market Co.* v. *Hoffman,* 101 U. S. 112, 115. *Ex parte Public National Bank,* 278 U. S. 101, 104.

Assuming that under § 2 (15) bankruptcy courts are empowered to allow writs of *ne exeat,* that granted in this case was without warrant, for conditions made essential by the common law and as well by the Judicial Code were lacking.

Speaking for the Supreme Court of Wisconsin in *Davidor* v. *Rosenberg,* 130 Wis. 22; 109 N. W. 925, Mr. Justice Winslow described the writ of *ne exeat* as follows (p. 24): "At common law it was simply a writ to obtain equitable bail. It was issued by a court of equity on application of the complainant against the defendant when it appeared that there was a debt positively due, certain in amount or capable of being made certain, on an equitable demand not suable at law (except in cases of account and possibly some other cases of concurrent jurisdiction), and that the defendant was about to leave the jurisdiction, having conveyed away his property, or under other circumstances which would render any decree ineffectual. *Dean* v. *Smith,* 23 Wis. 483. *Rhodes* v.

Cousins, 6 Rand. 188, 191, 18 Am. Dec. 715; *Gibert* v. *Colt,* 1 Hopk. Ch. 496, 14 Am. Dec. 557, and note."

The writ is a restraint upon the common right of movement from place to place within the United States and upon emigration. It has been abolished in some States and its use is largely regulated and restricted by statute in others.* And § 261 of the Judicial Code strictly governs the granting of the writ in federal courts.

Section 9 (b) provides a substitute for and so excludes the use of the writ against bankrupts. As respondent is not a bankrupt, that subdivision does not authorize his arrest or afford him protection. There is no reason for stricter measures to compel others to submit to examination. General authority to compel attendance and the giving of testimony is conferred by § 21a and § 2 (13) and (16). And, in the absence of language specifically disclosing that purpose, Congress will not be deemed to have intended to subject officers of bankrupt corporations or other witnesses to arrests and detentions, by writ of *ne exeat* or otherwise, against which § 9a and b protects bankrupt persons. We conclude that the court had no authority under § 2 (15) or otherwise to make the order of arrest and *ne exeat* under consideration.

Judgment affirmed.

AETNA CASUALTY & SURETY CO. *v.* PHOENIX NATIONAL BANK & TRUST CO.

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

No. 413. Argued January 25, 1932.—Decided March 14, 1932.

1. A surety company's undertaking to indemnify and hold harmless a bank from any loss through payment of falsely raised checks or

* See authorities cited in note, 14 Am. Dec. 560.

forged endorsements implies a right of subrogation to claims which the bank might assert against depositors upon whose accounts such checks are drawn, based on their alleged negligence in drawing them or in not notifying the bank of the forgeries. P. 214.

2. Under such a contract the liability of the surety which accrues when a forged check is paid, is discharged when the bank relinquishes its right against the depositor. *Id.*

3. In a suit for indemnity in which the defense is relinquishment of a claim of right to which the indemnitor should have been subrogated, the burden rests upon the indemnitee to show that the claim was unsubstantial. P. 216.

4. Under a contract to indemnify a bank from loss through payment of forged checks, the indemnitor is liable and may be sued when such check has been paid. The bank is not called upon first to defend against claims of the depositor or prosecute its own claims against endorsers. *Id.*

44 F. (2d) 511, reversed.

CERTIORARI, 284 U. S. 608, to review the reversal of a judgment in favor of the above-named petitioner in an action by the bank on a contract of indemnity.

Mr. Samuel M. Wilson, with whom *Messrs. Charles Kerr, Clinton M. Harbison,* and *A. K. Shipe* were on the brief, for petitioner.

Mr. James Park, with whom *Messrs. Richard C. Stoll* and *Wallace Muir* were on the brief, for respondent.

The loss covered by the bond was the loss of the bank's own money. It was sustained when the checks were paid, irrespective of any possible right of recoupment in special cases by future implied ratification by a depositor, estoppel of a depositor to assert the forgery, or recourse upon responsible endorsers. *Fitchburg Savings Bank* v. *Massachusetts B. & I. Co.,* 174 N. E. 324; *Sprague* v. *West Hudson County Trust Co.,* 92 N. J. Eq. 639; *First Nat. Bank* v. *Merchants Trust Co.,* 140 Atl. 582; *Royal Indemnity Co.* v. *American Vitrified Products Co.,* 158 N. E. 827; *Kimbell Trust & S. Bank* v. *Hartford Accident*

& Ind. Co., 333 Ill. 318; *Royal Indemnity Co.* v. *North Texas Nat. Bank,* 25 S. W. (2d) 822.

The bank was not required to attempt recoupment of its loss sustained at the time of payment before proceeding against the insurer. *Champion Ice Mfg. Co.* v. *American Bonding Co.,* 115 Ky. 863; *First Nat. Bank* v. *U. S. Fidelity & G. Co.,* 137 N. W. 744; *National Surety Co.* v. *Sheridan County,* 33 F. (2d) 473.

Even if the loss was sustained by the bank upon the recredit to the depositor's account, this does not defeat recovery in this action, as a legal adjudication of the bank's liability is not required. *Ocean Accident & G. Corp.* v. *Old Nat. Bank,* 4 F. (2d) 753; *Globe Indemnity Co.* v. *Union & Planters Trust Co.,* 27 F. (2d) 496.

The petitioner has not shown that the recredit to the depositor's account was voluntary,—that is that the bank was not legally liable to make such a recredit—because (a) a depositor is under no duty to examine endorsements on cancelled checks for forgery; he has a right to assume that the bank has ascertained their genuineness; (b) knowledge of the depositor's agent, and officer, committing the fraud, is not attributable to the depositor; (c) though the depositor be negligent in the examination of the cancelled checks, the bank must be free of negligence in paying them to defeat liability to the depositor; (d) the burden is upon one asserting non-liability of the bank to the depositor to show that the bank was not negligent in the payment of the checks; and (e) the delay of the depositor in discovering the forgery must be shown to have prejudiced the bank.

The bank would have incurred a hazard not covered by the bond if it had refused to make the recredit demanded by the depositor.

Mr. Justice Stone delivered the opinion of the Court.

This suit was brought by respondent, a national bank, in the Circuit Court of Fayette County, Kentucky, to re-

cover on a bond of indemnity issued by the petitioner. The cause was removed to the United States District Court for the Eastern District of Kentucky, which, after a trial by the court upon an agreed statement of facts, gave judgment for petitioner. Judgment of reversal by the Court of Appeals for the Sixth Circuit, 44 F. (2d) 511, is here for review on certiorari.

The indemnity bond, issued upon payment of a stipulated premium, undertook to indemnify the respondent for "any loss through the payment . . . of forged or raised checks or (genuine) checks bearing forged endorsements. . . ." On different dates between May 12, 1924, and June 23, 1925, while the bond was in force, a corporation depositor of respondent drew thirty-nine checks upon its deposit account in favor of third persons. The endorsements of the payee on thirty-five of the checks were forged, and the amounts payable on the other four and on eighteen others were raised by one Fulton, who was the vice president and treasurer of the depositor, having charge of its checkbooks and books of account. Authority to sign the checks was vested in the president and one other, who was not an officer of the depositor. All the checks bore genuine endorsements made subsequent to the forgeries, two of them by Fulton alone. All were paid by respondent on presentation, and the amounts paid were charged to the depositor's account. Monthly statements were rendered to the depositor, accompanied by the cancelled checks. No agents or representatives of the depositor other than Fulton, the forger, examined the depositor's accounts, cancelled checks, or books of account. The checks were prepared for signature by Fulton. The representatives of the depositor who signed them relied wholly on him for their accuracy and for the names of the payees. All of the raised checks "were completed in writing by Fulton, except that the line for the application of the protectograph was left blank, and

were signed, before the application of the protectograph to them. And Fulton was trusted to fill in the line stating the amount of the cheque, with the protectograph, and was charged with the duty of delivering the cheques, whether by mail or in person."

About August 7th, a month after the payment of the last check, the depositor gave notice of the forgeries to the respondent and demanded that the sum of $5,512.72, representing so much of the payments as were induced by the forgeries, be recredited to its account. The respondent in turn asked payment of that amount of petitioner in satisfaction of its liability on the indemnity bond. Petioner, while admitting liability if respondent was not authorized to charge the depositor with the loss, insisted that the depositor was so chargeable because of its negligence and delay in notifying respondent of the forgeries and its negligence in drawing the checks. It offered to defend any suit brought against the respondent by the depositor with respect to the loss, and asked respondent to give notice of the forgeries to prior endorsers and to demand reimbursement from them. Respondent failed to comply with any of these requests and later credited its depositor with the disputed amount.

The petitioner, by way of defense, set up specifically the bank's assumption of the loss by crediting the depositor in the face of the latter's alleged negligence and omissions. The court below thought that the question presented was merely one of the time of the loss indemnified against, and as that had occurred when the checks were paid by respondent, later events determining the ultimate incidence of the loss as between the bank and its depositor or endorsers, were immaterial. Hence it concluded that the subsequent credit to the depositor of the amount of the loss and the consequent relinquishment of any claim against the depositor or others, had no bearing on the liability of the indemnitor. The court said:

". . . in the present case, the loss was suffered and the liability arose from time to time as the checks were paid; and, when finally the bank cancelled the charges and recredited the total, it was not then suffering a loss; it was abandoning a claim for recoupment of its earlier loss—a claim which at first it did not have. We think, therefore, that the policy should be read as indemnity against the original loss, and not as holding the liability in the air until it can finally be determined whether the bank had a right to make the charge back." 44 F. (2d) 511, 512.

We think that the respondent could not relinquish any claims it might have had against the depositor and preserve unimpaired its right to the indemnity. Petitioner's undertaking "to indemnify . . . and hold harmless" the respondent from any loss sustained by reason of the specified payments, contained no words indicating an intention to destroy the indemnitor's usual privilege of subrogation to the indemnitee's right to recover from any who are liable to it for the loss. That privilege was a necessary incident to petitioner's contract, for only by resort to it could the character of the contract as indemnity be preserved. It is both the object and the justification of subrogation that it makes exact indemnity the measure of the liability. See *Standard Marine Insurance Co., Ltd.* v. *Scottish Metropolitan Assurance Co., Ltd.*, 283 U. S. 284; *United States* v. *American Tobacco Co.*, 166 U. S. 468; *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Commercial Union Ins. Co.*, 139 U. S. 223, 235; *Hall & Long* v. *The Railroad Companies*, 13 Wall. 367; *Jones* v. *Bacon*, 145 N. Y. 446, 450; 40 N. E. 216.

Even though we assume, as the court below held, that petitioner's liability attached on payment of the checks, and that respondent had none the less suffered a loss even though it might be able to recoup it from others, see

Champion Ice Mfg. & Cold Storage Co. v. *American Bonding & Trust Co.,* 115 Ky. 863; 75 S. W. 197, respondent was still under a duty not to impair the rights which petitioner, upon payment of its obligation, might enforce against third persons. The failure to observe that duty, by stating an account which relinquished all claims against its depositor, see *Greenhalgh Co.* v. *Farmers' National Bank,* 226 Pa. 184, 188; 75 Atl. 260, released the petitioner from the liability which had already accrued. See *Sims* v. *Mutual Fire Ins. Co.,* 101 Wis. 586; 77 N. W. 908; *Illinois Automobile Ins. Exchange* v. *Braun,* 280 Pa. 550; 124 Atl. 691; *American Surety Co.* v. *Ballman,* 104 Fed. 634; *Jones* v. *Bacon, supra.* To hold that respondent could, without affecting its indemnity, release its rights against those who might be liable for its loss would be to hold, by a parity of reasoning, that respondent could enforce them with a similar lack of effect upon its right to recover from petitioner. In either case petitioner's contract would be converted from one of indemnity, as stipulated, into an unqualified obligation to repay to the bank the amounts which it was induced to pay by the forgeries.

It is unnecessary to decide with finality what might have been the rights of the bank against other parties. It is enough to say that neither the decisions in the federal courts nor the statutes and decisions of Kentucky, which are controlling, preclude a successful defense to assertion of a claim by the depositor.[1] If the indemnitee assumes

[1] Carroll's Ky. Stat. (1930) §§ 3720b–124, 125, provide that material alterations avoid a negotiable instrument "except as against a party who has himself made, authorized or assented to the alteration and subsequent endorsers." These sections have been interpreted as permitting a holder to enforce the instrument where the maker has negligently left blank spaces which have been filled out in violation of the maker's authority. See *Hackett* v. *First National Bank,* 114 Ky. 193; 70 S. W. 664; *Woolfolk* v. *Bank of America,* 73 Ky. 504; *Blakey*

to relinquish its rights without the consent of its indemnitor, the burden rests on it to establish that they are nonexistent or unsubstantial. See *Wilson* v. *Hite's Executor,* 154 Ky. 61, 69; 157 S. W. 41; *Wheeler* v. *Sweet,* 137 N. Y. 435, 443; 33 N. E. 483.

The court below thought that it was not reasonable to suppose that the bank had intended to buy a kind of indemnity which would involve it in litigation with its depositors, since the purpose of the bank was to keep its depositors and not to alienate them. As the liability had already attached on payment of the checks, the bank might have sued its indemnitor at once, and was not called on to defend itself against claims of its depositor or to prosecute its own claims against the endorsers. *Insurance Co.* v. *Stinson,* 103 U. S. 25. But it could not, as it has sought to do, retain its indemnity and withhold from its indemnitor the privilege of contesting or making such claims. See *American Surety Co.* v. *Greek Catholic Union,* 284 U. S. 563. If such was respondent's object, it should have taken from petitioner not a contract of indemnity, as it did here, but one to pay to it all amounts disbursed on forged checks.

Reversed.

---

v. *Johnson,* 76 Ky. 197, 204; *Cason* v. *Grant County Deposit Bank,* 97 Ky. 487; 31 S. W. 40; *Diamond Distilleries Co.* v. *Gott,* 137 Ky. 585; 126 S. W. 131. Compare *Commercial Bank* v. *Arden & Fraley,* 177 Ky. 520; 197 S. W. 951; *Maryland Casualty Co.* v. *Dickerson,* 213 Ky. 305; 280 S. W. 1106; *Rice & Givens* v. *Citizens National Bank,* 51 S. W. 454; 21 Ky. L. R. 346. And see *Champion Ice Mfg. & Cold Storage Co.* v. *American Bonding & Trust Co.,* 115 Ky. 863, 874–875; 75 S. W. 197; *London Joint Stock Bank, Ltd.* v. *MacMillan & Arthur,* [1918] A. C. 777.

As to the possibility that the depositor may have been estopped to assert a claim against the bank, because of negligence in examining its statements and accounts, see *Leather Manufacturers' Bank* v. *Morgan,* 117 U. S. 96; *Empire Trust Co.* v. *Cahan,* 274 U. S. 473, 479–480; *Critten* v. *Chemical National Bank,* 171 N. Y. 219; 63 N. E. 969.

LAMB *v.* CRAMER ET AL.

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

No. 432. Argued February 17, 1932.—Decided March 14, 1932.

1. An attorney for a defendant in a suit to set aside conveyances in fraud of creditors, received from his client while the cause was pending a transfer of part of the property in controversy, as a fee for legal services. Later a decree was entered adjudging that the plaintiffs had liens on all the property involved and appointing a receiver to liquidate the liens. *Held:*

   (1) That the attorney took the transfer subject to the equities alleged in the bill and to the decree. P. 219.

   (2) His retention of the property after entry of the decree was a contempt of court which might be proceeded against civilly. P. 219.

   (3) A proceeding in contempt for the purpose of forcing restoration of the diverted property in order to carry out the decree in the main suit for the benefit of the plaintiffs was a civil proceeding. P. 220.
2. The same conduct may be both civil and criminal contempt. P. 221.
3. It is the purpose of the punishment, rather than the character of the act punished, which determines whether the proceeding is for civil or criminal contempt. P. 220.
4. A judgment of the District Court dismissing a civil contempt proceeding for want of jurisdiction, *held* final and appealable. P. 221.
5. A civil contempt proceeding in aid of a suit in equity and of the decree made or to be made therein, may be maintained independently of the suit, and is independently appealable. *Id.*
6. Obscure assignments of error, *held* construable as asserting the grounds of reversal adopted by the court below. *Id.*
7. In the Circuit Court of Appeals for the Fifth Circuit, a reversal may be based upon an error appearing on the face of the record, even though unassigned. *Id.*

48 F. (2d) 537, affirmed.

CERTIORARI, 284 U. S. 609, to review a decree reversing the dismissal of a petition to punish for contempt. See the next case.

Mr. Edward B. Burling, with whom *Messrs. Emile Godchaux, W. Calvin Wells, Preston B. Cavanaugh,* and *Arvid B. Tanner* were on the brief, for petitioner.

Mr. Gerald FitzGerald, with whom *Messrs. Sam C. Cook* and *Garner W. Green* were on the brief, for respondents.

Mr. Justice Stone delivered the opinion of the Court.

In this case certiorari was granted to review a judgment of the Circuit Court of Appeals for the Fifth Circuit, 48 F. (2d) 537, reversing a decree of the District Court for Northern Mississippi, which quashed citation issued on respondent's petition to punish Lamb for contempt, and which dismissed the petition.

The petition was ancillary to a suit brought to set aside conveyances of land and other dispositions of money and personal property by the defendant Holland to other defendants, as in fraud of judgment creditors. The petition set up that pending the suit Holland had transferred to Lamb, who was acting as her attorney, a substantial part of the property involved in the suit, said to have been in payment of attorney's fees. It prayed citation against Lamb, the petitioner here, to show cause why he should not be held in contempt of court, and for other relief, including an injunction restraining further transfers of the property, and the cancellation of those already made.

Lamb appeared and answered the petition as one to punish for contempt. Pending disposition of that proceeding, final decree, in the main cause, was entered on consent, declaring that the judgments of the plaintiffs in that suit were a lien on the property described in the bill from the date of its filing, and appointing a receiver to take possession of the property and liquidate the lien. The decree as entered was stated to be without prejudice to the rights of Lamb, who was not a party to it, and

reserved to the court jurisdiction of the cause to make further orders for the preservation of the rights of the parties. The petition in the contempt proceeding then pending was later dismissed by the district court on the motion of Lamb, setting up want of jurisdiction of the subject matter and of his person.

The court below rightly held that upon the facts presented by the petition, proceedings might be had against Lamb, either by bill in equity, as was done by the supplemental bill filed by the receiver in *Lamb* v. *Schmitt, post,* p. 222, or by contempt proceedings, as in the present case, or by both, to compel restoration of the diverted property to the custody of the court. The petitioner, as counsel in the principal suit, had notice of the equities alleged in the bill. So far as he acquired, *pendente lite,* any interest in the property involved in the suit, he was not only subject to those equities, but bound by any decree which the court might make with respect to it, to the extent that it might adjudicate the rights of the plaintiffs against the defendants. *Utah* v. *United States,* 284 U. S. 534; *Mellen* v. *Moline Malleable Iron Works,* 131 U. S. 352, 371; *Tilton* v. *Cofield,* 93 U. S. 163; *Warren County* v. *Marcy,* 97 U. S. 96, 105; cf. *Terrell* v. *Allison,* 21 Wall. 289. The provision in the decree that it should be without prejudice to the rights of Lamb postponed until further order of the court the adjudication of his rights, but did not forestall it. His receipt and diversion of the property, which was then *in gremio legis,* see *Metcalf* v. *Barker,* 187 U. S. 165, 173 *et seq.; Pierce* v. *United States,* 255 U. S. 398, tended to defeat any decree which the court might ultimately make in the cause. That and his retention of the property after the decree was entered, were in fraud of the rights of the plaintiffs to prosecute the suit to its conclusion, and an obstruction of justice constituting a contempt of court which might be proceeded against civilly. *Merrimack*

River Savings Bank v. *Clay Center,* 219 U. S. 527, 535–536; *Clay* v. *Waters,* 178 Fed. 385, 390, 391. Cf. *In re Swan,* 150 U. S. 637.

The objections chiefly urged by petitioner are that the present proceeding was criminal in its nature, to punish for criminal contempt, and hence the order dismissing the petition was not appealable, *United States* v. *Sanges,* 144 U. S. 310, 323; *Toledo Newspaper Co.* v. *United States,* 247 U. S. 402, 410; and that if the proceeding be regarded as civil, still no appeal would lie from the order of dismissal, because no appeal was taken from the final decree in the principal suit.

We think it plain that the petition, although inartistically drawn, invoked the power of the court to punish for contempt in aid of the adjudication sought in the principal suit. Hence, the proceeding is to be deemed a civil one and, as the order of the District Court finally denied the relief sought, it could be appealed. The petition charged the contumacious acts of Lamb in diverting the property, which was the subject matter of the principal suit. The prayer of the petition for relief, which is determinative of the nature of the proceeding, see *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418, 448, declared that its purpose was to secure restoration of the diverted property in order to carry out the decree in the principal suit. The court cited Lamb to show cause why he should not be punished for contempt and why he should not be adjudged to hold the property subject to the jurisdiction of the court.

To the extent that this purpose might be effected by process against Lamb for contempt, the proceeding was remedial, to aid in giving to the plaintiffs the property which, as against the defendants in the principal suit, they were entitled to receive. It is the purpose of the punishment, rather than the character of the act punished, which determines whether the proceeding is for

civil or criminal contempt. *Gompers* v. *Bucks Stove & Range Co., loc. cit. supra; Doyle* v. *London Guarantee & Accident Co.,* 204 U. S. 599, 604–605, 607. Even though the particular acts of the petitioner may take the characteristics of both a civil and a criminal contempt, and so may not be classified as exclusively one or the other, see *Bessette* v. *W. B. Conkey Co.,* 194 U. S. 324, 329, still, under the allegations and prayer of the petition, it would have been competent for the District Court to punish the contempt by its coercive order until Lamb made restitution of the property or to impose a fine, payable to the receiver, compensating for its taking. A proceeding to secure such relief is civil in its nature. See *Gompers* v. *Bucks Stove & Range Co., supra,* p. 449; *Bessette* v. *W. B. Conkey Co., supra,* p. 338; *Leman* v. *Krentler-Arnold Hinge Last Co.,* 284 U. S. 448.

The decree of the District Court, dismissing the petition, finally adjudicated the rights asserted by it. *Shaffer* v. *Carter,* 252 U. S. 37, 44; *The Pesaro,* 255 U. S. 216, 217; *Rosenberg Bros. & Co.* v. *Curtis Brown Co.,* 260 U. S. 516, 517. The proceeding, based on transactions had with the property involved in the principal suit, was in aid of that suit and of any decree which might be entered in it. It could be maintained, independently of the suit, either before or after the decree was entered, so long as it remained unsatisfied; and the appeal was not dependent upon an appeal from the decree. See *Root* v. *Woolworth,* 150 U. S. 401, 411; *Leman* v. *Krentler-Arnold Hinge Last Co., supra; Gompers* v. *Bucks Stove & Range Co., supra,* pp. 451–452; *Utah* v. *United States, supra.*

The petition for certiorari urged as a ground for granting it that the court below reversed on errors not assigned. It is true that the assignments erroneously described the order of the District Court as one sustaining a motion to quash the service of process, a mistake which may well have been induced by the inept use of language in the

motion. But the assignments, despite their lack of clarity, are not incapable of being construed as asserting the grounds for reversal adopted by the court below and stated in this opinion. In any case, the court below was not precluded from reversing for errors appearing on the face of the record, even though unassigned. *McBride* v. *Neal,* 214 Fed. 966, 969; *United States* v. *Tennessee & Coosa R. Co.,* 176 U. S. 242, 256; cf. *Weems* v. *United States,* 217 U. S. 349; *Duignan* v. *United States,* 274 U. S. 195, 200. See also Rules 8 and 11, C. C. A. 5th; *Johnson Farm Loan Co.* v. *McManigal,* 288 Fed. 185, 186; *Grafton* v. *Meikleham,* 246 Fed. 737, 738, cert. den. 246 U. S. 665; *Jones* v. *Pettingill,* 245 Fed. 269, 273–274, cert. den. 245 U. S. 663.

Affirmed.

LAMB *v.* SCHMITT, RECEIVER.

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

No. 433. Argued February 17, 1932.—Decided March 14, 1932.

1. The general rule that witnesses, suitors, and their attorneys, while in attendance in connection with the conduct of one suit are immune from service of process in another, is founded, not upon the convenience of the individuals but upon that of the court. P. 225.
2. The privilege should not be enlarged beyond the reason upon which it is founded and should be extended or withheld as judicial necessities require. *Id.*
3. A nonresident attorney, attending the federal court as counsel for a defendant in a suit over property, is not exempt from service under a supplemental bill, the purpose of which is to require him to restore to the court, in order that it may be subjected to a decree in the main suit favorable to the plaintiff, a part of the fund in controversy which was transferred to him by his client while the main suit was pending. P. 226.

4. The question of immunity is to be determined by the nature of the proceeding in which service on the attorney is made and its relation to the principal suit, as disclosed by the pleadings. P. 228.

48 F. (2d) 533, affirmed.

CERTIORARI, 284 U. S. 609, to review a decree reversing an order quashing service of a subpœna to answer a supplemental bill.

Mr. Edward B. Burling, with whom *Messrs. Emile Godchaux, W. Calvin Wells, Preston B. Cavanaugh,* and *Arvid B. Tanner* were on the brief, for petitioner.

If process is served on persons who are in the jurisdiction solely on business with the court, the service will be quashed. *Stewart* v. *Ramsey,* 242 U. S. 128; *Page Co.* v. *Macdonald,* 261 U. S. 446; *Central Trust Co.* v. *Milwaukee St. Ry. Co.,* 74 Fed. 442; *Read* v. *Neff,* 207 Fed. 890; *Durst* v. *Tautges, Wilder & McDonald,* 44 F. (2d) 507.

The case discloses no reason for creating any exception to the general rule. The rule is inflexible.

That the suit in which the process was issued is ancillary does not create an exception. Parties must be brought into the proceeding in the same manner as in case of an original bill. *Pacific Railroad* v. *Missouri Pac. R. Co.,* 3 Fed. 772.

If by the general rule a process server must not molest a person who has not taken the court's property, but by an exception to the rule may serve a person who has taken the court's property—then that exception would not justify service on a defendant when the question of whether he has taken the court's property is the very question brought into litigation in that very suit. If the propriety of the service on him depends on his character as a meddler with the court's property, that fact must be judicially established, not in that suit, but by a prior adjudication. *Page* v. *Macdonald,* 261 U. S. 446.

If the validity of service could possibly be made to depend upon the question whether or not Lamb was a man who had meddled with property in the possession of the court, then not only was that fact not proved,—it is disproved by the record.

The evidence, introduced by the respondent on the motion to quash the service of summons, shows that the moneys received by the petitioner were payments for counsel fees received in the ordinary course of business.

Messrs. Gerald FitzGerald and *Sam C. Cook,* with whom *Mr. Garner W. Green* was on the brief, for respondent.

Mr. Justice Stone delivered the opinion of the Court.

This case is here on certiorari to review a decree of the Court of Appeals for the Fifth Circuit, 48 F. (2d) 533, reversing an order of the District Court for Northern Mississippi, which quashed service of process upon the petitioner Lamb. The suit is a companion to *Lamb* v. *Cramer,* decided this day, *ante,* p. 217, and, like it, is ancillary to the principal suit referred to in that case, which was brought to set aside conveyances of land and dispositions of money and personal property as in fraud of judgment creditors.

The present suit was brought by the respondent here, the receiver appointed by the decree in the first one. It seeks the recovery of a part of the funds involved in the first suit, paid, *pendente lite*, as fees to Lamb, who acted as attorney of one of the defendants in that suit. The petitioner, a resident of Illinois, was served with process while he was in the Northern District of Mississippi in attendance on the court as an attorney in the principal suit. The sole question presented is whether the court below rightly held that the petitioner, in the circumstances stated, was not immune from service of process.

The general rule that witnesses, suitors, and their attorneys, while in attendance in connection with the conduct of one suit are immune from service of process in another, is founded, not upon the convenience of the individuals, but of the court itself. *Page Co.* v. *MacDonald,* 261 U. S. 446; *Stewart* v. *Ramsay,* 242 U. S. 128, 130; *Hale* v. *Wharton,* 73 Fed. 739; *Diamond* v. *Earle,* 217 Mass. 499, 501; 105 N. E. 363; *Parker* v. *Marco,* 136 N. Y. 585; 32 N. E. 989. As commonly stated and applied, it proceeds upon the ground that the due administration of justice requires that a court shall not permit interference with the progress of a cause pending before it, by the service of process in other suits, which would prevent, or the fear of which might tend to discourage, the voluntary attendance of those whose presence is necessary or convenient to the judicial administration in the pending litigation. See *Bridges* v. *Sheldon,* 7 Fed. 17, 43 *et seq.* In *Stewart* v. *Ramsay,* the court said (p. 130), quoting from *Parker* v. *Hotchkiss,* Fed. Cas. 10,739:

"The privilege which is asserted here is the privilege of the court, rather than of the defendant. It is founded in the necessities of the judicial administration, which would be often embarrassed, and sometimes interrupted, if the suitor might be vexed with process while attending upon the court for the protection of his rights, or the witness while attending to testify."

It follows that the privilege should not be enlarged beyond the reason upon which it is founded, and that it should be extended or withheld only as judicial necessities require. See *Brooks* v. *The State,* 3 Boyce (Del.) 1; 79 Atl. 790; *Netograph Co.* v. *Scrugham,* 197 N. Y. 377; 90 N. E. 962; *Nichols* v. *Horton,* 14 Fed. 327; *Iron Dyke Copper Min. Co.* v. *Iron Dyke R. Co.,* 132 Fed. 208. Limitations of it on this basis have been not infrequently made because the attendance upon the trial of a

cause, however vital to the personal interests of those concerned, was not for the purpose of facilitating the progress of the cause (see *Brooks* v. *State, supra; Vaughn* v. *Boyd,* 142 Ga. 230; 82 S. E. 576; *Sampson* v. *Graves,* 208 App. Div. 522, 526; 203 N. Y. S. 729), or because the service was made on one whose attendance was not voluntary, and hence had no tendency to interfere with judicial administration. *Netograph Co.* v. *Scrugham, supra.*

The question presented here is of a somewhat different character: Whether, despite any effect of the immunity in encouraging voluntary attendance at the trial, it should be withheld from one who, while in attendance, is served with process commanding his continued presence and aid to facilitate the pending litigation, and to carry it to its final conclusion?

It has never been doubted that witnesses, parties, and their counsel are amenable to the process or order of the court for contempt of court, committed while in attendance upon the trial, or that any of them, while there, are subject to the process and orders of the court to compel the production of documents or their testimony in the cause. Nor can it be doubted that the petitioner here, notwithstanding his presence as an attorney and officer of the court in the conduct of the principal cause, was not immune from the service of process in a summary proceeding to compel restoration of the subject matter of the suit wrongfully removed from the custody of the court. See *Lamb* v. *Cramer, supra.* The deterrent effect, if any, upon attendance at the trial, of the possibility that these procedures may be resorted to, is outweighed by the fact that the immunity, if allowed, might paralyze the arm of the court and defeat the ends of justice in the very cause for the protection of which the immunity is invoked.

These considerations have in special circumstances led to a denial of the immunity, even though the service was made in an independent suit in no sense ancillary to the pending litigation. See *Livengood* v. *Ball,* 63 Okla. 93; 162 Pac. 768; *Rizo* v. *Burruel,* 23 Ariz. 137; 202 Pac. 234. But it is not necessary to go so far in the present case. Here the two suits, pending in the same court, are not independent of each other or unrelated. The second was brought in aid of the first, on which the petitioner, when served with process, was in attendance, charged with the duty of counsel in the case to assist the court. It was brought to secure rights asserted in the first suit which, but for the acts charged against the petitioner in the second, would have been secured in the first. Cf. *Page Co.* v. *MacDonald, supra.* The later suit was so much a part and continuation of the earlier one that the jurisdiction of the court over the first extended to the second without regard to citizenship of the parties or the satisfaction of any other jurisdictional requirements. *Pacific Railroad of Missouri* v. *Missouri Pacific Ry. Co.,* 111 U. S. 505, 522.

From the viewpoint of the due administration of justice in the first suit, the second was as much a part of it as if it had been an interlocutory motion to compel the production in court of documents or of property involved in the suit. The case is, therefore, not one where the cause pending before the court is subjected to possible hindrance or delay by service of process in some unrelated suit. The aid of the petitioner already in attendance upon the litigation, was demanded in order that the relief prayed might be secured and the cause brought to a final and successful termination. Neither that demand nor compliance with it could prevent his attendance upon the principal cause, as service of process in another court might. Even if we make the assumption that the nonrecognition of such immunity might have discouraged

petitioner's participation as counsel, still it would defeat, not aid, the administration of justice in the principal cause to encourage petitioner's voluntary presence by the grant of an immunity which would relieve him from any compulsion either to continue his presence or to answer for his acts affecting the progress of the cause. Judicial necessities require that such immunity should be withheld, and it was rightly denied by the court below.

It is said that the service of process in this case cannot be deemed an exception to the general rule without assuming the truth of the allegations in the bill of complaint, and that the truth or falsity of the pleadings cannot be assumed. See *Page* v. *MacDonald, supra,* pp. 448–449. But the test of the privilege is not the probable success or failure of the suit or proceeding in which the process was served. If it were, the immunity could never be denied. The test is whether the immunity itself, if allowed, would so obstruct judicial administration in the very cause for the protection of which it is invoked as to justify withholding it. That, as we have said, depends here upon the nature of the proceeding in which the service is made and its relation to the principal suit, both of which are disclosed by the pleadings.

Affirmed.

SHEARER *v.* BURNET, COMMISSIONER OF INTERNAL REVENUE.*

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

No. 469. Argued February 23, 24, 1932.—Decided March 14, 1932.

The provisions of the Revenue Act of 1924, §§ 1200 (a), 1201 (a) (b) for granting a 25 per cent. reduction of taxes imposed under the Act

---

* Together with No. 470, *Stewart* v. *Burnet, Commissioner of Internal Revenue.*

of 1921 upon taxpayers returning income for the calendar year 1923, and proportionate reductions where returns were made for other fiscal periods beginning or ending in that calendar year,—do not apply to a partner making his individual return for the calendar year 1924, even though the distributive share received by him in that year was attributable in part to the 1923 portion of a partnership fiscal year beginning in 1923 and ending in 1924. P. 230.
52 F. (2d) 17, affirmed.

CERTIORARI, 284 U. S. 612, to review judgments affirming orders of the Board of Tax Appeals sustaining income tax assessments. 18 B. T. A. 393.

Mr. M'Cready Sykes, with whom *Messrs. Charles Henry Butler* and *George L. Shearer* were on the brief, for petitioners.

Mr. Whitney North Seymour, with whom *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Sewall Key* and *Norman D. Keller* were on the brief, for respondent.

Messrs. Burton E. Eames and *R. Gaynor Wellings,* by leave of Court, filed a brief as *amici curiae.*

MR. JUSTICE STONE delivered the opinion of the Court.

The petitioners in these cases, members of a law partnership, filed their individual tax returns for the calendar year 1924. The partnership books were kept on the basis of a fiscal year and the partnership information return, filed in 1924, was for the fiscal year ending April 30th of that year. As required by § 218 (a) of the Revenue Act of 1924, c. 234, 43 Stat. 253, 275, the petitioners included in their individual returns their respective shares of the partnership profits for the partnership year ending in 1924. They thus returned, as 1924 income, partnership profits attributable to eight months of the previous year.

In assessing the tax, the Commissioner rejected their claim that, under the provisions of Title XII of the Revenue Act of 1924, they were entitled to a reduction of 25% of the tax at 1923 rates on that portion of their respective shares of the partnership income attributable to the eight months of the partnership year, which fell in the calendar year 1923, and found deficiencies accordingly. The orders of the Board of Tax Appeals sustaining the action of the Commissioner, 18 B. T. A. 393, were affirmed by the Court of Appeals for the Second Circuit. 52 F. (2d) 17. This Court granted certiorari to resolve a conflict between the decision below and that of the Court of Appeals for the First Circuit, in *White* v. *Maddison,* 45 F. (2d) 335.

The provisions of Title XII of the Revenue Act of 1924 embody a comprehensive scheme for relieving taxpayers from the burdens of the higher rates applicable to 1923 income under the 1921 Act. The 1924 Act reduced the rates, but became a law too late in the year to make them readily applicable to income earned in the previous year. Instead, it adopted the less scientific, but more convenient, plan of a level reduction of 25% of the tax. In making it, Congress was careful to limit the reduction to taxes on income returned for 1923. The applicable provisions are found in §§ 1200 (a) and 1201 (a) and (b) of the 1924 Act.[1] Section 1200 (a) authorized the allowance to tax-

[1] "Sec. 1200 (a). Any taxpayer making return, for the calendar year 1923, of the taxes imposed by Parts I and II of Title II of the Revenue Act of 1921 shall be entitled to an allowance by credit or refund of 25 per centum of the amount shown as the tax upon his return.

"Sec. 1201 (a). Any taxpayer making return, for a period beginning in 1922 and ending in 1923, of the taxes imposed by Parts I and II of Title II of the Revenue Act of 1921, shall be entitled to an allowance by credit or refund of 25 per centum of the same proportion of his tax for such period (determined under the law applicable to the calendar year 1923 and at the rates for such year) which the portion of such period falling within the calendar year 1923 is of the entire period.

payers making a return of income for the calendar year 1923. Section 1201 (a) and (b) granted it to taxpayers returning income for a fiscal year beginning or ending in 1923, but only with respect to the tax on so much of the income returned as was attributable to income earned in the calendar year 1923.

Petitioners' claims for the allowance plainly are not comprehended by the language of either section. They made their returns on the calendar year basis, and were entitled to, and presumably received, the allowance authorized by § 1200 (a) upon the tax on income returned for the calendar year 1923. But this section does not authorize any reduction of the tax upon income returned for the calendar year 1924, as was that of petitioners. Section 1201 (a) and (b) applies only to taxpayers returning income for a fiscal year beginning or ending in 1923. The petitioners, who made no such returns, were thus excluded from the benefits of the 25% reduction of the tax on any part of their income returned for the calendar year 1924 by the unambiguous language of these sections. See *Crooks* v. *Harrelson,* 282 U. S. 55, 60, 61.

They argue that the provisions of these sections applicable to income returned for 1923, evidence a general purpose to allow the reduction of tax upon any income attributable to that year. Hence, despite the language of § 1201 (b) restricting its benefits to those returning income for taxation for some part of the year 1923, they insist that it should be deemed to extend to taxes on partnership income attributable to 1923, although in

"(b) Any taxpayer making return, for a period beginning in 1923 and ending in 1924, of the taxes imposed by Parts I and II of Title II of this Act, shall be entitled to an allowance by credit or refund of 25 per centum of the same proportion of a tax for such period (determined under the law applicable to the calendar year 1923 and at the rates for such year) which the portion of such period falling within the calendar year 1923 is of the entire period."

fact income in 1924, and returned by the taxpayers as such in their 1924 returns.

Even if there were room for construction of the words of the statute, it is impossible to discern any such general purpose underlying the 1924 Act as would support petitioners' contention. There are two insuperable obstacles to the construction urged. The first is the necessary effect of § 1200 (a) when applied to returns of taxpayers for the calendar year 1923. That section authorizes a reduction of 25% of the taxes for 1923 upon all income, including that derived from partnerships having a fiscal year beginning in 1922 and ending in 1923. Thus applied, it allows 25% reduction of petitioners' 1923 tax, including that upon their partnership income, attributable to eight months of 1922. If, as they insist, § 1201 (b) is to be construed as permitting a like reduction of the 1924 tax on partnership income attributable to the last eight months of the calendar year 1923, which overlapped the partnership year ending in 1924, petitioners, despite the careful limitation of the reduction to taxes upon income for a single year, would be entitled to a reduction of the tax on partnership income for a period of more than a year, in this case twenty months, eight months of 1922 and the full twelve months of 1923.

A second objection to the suggested construction of § 1201 (b) is that if the reduction, for which it provides, were extended to the tax involved here, it would not necessarily result in a return of 25% of the tax assessed, as is the obvious purpose of the section. Section 1201 (a) and (b), allows the 25% reduction on that proportion of the tax for the entire year, computed at 1923 rates, which the period of the fiscal year falling within the calendar year 1923 bears to the entire taxable year. As this is the same basis on which the tax is computed, under § 207 (a) of the 1924 Act, where the taxable year begins in 1923 and

ends in 1924, the reduction is exactly 25% of the tax assessed.

A different method of computing the tax on a distributive share of partnership income for a partnership fiscal year beginning in 1923 and ending in 1924, is prescribed by § 207 (b) of the 1924 Act. Under that section the tax computed for the fiscal year at 1923 rates is not, as under § 207 (a), apportioned to the number of months of the fiscal year which fall in the calendar year 1923. Instead, § 207 (b) applies the 1923 schedule of rates to the income apportioned to 1923, and the 1924 schedule to the income apportioned to 1924. And for purposes of the surtax it places the income from the partnership subject to the 1924 rates in the lower brackets and the income subject to the 1923 rates in the higher brackets.

The difference in method of calculating the tax on the two classes of income may produce different amounts of tax on the same amount of income. The tax computed under § 207 (a) upon income of an individual taxpayer attributable to the first eight months of a fiscal year ending April 30, 1924, would be exactly two-thirds of the total tax, and it is to the two-thirds of this total to which the 25% reduction is applied by § 1201 (b). If applicable to the present case, the reduction would likewise be allowed on two-thirds of the tax for the entire year at 1923 rates. But the tax calculated under § 207 (b), on income derived from the partnership, for the same eight months of 1923, would be more than two-thirds of the total tax for the year, because of the higher rate of surtax applicable to the income attributed to 1923 than to the income apportioned to 1924.

The reduction of the tax calculated as prescribed by § 1201 (b) would accordingly not be 25% of the tax. The section, if construed to extend the reduction to a tax computed as was the petitioners', would thus depart from the

obvious purpose and definite scheme of the 1924 Act to return uniformly to taxpayers 25% of the tax on income of a single year. Undoubtedly Congress might have included the tax on this income of petitioners in its scheme for refunding taxes. Its failure to do so is doubtless a consequence of the fact already noted that it did make provision for reduction of the like tax on the income for the corresponding months of 1922.

Assuming that petitioners can invoke the protection of the Fifth Amendment to secure an equable share of a credit or refund of a tax after its assessment, we can discern in this statute no want of due process of law. The petitioners are within a defined class which Congress clearly had power to select for purposes of a tax refund. See *La Belle Iron Works* v. *United States,* 256 U. S. 377, 392; *Billings* v. *United States,* 232 U. S. 261, 282; *Barclay & Co.* v. *Edwards,* 267 U. S. 442, 450. They cannot complain of the possibly unequal operation of the statute on others less favorably situated. *Heald* v. *District of Columbia,* 259 U. S. 114, 123.

Affirmed.

BOSTON & MAINE RAILROAD *v.* ARMBURG.

CERTIORARI TO THE MUNICIPAL COURT OF BOSTON, COUNTY OF SUFFOLK, MASSACHUSETTS.

No. 477. Argued February 24, 25, 1932.—Decided March 14, 1932.

1. Under the Massachusetts Workmen's Compensation Act, an employer not electing to comply with the Act by effecting the prescribed insurance for the benefit of his employees, is deprived, in an action brought by an employee to recover for personal injuries sustained in the course of his employment, of the defenses of negligence of a fellow servant and assumption of risk. The state court construed the Act to be applicable to a carrier engaged in both intrastate and interstate commerce, but not to such of its employees as at the time of injury were engaged in interstate com-

merce. *Held*, as thus construed the Act does not on its face impose any burden on interstate commerce. Pp. 237–238.

2. The Federal Employers' Liability Act does not exclude the exertion of state power over employees of interstate carriers while engaged in services not involving interstate commerce. P. 238.
3. The objection that the Massachusetts Act invades the field already occupied by federal legislation, in that it applies to all employees engaged in intrastate commerce, although at the same time and in the same service some may be engaged in interstate commerce, is not open to a carrier (who did not elect to comply with the Act) in an action for personal injuries brought by an employee who at the time of the accident was not engaged in interstate commerce. Pp. 238–239.
4. As construed by the state court, the Act does not extend to employees engaged at the time of injury in interstate commerce, even though at the same time their service is also in intrastate commerce. P. 239.
5. The insurance provisions of the Act, in their application to an interstate carrier, and as construed by the state court, require the premiums to be based on so much of the carrier's payroll as may be allocated to the hours of employment in intrastate commerce. *Held:*

   (1) It is not self-evident that the Act is unworkable; and there was nothing in the record enabling the Court to say that such allocation was either impossible or so difficult as necessarily to impose a burden on interstate commerce. Pp. 239–240.

   (2) The burden was on the carrier, who assailed the statute, to establish its unconstitutionality. P. 240.

276 Mass. 418; 177 N. E. 665, affirmed.

CERTIORARI, 284 U. S. 609, to review a judgment of the Municipal Court of Boston, entered on rescript from the Supreme Judicial Court of Massachusetts, in an action against a railroad company by an employee to recover damages for personal injuries sustained in the course of his employment.

Mr. Philip N. Jones, with whom *Mr. Francis P. Garland* was on the brief, for petitioner.

Mr. Clarence W. Rowley for respondent.

Messrs. John M. Gibbons, Eugene J. Phillips, and *Henry Lawlor,* by leave of Court, filed a brief as *amici curiae.*

Mr. Justice Stone delivered the opinion of the Court.

This case is here on certiorari to review a judgment of the Muncipal Court of Boston, entered on rescript of the Supreme Judicial Court of Massachusetts, holding that the Massachusetts Workmen's Compensation Act does not impose an unconstitutional burden on interstate commerce. 276 Mass. 418; 177 N. E. 665.

The suit was brought by respondent to recover for personal injuries while in the employ of petitioner, an interstate rail carrier, engaged in both intrastate and interstate commerce. At the time of his injury, he was engaged exclusively in intrastate commerce. The Railroad Company interposed as defenses that the injury was due solely to the negligence of a fellow servant and that respondent had assumed the risks of such negligence. Upon the trial by the court without a jury, respondent invoked the provisions of the Massachusetts Workmen's Compensation Act, § 66, c. 152, Mass. General Laws, providing that an employer not electing to comply with that Act by effecting the prescribed insurance for the benefit of his employees, as petitioner had failed to do, may not interpose these defenses in an action brought by an employee to recover for injuries sustained in the course of his employment. Rulings requested by the petitioner that the Act did not apply to petitioner, and if it did, that the provisions invoked, constituted an unconstitutional burden on commerce, were denied. The correctness of these rulings was reviewed and upheld by the Supreme Judicial Court, after which, following the Massachusetts practice, judgment was entered accordingly by the Municipal Court.

It is the contention of the petitioner that the insurance provisions of the Massachusetts Act, if applied to an interstate carrier, impose an unconstitutional burden on interstate commerce, and as § 66, denying to employers certain common law defenses, in effect penalizes failure to comply with the insurance provisions, and is inseparable from them, the constitutionality of the section is conditioned upon that of the insurance requirements and it must be deemed unconstitutional as applied to petitioner. See *Williams* v. *Standard Oil Co.,* 278 U. S. 235; *Western Union Telegraph Co.* v. *Kansas,* 216 U. S. 1; *Frost Trucking Co.* v. *Railroad Commission,* 271 U. S. 583.

The Act, in terms, § 1 (4), is made broadly applicable to employees "except masters of and seamen on vessels engaged in interstate or foreign commerce," and the state court held in this case that it is applicable to the employees of interstate carriers engaged in intrastate commerce. But, construing the Act, it ruled that as by implication all statutes of the state are intended to operate only upon a subject within the jurisdiction of the legislature enacting them, this statute is not to be deemed to be applicable to employees whose rights of recovery for injuries in the course of their employment in interstate commerce are governed by the Federal Employers' Liability Act. The court said (pp. 423, 424):

". . . The act does not require . . . that an employer must insure branches or departments or kinds of business which for any reason are not within the jurisdiction of the General Court and thus necessarily outside the scope of the act. An employer, conducting some business within the jurisdiction of the General Court and other business outside that jurisdiction, may insure under the act with respect to his employees in the part of his business within that jurisdiction and secure

with respect to them all the benefits of the act unaffected by the circumstance that he continues to conduct the part of his business outside that jurisdiction without such insurance; and he may continue to conduct this latter part of his business under the principles of legal obligation governing it, free from any effect flowing from insurance under the act as to the other part of his business conducted within the jurisdiction of the General Court."

Thus construed the Act does not on its face impose any burden on interstate commerce.

The enactment of workmen's compensation acts is within the legislative power of the state, *Mountain Timber Co.* v. *Washington,* 243 U. S. 219, 238, 239; *Madera Sugar Pine Co.* v. *Industrial Accident Commission,* 262 U. S. 499, 501, 502, which includes the power to do away with the fellow servant and assumption of risk rules. *New York Central R. Co.* v. *White,* 243 U. S. 188, 200; *Hawkins* v. *Bleakly,* 243 U. S. 210, 213; *Missouri Pacific Ry. Co.* v. *Mackey,* 127 U. S. 205; *Minnesota Iron Co.* v. *Kline,* 199 U. S. 593. The interstate commerce clause did not withdraw from the states the power to legislate with respect to their local concerns, even though such legislation may indirectly and incidentally affect interstate commerce and persons engaged in it. *Sherlock* v. *Alling,* 93 U. S. 99, 103; *Western Union Telegraph Co.* v. *Kansas,* 216 U. S. 1, 26; *Interstate Busses Corp.* v. *Holyoke St. Ry. Co.,* 273 U. S. 45, 52; *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Solan,* 169 U. S. 133, 137, 138.

Although by the Federal Employers' Liability Act the regulatory power of the national government over interstate commerce has been extended to the employees of interstate rail carriers, it has not excluded the exertion of state power over their employees, while engaged in a service not involving interstate commerce. See *Shanks* v. *Delaware, Lackawanna & Western R. Co.,* 239 U. S. 556, 558. The liability of the carrier to its employees

when so engaged is controlled by state law, see *Illinois Central R. Co.* v. *Behrens,* 233 U. S. 473; *Wabash R. Co.* v. *Hayes,* 234 U. S. 86, 89, 90; and thus remains within the scope of state legislative power to regulate the relations of master and servant. *Chicago & Eastern Illinois R. Co.* v. *Industrial Commission,* 284 U. S. 296.

But the petitioner insists that the Massachusetts statute does invade the field already occupied by the federal legislation. It is said that the statute, as construed by the state court, applies to all employees in intrastate commerce, while the federal act does extend to and include some employees engaged in intrastate commerce if, at the same moment and in the same service, they are also engaged in interstate commerce. See *Pedersen* v. *Delaware, Lackawanna & Western R. Co.,* 229 U. S. 146; *Erie R. Co.* v. *Winfield,* 244 U. S. 170; *Southern Pacific Co.* v. *Industrial Accident Commission,* 251 U. S. 259.

But there are two answers to this suggestion. First, as was conceded at the trial, the respondent was not engaged in interstate commerce at the time of the accident, and the petitioner cannot object, on the ground advanced, to the application of the Act to his employment. Second, we do not read the opinion of the state court as placing any such construction on the Act. By the language which we have quoted and elsewhere in the opinion, the court states with emphasis that the Act is not to be construed as reaching into any part of the field occupied by federal legislation. Thus construed, it does not purport to extend to employees who, because they are engaged in interstate commerce, are within the federal act, even though at the same time their service is also in intrastate commerce.

Petitioner also urges that as the insurance provisions of the Act, as interpreted by the state court, require the premiums to be based on so much of its payroll as may be allocated to the hours of employment in intrastate

commerce, a burden is imposed on interstate commerce by the difficulty, if not impossibility, of making the allocation. So far as this argument is based on an interpretation of the statute which the state court has rejected, it may be disregarded. The allocation required is only to employment exclusively in intrastate service not embraced in the Federal Employers' Liability Act. The state court thought that possible difficulties in making it could be dealt with administratively by rules framed by the State Insurance Commissioner, acting under authority of the Act. In any case, it is not self-evident that the Act is unworkable, and there is nothing on the record which would enable us to say that such allocation is either impossible or so difficult as necessarily to impose any burden on interstate commerce. See *Interstate Busses Corporation* v. *Holyoke St. Ry. Co., supra,* p. 52.

There are no findings and the petitioner asked no ruling with respect to the point. There is no evidence from which it could be inferred that the allocation could not be made or that insurance could not be effected at a cost bearing a fair relation to the intrastate service to which the Act applies. The burden was on petitioner, who assailed the statute, to establish its unconstitutionality. *O'Gorman & Young, Inc.* v. *Hartford Fire Ins. Co.,* 282 U. S. 251; *Hardware Dealers Mutual Fire Ins. Co.* v. *Glidden Co.,* 284 U. S. 151, 158. For the same reasons we need not discuss like objections based on the Federal Safety Appliances Act.

Affirmed.

SOUTHERN PACIFIC CO. *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 339. Argued February 15, 1932.—Decided March 14, 1932.

Engineer officers of the War Department, assigned to duty in connection with the improvement of rivers and harbors or the work of the California Debris Commission, are not within the meaning of

the provisions of the land-grant acts and the so-called equalization agreements and joint military arrangements under which the Government is entitled to deductions from the regular commercial rates for the transportation of members of the military forces or "troops of the United States." P. 246.

72 Ct. Cls. 273, reversed.

CERTIORARI, 284 U. S. 611, to review a judgment of the Court of Claims, insofar as it allowed deductions from charges for transportation of engineer officers assigned to duty in connection with rivers and harbors improvement and the work of the California Debris Commission.

Mr. Charles H. Bates for petitioner.

Assistant Attorney General Rugg, with whom *Solicitor General Thacher,* and *Messrs. Claude R. Branch* and *H. Brian Holland* were on the brief, for the United States.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The petitioner operates a railway system comprising certain lines of railroad constructed with the aid of Congressional grants of public lands. During the years 1920–1923, both inclusive, the company, upon transportation requests issued by the War Department, the Navy Department, and the Marine Corps of the United States, transported military prisoners and their guards; officers of the reserve corps traveling to and from encampments under orders of the Secretary of War; members of the nurse corps of the navy; engineer officers of the War Department on duty in connection with river and harbor works and the California Debris Commission; escorts accompanying the remains of deceased soldiers; enlisted men changing station or returning thereto; officers of the army proceeding to their homes after date of their retirement; and stranded enlisted men of the navy traveling

back to their proper stations. In settling petitioner's accounts for transportation so furnished, or in adjusting those previously settled, the United States, through its disbursing officers, made or required petitioner to make certain deductions from the amounts due at regular commercial fares, on the ground that the persons transported were troops of the United States within the meaning of the applicable land grant laws, appropriation acts, and land grant equalization agreements. Payment on this basis was accepted under protest. Suit was instituted in the Court of Claims to recover the amounts deducted, the claim being that none of the persons with respect to whose transportation deduction had been made came within the purview of the statutes and agreements requiring the company to carry troops of the United States at reduced fares. The Court of Claims entered judgment for the petitioner on certain items of the claim, but as to most of them found in favor of the United States. A petition for certiorari was filed, and the writ was granted, "limited to the question raised with respect to engineer officers of the War Department in performing duties in time of peace in connection with rivers and harbors improvements and the meetings of the California Debris Commission."

A portion of what is now petitioner's railroad system was granted aid by the Act of July 27, 1866 (14 Stat. 292). The act made the railroad a post route and military road, the charges of which should be subject to such regulations as Congress might impose.[1] With respect

[1] Act of July 27, 1866; 14 Stat. 292, § 11. *"And be it further enacted,* That said Atlantic and Pacific Railroad, or any part thereof, shall be a post route and military road, subject to the use of the United States for postal, military, naval, and all other government service, and also subject to such regulations as Congress may impose restricting the charges for such government transportation."

Section 18 of the same act made the same provision respecting the Southern Pacific Railroad, now a part of petitioner's system.

to the line in question the army appropriation acts provide that such railroad "having claims against the United States for transportation of troops and munitions of war and military supplies and property . . . shall be paid out of the moneys appropriated by the foregoing provisions only on the basis of such rate for the transportation of such troops and munitions of war and military supplies and property as the Secretary of War shall deem just and reasonable under the foregoing provision, such rate not to exceed 50 per centum of the compensation of such Government transportation as shall at that time be charged to and paid by private parties to any such company for like and similar transportation; and the amount so fixed to be paid shall be accepted as in full for all demands for such service." [2]

As respects another division of petitioner's system the grant of lands was under the Act of July 25, 1866 (14 Stat. 239, 241), which provided: "And said railroad shall be and remain a public highway for the use of the government of the United States, free of all toll or other charges upon the transportation of the property or troops of the United States." This clause was construed in *Lake Superior & Mississippi R. Co.* v. *United States*, 93 U. S. 442, as conferring only the free use of the roadbed as a highway. Under appropriate legislation following that decision payment of compensation has been made by the United States for transportation of property and troops at fifty per cent. of that charged to private parties. See *United States* v. *Union Pacific R. Co.*, 249 U. S. 354.

[2] See the Army Appropriation Act for the year ending June 30, 1921, approved June 5, 1920 (41 Stat. 948, 960). The act contains the following proviso: "That nothing in the preceding provisos shall be construed to prevent the accounting officers of the Government from making full payment to land-grant railroads for transportation of property or persons where the courts of the United States have held that such property or persons do not come within the scope of the deductions provided for in the land-grant Acts: . . ."

The Government and certain railroads have entered into so-called equalization agreements and joint arrangements for military transportation, which provide for deductions additional to the fifty per cent. required by the statutes. The petitioner is a party to these agreements, which have been construed generally as applying to charges for transportation of the same classes of persons to whom the land-grant rates would be applicable. Both the petitioner and the Court of Claims have so treated these agreements and arrangements, and our decision under the statutes may be taken to apply to deductions under these contracts.

This court had occasion in the *Union Pacific* case (*supra*) to pass upon the meaning and scope of the phrase "troops of the United States" as used in the land-grant legislation and in the agreements. What was there said is apposite to expenditures under appropriation acts which use the same phraseology and apply to transportation over petitioner's railroad. The opinion in that case demonstrates that the word "troops" was intentionally used in contradistinction to the words any persons in the service of the United States, or their equivalent, and holds that the word "troops" had, at the time of the passage of the land-grant acts, and ever since has had, an established meaning, namely, "soldiers collectively—a body of soldiers."

Thus the test is whether the person to be transported is one of such a collective body of soldiers. The reduced rate is applicable to a person so described, although he may not be traveling as part of a detachment or moving body of men. *Illinois Central R. Co.* v. *United States,* 62 Ct. Cls. 61; *Chicago, Rock Island & Pacific Ry. Co.* v. *United States,* 58 Ct. Cls. 33. In the *Union Pacific* case it was pointed out that although certain persons were properly characterized as members of the army and as having official relation thereto, they could not, at the time of their transportation, be classified as part of the

troops of the United States, as, for example, a furloughed soldier returning to his station, or retired soldiers en route to their homes after retirement.

The narrow question presented for decision is whether engineer officers cease to be members of the military forces or "troops of the United States" when they are assigned to duty in connection with the improvement of rivers and harbors or the work of the California Debris Commission.

While, as is argued by the United States, river and harbor improvement has in one aspect a bearing upon the military defence of the United States, obviously the principal purpose of this work is the promotion of commerce and transportation, by maintaining and deepening channels, and constructing dikes, jetties, and other works which effect the improvement of navigation generally.

The California Debris Commission was created by the Act of March 1, 1893 (27 Stat. 507), which authorized the appointment of a commission from officers of the corps of engineers of the United States army, whose duty was to mature and adopt a plan or plans to improve the navigability of the Sacramento and San Joaquin rivers in California, deepen their channels, and protect their banks, with a view of preventing encroachment and damage from debris resulting from mining operations, natural erosion, or other causes, and restoring as far as practicable the navigability of the rivers to the condition existing in 1860. The Commission was to permit mining by hydraulic processes, provided this could be done without injury to the navigability of the rivers or to the lands adjacent thereto. Quite evidently this work is of a non-military nature and in the interest of commerce and navigation.

Conceding that engineer officers of the United States army perform a true military function when engaged in work on the military defences of the United States, and, when so engaged form a part of the nation's troops, we

are of opinion that their activity in connection with rivers and harbors work and the California Debris Commission is non-military in character, and falls within the same category as that of many other employees and officials of the War Department, the nature of whose service excludes them from classification as part of the "troops of the United States."

Congress has recognized that such service by engineer officers is non-military. For example, in the Army Appropriation Act for 1930, approved February 28, 1929 (45 Stat. 1349, 1374, 1379), Title I deals with military activities and expenses of the War Department incident thereto. Title II has to do with non-military activities of the War Department, and under the subtitle "Corps of Engineers" makes appropriation for defraying the expenses of the California Debris Commission, and also for the rivers and harbors improvement work of the United States to be carried on under the control and supervision of the Chief of Engineers of the War Department. The Secretary of War, in his annual reports, under the caption "Civil Activities of the Corps of Engineers," mentions rivers and harbors work and that of the California Debris Commission.[3]

The Court of Claims held the view that, as respects engineer officers employed in the capacities mentioned, the Government was entitled to the deduction of fifty per cent. under the terms of the land-grant acts and appropriations pursuant thereto, and other deductions under the equalization agreement and joint military arrangements. For the reasons given, we are of the contrary opinion, and accordingly reverse the judgment of the Court of Claims and remand the cause for further proceedings in conformity herewith.

Reversed.

[3] Typical reports are that for 1928, p. 25 *et seq.*, and that for 1930, pp. 9, 16, 17.

Syllabus.

AMERICAN TRADING CO. *v.* H. E. HEACOCK CO.*

CERTIORARI TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

No. 506. Argued February 26, 1932.—Decided March 21, 1932.

1. Congress has authority to legislate upon the substantive law of trade-marks in the Philippine Islands, or to provide for such legislation. P. 256.
2. Philippine Act No. 666 of 1903, passed by the Philippine Commission under authority of Congress, and providing for the registration of trade-marks and their protection, was not displaced by the Federal Trade-Mark Act of 1905, and was continued in force by the Organic Act of 1916. Pp. 256–258.
3. The Federal Trade-Mark Act of 1905 provides with respect to trade-marks used in commerce between continental United States and the Philippine Islands a protection similar to that which was accorded by the Act to the use of trade-marks in interstate commerce. P. 257.
4. This Act does not attempt to create exclusive substantive rights in marks, or to afford a refuge for piracy through registration under it, but to provide procedure and give protection to remedies where property rights exist under local law. P. 258.
5. Registration under the Federal Trade-Mark Act of a mark acquired in the United States does not enable the owner to do local business under it in the Philippines in competition with another who has acquired the right to the mark there by local use and by registration under the Philippine Act. *Id.*
6. The name Rogers was registered in the Philippine Islands as a trade-mark by one who had built up a local business and good will in selling silverware stamped with it and who was a pioneer in its use there in that trade. The name had significance as a symbol of the ware and not as a family name. The ware sold was made in the United States by a manufacturer which had a federal registration of the name as its trade-mark, and which consented to the Philippine registration. *Held:*

(1) That the Philippine registration was valid to prevent local selling of similar goods, bearing the name Rogers, which were made

* Together with No. 507, *Wm. A. Rogers, Ltd., et al.* v. *H. E. Heacock Co.*

in the United States by another manufacturer claiming the name as its trade-mark, also registered under the Federal Act. P. 259.

(2) That the local rights of the Philippine registrant were independent of the rights *inter sese* of the two manufacturers, and he was not estopped because of their relations. P. 261.

7. In the interpretation of the local law of the Philippine Islands, this Court, while free to exercise its independent judgment, will not overrule a decision of the insular court, except for cogent reasons. *Id.*

Affirmed, with modifications.

CERTIORARI, 284 U. S. 613, to review the affirmance of a judgment enjoining infringement of a trade-mark and for an accounting, and the affirmance of a judgment dismissing a cross-suit.

Mr. Harry D. Nims, with whom *Messrs. William Cattron Rigby, Minturn de S. Verdi,* and *James J. Kennedy* were on the brief, for petitioners.

Philippine Act. No. 666 should not be construed to interfere with and burden trade relations between the United States and the Philippine Islands.

The proviso indicates an intention to provide for marks registered under the Act of 1905, protection auxiliary to that given by that Act. It seems to differentiate goods imported from the United States under registered trade-marks from all other imported goods; doubtless the reason was that the Islands are not foreign to the United States. *Fourteen Diamond Rings* v. *United States,* 183 U. S. 176.

The principle that local law may not be construed so as to burden interstate or foreign commerce particularly applies to commerce with the Islands, which in a peculiar way are under the control and care of the Congress.

The court below holds that the Act of 1905 does not extend to the Islands. By so doing, it nullifies (so far as trade relations with the Islands go) registration under this Act.

The Heacock registration is invalid on its face because it is a registration of a personal surname. *Coty, Inc.* v. *Parfums de Grande Luxe,* 298 Fed. 865, 874; *Andrew Jergens Co.* v. *Bonded Products Corp.,* 21 F. (2d) 419, affirming 13 F. (2d) 417; *Andrew Jergens Co.* v. *Woodbury,* 273 Fed. 952, 966; *Howe Scale Co.* v. *Wyckoff, Seamans & Benedict,* 198 U. S. 118, 135.

Under Act No. 666, a trade-mark is a mark which distinguishes goods of one man from those of another (§ 1) and registrants under this Act must be "owners of trade-marks or trade-names" (§ 2).

Heacock admits that he owns neither the registration nor the trade-mark registered, but that both, in reality, belong to the Silver Company, which concern is equitably estopped from claiming exclusive rights in this surname. *Ubeda* v. *Zialcita,* 226 U. S. 452. When, in 1918, the Silver Company connived with Heacock to take out this registration, it knew of the trade-marks of Wm. A. Rogers, Ltd., and its use of them. We submit that a court of equity will not allow the Silver Company and Heacock to profit now by this situation to the injury of Wm. A. Rogers, Ltd.

Heacock's registration is invalid because contrary to the provisions of § 13 of Act No. 666, which forbids registration of a mark "identical with a registered or known trade-mark owned by another . . . or which so nearly resembles another person's lawful trade-mark or trade-name as to be likely to cause confusion." It is invalid because he never applied it to merchandise.

One of two concerns using composite trade-marks has not the right to appropriate and claim exclusive use of one of the words common to the marks. This is particularly true when that word is in common use, either by the public or by competitors. *Planten* v. *Canton Pharmacy Co.,* 33 App. D. C. 268; *Laughran* v. *Quaker City Chocolate Co.,* 296 Fed. 822; *Van Camp Sea Food Co.* v. *West-*

gage Sea Products Co., 28 F. (2d) 957; *Morrell* v. *Hauser*, 20 F. (2d) 713.

It is no answer to assert that the Silver Company's goods were sold in the Islands before those of Wm. A. Rogers, Ltd. The Philippine Islands do not constitute a State. The Islands are a territory belonging to the United States under a civil government established by the Congress. In this sovereignty, in interstate commerce in the continental United States, the marks of the Silver Company and of Wm. A. Rogers, Ltd., which are involved here, are admittedly not infringements of each other. For years they have been used side by side. The question therefore, is here presented whether one of these parties, simply because it happened to be the first to occupy the Philippine Market with its Rogers marks, with full knowledge of the rights of the other, may make use of the local Act to prevent the exportation to the Islands of goods bearing these registered trade-marks of the other.

Mr. Edward S. Rogers, with whom *Messrs. John P. Bartlett* and *Richard Eyre* were on the brief, for respondent.

The word "Rogers" was registrable under the Philippine Act. Independently of the statutory right, this name had acquired a secondary significance in the Philippines as designating the goods of respondent.

Sale of the goods of one manufacturer or trader as those of another is the essence of the wrong in both trade-mark and unfair competition cases. *Hanover Star Milling Co.* v. *Metcalf*, 240 U. S. 403, 412.

Unfair competition is a question of fact, to be determined with reference to the particular conditions existing in each case. *International News Service* v. *Associated Press*, 248 U. S. 215, 236; *Reddaway* v. *Banham*, (1896) A. C. 199, 204; *Birmingham Vinegar Co.* v. *Powell*, (1897) A. C. 710; *Howe Scale Co.* v. *Wyckoff, Seamans & Benedict*, 198 U. S. 118, 137.

Petitioners are violating the universally accepted principle of law that nobody has any right to represent his goods as the goods of somebody else. *Reddaway* v. *Banham,* (1896) A. C. 199, 204; *American Waltham Watch Co.* v. *U. S. Watch Co.,* 173 Mass. 85, 88.

Since the Philippine Islands are territories of the United States, Congress, under the Constitution, had complete legislative authority over them (*Dorr* v. *United States,* 195 U. S. 138) which was lawfully delegated to the Philippine Commission (*Dorr* v. *United States, supra; United States* v. *Heinszen,* 206 U. S. 370). This general power included the authority to fix the substantive law of trademarks and unfair competition in the Islands.

The federal trade-mark statutes are based on the commerce clause. Congress has no authority to legislate upon the substantive law of trade-marks. *Trade-Mark Cases,* 100 U. S. 82; *American Steel Foundries* v. *Robertson,* 269 U. S. 372, 381. The Trade-Mark Act of February 20, 1905 (U. S. C., Title 15) is and can be only procedural. There is no conflict between that act and the Philippine Act, as they cover different fields.

Respondent was entitled at common law to be protected against unfair invasion of its long established local good will by petitioners' use of deceptive marks. *Hanover Star Milling Co.* v. *Metcalf,* 240 U. S. 403, 422.

Petitioners proceed upon the theory that registration under the Federal Trade-Mark Act is the grant of a right to use the registered mark; but the exact contrary is the case. *Trade-Mark Cases,* 100 U. S. 82; *United Drug Co.* v. *Rectanus Co.,* 248 U. S. 90.

Petitioners invoke registration under the federal statute to project an alleged trade-mark in advance of any trade under it, and thus to dislodge a prior occupant of the market from an earned good will. Under the decisions of this Court, this can not be done. *United Drug Co.* v. *Rectanus Co.,* 248 U. S. 90; *U. S. Printing & Litho. Co.* v.

Griggs, Cooper & Co., 279 U. S. 156; *Hanover Star Milling Co.* v. *Metcalf*, 240 U. S. 420.

Petitioner, Wm. A. Rogers, Ltd., has divested itself of the rights it claims, by assignment to the Oneida Community, Ltd.

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

In No. 506, H. E. Heacock Co., a corporation of the Philippine Islands and a dealer in 'flatware,' brought suit in the Court of First Instance of Manila against the American Trading Company, also a local corporation, to enjoin infringement of trade-mark and unfair competition. The trade-mark was the name "Rogers" which it was alleged, had been used by plaintiff for upwards of twenty years on flatware, whether nickel, silver-plated or silver, imported by plaintiff and sold in the Islands. In the year 1918, this trade-mark was registered under the Philippine Act No. 666 of March 6, 1903, as amended, in the local Bureau of Commerce and Industry. The complaint charged that defendant, about the year 1925, began to import and sell within the Philippine Islands flatware of precisely the same designs, as that imported and sold by plaintiff, with the words "Wm. A. Rogers" stamped on the ware in the same position as that which plaintiff utilized, and that through this imitation plaintiff was being defrauded of its legitimate trade. The answer denied the allegations of unfair dealing, and alleged that plaintiff had no legal right to appropriate the name "Rogers" and that, as against defendant, the registration of that name was invalid. The answer further averred that the defendant was acting in the Philippine Islands as the local representative of Wm. A. Rogers, Ltd., (a Canadian corporation doing business in Canada and New York) which was engaged in the manufacture of flatware and had duly registered in the United States, and was

using in its business, several trade-marks embracing the name "Wm. A. Rogers" and "Rogers" in various forms. No. 507 is a cross suit instituted by Wm. A. Rogers, Ltd. and the American Trading Company against H. E. Heacock Co.

The two suits were tried together. Judgment was rendered in favor of H. E. Heacock Co., ordering an accounting of profits and directing that Wm. A. Rogers, Ltd. and the American Trading Company "perpetually abstain from importing and selling in the Philippine Islands silver-plated wares for use in the table and for other purposes similar to those imported and sold by the plaintiff, bearing the trade-mark 'Rogers'." The cross suit was dismissed. The Supreme Court of the Philippine Islands rendered judgments of affirmance, and this Court granted writs of certiorari. Act of February 13, 1925, c. 229, § 7, 43 Stat. 936, 940.

The facts as found by the insular courts, and as set forth in the opinion of the Supreme Court, may be summarized as follows: About seventy years ago, three brothers by the name of Rogers, composing a firm in Connecticut under the name of "Rogers Bros.," were the first to apply the art of electroplating to the manufacture of silver-plated ware in the United States. Their ware soon acquired a high reputation. In 1865, Wm. Rogers, one of the brothers, organized a corporation known as the Wm. Rogers Manufacturing Company which used on its silver-plated ware the trade-marks "1865 Wm. Rogers Mfg. Co." and "Wm. Rogers & Son." Two other corporations also acquired from one or more of the brothers the right to the use of the name Rogers, and the wares of these concerns were known by the public as "Rogers." In 1898, the International Silver Company was organized and became the owner of the capital stock or properties of a number of corporations, including the Wm. Rogers Manufacturing Company, the Meriden Britannia Com-

pany, and Rogers & Bro. (which were engaged in making silver-plated ware) together with their good will and trade-marks embracing the marks "1847 Rogers Bros." and the "(Star) Rogers & Bro."

The plaintiff H. E. Heacock Co. was established in Manila in 1909 as successor of the firm of Heacock & Frier, which since 1901 had been importing into the Philippine Islands flatware bearing the mark "Rogers." The Heacock Company continued this trade and its goods bearing that mark became widely known in the Islands. These wares were manufactured in the United States by the International Silver Company, and, in 1918, the Heacock Company, with the knowledge and consent of the International Silver Company, registered the word "Rogers" as a trade-mark in the Philippine Bureau of Commerce and Industry. The only competitor of the Heacock Company in this trade is the defendant American Trading Company, which began to import its wares into the Philippine Islands in 1925. These are manufactured in the United States by Wm. A. Rogers, Ltd., which has its trademarks, as alleged by it, duly registered in the United States. They were not registered in the Philippine Islands until after the trial of these suits. As to the similarity of the wares and the effect of the use of the word 'Rogers', the Supreme Court found that "when Heacock Company first imported such wares into the Philippine Islands it was then a virgin country, and it must be admitted that any business standing or reputation which such wares had up to 1925 were those given by the advertising and business methods and dealings of that company. The evidence is conclusive that the wares for which the American Trading Company has been taking and filling orders are very similar in appearance, design, and material to the wares which have been advertised and sold in this country by Heacock Company since 1905. It is true that a dealer in such wares could

and would see the distinction between them, but even so, in the ordinary course of business, the average public to whom they are sold could not and would not distinguish one from the other." And further, the Supreme Court said, "stripped of all non-essentials, it must be conceded that in this line of wares it is the word 'Rogers' which gives the business its intrinsic value." [1]

[1] The Supreme Court in substance confirmed the findings of the Court of First Instance which stated "that the silver-plated goods for use in the table and for other purposes manufactured by the International Silver Corporation and imported into the Islands by H. E. Heacock Co. were known generally and in the Islands by their trade-mark 'ROGERS' and this trade-mark used in connection with said silver-plated goods have been known by the public as goods sold by H. E. Heacock Co.; that the said silver-plated goods with the trade-mark 'ROGERS' were notoriously known in the Philippine Islands due to the extensive propaganda and advertisement made by H. E. Heacock Co. which cost from forty thousand to fifty thousand pesos; that the silver-plated goods for use in the table and for other purposes imported into these Islands by H. E. Heacock Co. and by Wm. A. Rogers, Ltd., and the American Trading Co., have the word 'ROGERS' with the addition of other words, figures or symbols indicating the different grades or qualities of the goods; that in the local market the word 'ROGERS' is the one generally known and sought for by the public which desires to buy silver-plated goods for the table and for other purposes, disregarding and overlooking completely the other words, figures and symbols appearing on the goods; that some of the dealers in silver-plated goods imported by Wm. Rogers, Ltd., and the American Trading Co. only make mention and call attention to the word 'ROGERS' appearing thereon, and in almost all cases the public entertained the conviction and the belief, at least, that such silver-plated goods were the same as those which bore the trade-mark 'ROGERS' sold by H. E. Heacock Co.; that the American Trading Co., through it and as representative of Wm. A. Rogers, Ltd., has succeeded in making a name in the market for the silver-plated goods which it imports and sells in the Philippines, thanks to the word 'ROGERS' engraved thereon, and, finally, that H. E. Heacock Co. was informed of the importation of these silver-plated goods bearing the word 'ROGERS' by the American Trading Co. about the end of 1927 only."

No ground appears for disturbing these findings of fact. The petitioners contend that, irrespective of the validity of respondent's local registration, the petitioner Wm. A. Rogers, Ltd. 'was entitled to send its goods marked with its federally registered trade-marks to the Islands and sell them there'; that the respondent's registration in the Islands was invalid upon various grounds; and that both that registration, and the trade-mark registered, in reality belong to the International Silver Company, which is equitably estopped from claiming exclusive rights in the word 'Rogers'. Respondent rests upon the Philippine statute and its registration thereunder, and upon general principles of law, insisting that the registration by Wm. A. Rogers, Ltd., of its trade-marks in the United States does not constitute a defense against infringement and unfair competition in the local trade in the Islands.

First. While the Congress, by virtue of the commerce clause, has no power to legislate upon the substantive law of trade-marks,[2] it does have complete authority so to legislate, or to provide for such legislation, in the government of the Philippine Islands.[3] Under the authority validly conferred by the Congress,[4] the Philippine Commission passed the Philippine Act No. 666, of 1903, which made comprehensive provision in relation to trade-marks, trade names and unfair competition in the Philippine Islands. That Act, with amendments, has been continued. It provides for the registration of trade-marks and their protection. The Congress has had authority to amend or repeal this legislation, relating to local trade within the

[2] *Trade-Mark Cases,* 100 U. S. 82; *United Drug Co.* v. *Rectanus Co.,* 248 U. S. 90, 98; *American Steel Foundries* v. *Robertson,* 269 U. S. 372, 381.

[3] *De Lima* v. *Bidwell,* 182 U. S. 1, 196, 197.

[4] Act of March 2, 1901, c. 803, 31 Stat. 910; *Dorr* v. *United States,* 195 U. S. 138, 153; *United States* v. *Heinszen & Co.,* 206 U. S. 370, 385.

Islands, but it has not done so. The Federal Trade-Mark Act of 1905,[5] cannot be regarded as intended to displace the Philippine statute so far as the latter applied to local commerce. The Act contains no provision to that effect. It was, however, manifestly intended to apply to valid trade-marks used in commerce between continental United States and the Philippine Islands. This is apparent from § 29[6] which provides that the word 'States', as used in the Act 'embraces the District of Columbia, the Territories of the United States, and such other territory as shall be under the jurisdiction and control of the United States.'[7] The Tariff Act of 1909,[8] relating to the Philippine Islands, provided for jurisdiction in the insular courts in matters arising under the Federal Trade-Mark Act of 1905. And the Philippine statute as to trade-marks, as amended in 1915 (Act No. 2460) in prohibiting the importation of merchandise with names or marks simulating those of domestic manufacturers or traders registered under the local Act, contained a proviso that "this section" (§ 14) "shall not be construed to affect rights that any person may have acquired by virtue of having registered a trade-mark under the laws of the United States."[9]

Accordingly, we must assume that it was the intention of the Congress in the Federal Trade-Mark Act of 1905 to provide, with respect to trade-marks used in commerce between continental United States and the Philippine Islands, a protection similar to that which was accorded

[5] Act of February 20, 1905, c. 592, 33 Stat. 724, U. S. C., Tit. 15, §§ 81 *et seq.*

[6] 33 Stat. 731, U. S. C. Tit. 15, § 108.

[7] See U. S. Treasury Department, Rules and Regulations, 1908, vol. 3, art. 325, p. 159; 27 Op. Atty. Gen. 623, 624.

[8] Act of August 5, 1909, c. 8, § 26, 36 Stat. 130, 177.

[9] See, also, Customs Administrative Order No. 194, January 13, 1926: "Laws, Rules and Regulations governing the registration of Trade-Marks and Trade Names in the Philippine Islands" published by the Philippine Government in 1927.

by the Act to the use of trade-marks in interstate commerce. As to the latter, the Federal statute did not attempt to create exclusive substantive rights in marks, or to afford a refuge for piracy through registration under the Act, but to provide appropriate procedure and to give the described protection and remedies where property rights existed. The acquisition of such property rights in trade-marks rested upon the laws of the several States. *United Drug Co.* v. *Rectanus Co.*, 248 U. S. 90, 98; *American Steel Foundries* v. *Robertson*, 269 U. S. 372, 381; *United States Printing & Lithograph Co.*, v. *Griggs, Cooper & Co.*, 279 U. S. 156, 158. And in view of the object and terms of the statute, and of the assimilation in this respect of commerce with the Philippines to interstate commerce, the same rule of construction must be deemed applicable in both cases. There is no ground for the conclusion that the Congress, in thus according the protection of the Federal statute to valid registered trade-marks used in commerce with the Philippine Islands, intended to override the Philippine statute with respect to the acquisition and protection of rights in marks and names in local trade within the Islands. The Philippine Trade-Mark Act in its proper application to local trade is undoubtedly one of the laws which was continued in force by the Organic Act for the Philippine Islands, enacted in 1916,[10] which provided in § 6 " that the laws now in force in the Philippines shall continue in force and effect, except as altered, amended, or modified herein, until altered, amended, or repealed by the legislative authority herein provided or by Act of Congress of the United States."

The controversy with respect to the trade in the wares in question is narrowed by the concession of the respondent, in its argument here, that its bill " did not pray for

[10] Act of August 29, 1916, c. 416, 39 Stat. 545, 547.

an injunction against importation, but against selling—meaning, of course, local selling within the Philippines." Respondent states that "the infringing and unfair acts of petitioners all had to do with local selling after the imported goods had 'mingled with and become a part of the general property of the' Islands." Referring to the provision of the judgment enjoining petitioners from 'importing and selling in the Philippine Islands,' respondent concedes that "if the words 'selling in the Philippines' should be construed as comprehensive enough to include selling by Wm. A. Rogers, Ltd. directly to a purchaser in the Philippines," the judgment might be "open to criticism," and respondent submits that these words mean "local sales." Insisting that the judgment as thus construed "in no way interferes with the importation of goods of petitioners or the sale of their goods in original packages," respondent states that, if the judgment be found ambiguous in this respect, "it would be enough to reform it to confine its operation to 'selling in local trade in the Philippine Islands.'"

Second. With respect to the local trade within the Islands, respondent had acquired rights under the Philippine law. Respondent had long been engaged in selling its wares and had a valuable good will. These wares had been known by the name of 'Rogers' for many years. This name had identified the wares and had made the respondent's trade distinctive. In employing this designation there had been no simulation of the names of others in the Islands and there had been no occasion for confusion. For this trade, as the insular Court has said, the Islands were 'virgin' territory. The facts, as found, thus demonstrate that in this long continued local trade the word 'Rogers' did not have the significance of a family name but had acquired a secondary meaning in particular relation to the wares in which the respondent

dealt.[11] The insular Supreme Court held that in these circumstances the word 'Rogers' was entitled to registration under the Philippine Trade-Mark Act No. 666. We perceive no ground on which it can be said that legislation permitting such a registration and affording the remedies for which the Act provides was not within the competency of the local legislative authority. Compare, with respect to the provision of § 5 of the Federal Trade Mark Act of 1905, *Thaddeus Davids Co.* v. *Davids Mfg. Co.*, 233 U. S. 461, 468, 470; *G. & C. Merriam Co.* v. *Syndicate Publishing Co.*, 237 U. S. 618, 622. The fact that the goods thus designated were imported goods does not affect the question of the respondent's right to protection in the local trade it had built up. The fundamental purpose of the Philippine legislation was to protect the continued enjoyment of reputation acquired in such trade and the good will flowing from it. See *Hanover Milling Co.* v. *Metcalf*, 240 U. S. 403, 412, 413. In this aspect it is unnecessary to consider the respective rights of the International Silver Company and Wm. A. Rogers, Ltd. in relation to the use of their marks in the States of the Union. These rights have been the subject of numerous judicial decisions.[12]

---

[11] See *Herring-Hall-Marvin Safe Co.* v. *Hall's Safe Co.*, 208 U. S. 554, 559; *L. E. Waterman Co.* v. *Modern Pen Co.*, 235 U. S. 88, 94; *American Waltham Watch Co.* v. *United States Watch Co.* 173 Mass. 85, 87; 53 N. E. 141; *Westphal* v. *Westphal's Corp.*, 216 App. Div. (N. Y.) 53; 215 N. Y. S. 4; *Id.*, 243 N. Y. 639; 154 N. E. 638; *Garrett* v. *Garrett & Co.*, 78 Fed. 472, 478; *Henderson* v. *Peter Henderson & Co.*, 9 F. (2d) 787, 789; *Vick Medicine Co.* v. *Vick Chemical Co.*, 11 F. (2d) 33, 35; *Montgomery* v. *Thompson* (1891), A. C. 217; 64 L. T. R. 748; *Matter of Burford & Co.*, 36 R. P. C. 139.

[12] *William Rogers Mfg. Co.* v. *Rogers & Spurr Mfg. Co.*, 11 Fed. 495; *William Rogers Mfg. Co.* v. *R. W. Rogers Co.*, 66 Fed. 56; *R. W. Rogers Co.* v. *Wm. Rogers Mfg. Co.*, 70 Fed. 1017; *Rogers* v. *Wm. Rogers Mfg. Co.*, 70 Fed. 1019; *Wm. Rogers Mfg. Co.* v. *Rogers*, 84 Fed. 639; *Wm. Rogers Mfg. Co.* v. *Rogers*, 95 Fed. 1007; *Inter-*

It is sufficient to say that when petitioners entered the trade within the Philippine Islands in 1925, they found a field already occupied and were bound to respect the rights there established. Nor do we find any ground for holding that the respondent is estopped from seeking relief by reason of its relation to the International Silver Company. Respondent manifestly had acquired an interest in the local trade which was entitled to protection, and it has sought and obtained that protection in accordance with the law governing that trade.

As the questions are those of the interpretation of the local law, and its application to particular facts, this Court, while free to exercise its independent judgment, is not disposed except for cogent reasons to overrule the decision of the insular court. *Alzua* v. *Johnson,* 231 U. S. 106, 110; *Gauzon* v. *Compañia General,* 245 U. S. 86, 89; *Ibanez* v. *Hong Kong Banking Corp.,* 246 U. S. 627, 629; *Philippine Sugar Co.* v. *Philippine Islands,* 247 U. S. 385, 390; *Yu Cong Eng* v. *Trinidad,* 271 U. S. 500, 523. We find no such reasons here.

The judgment of the Court of First Instance of Manila is modified, in the provision for injunction, by striking out the words "importing and selling in the Philippine Islands" and substituting therefor the words "selling in local trade in the Philippine Islands," and, in the provision for accounting, by striking out the words "importation and sale in the Philippines" and substituting therefor the words "sale in local trade in the Philippine

---

national Silver Co. v. *Simeon L. & George H. Rogers Co.,* 110 Fed. 955; *Wm. A. Rogers, Ltd.* v. *International Silver Co.,* 30 App. D. C. 97; *Wm. A. Rogers, Ltd.* v. *International Silver Co.* (1), 34 App. D. C. 410; *William A. Rogers, Ltd.* v. *International Silver Co.* (2), 34 App. D. C. 413; *Wm. A. Rogers, Ltd.* v. *International Silver Co.* (3), 34 App. D. C. 484; *Wm. A. Rogers, Ltd* v. *Rogers Silverware Redemption Bureau, Inc.,* 247 Fed. 178; *William Rogers Mfg. Co.* v. *Rogers Mfg. Co.,* 16 Phila. Rep. 178.

Islands"; and, with this modification, the judgments of the Supreme Court of the Philippine Islands are affirmed.

Affirmed.

MR. JUSTICE CARDOZO took no part in the consideration or decision of these cases.

NEW STATE ICE CO. *v.* LIEBMANN.

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

No. 463. Argued February 19, 1932.—Decided March 21, 1932.

1. The business of manufacturing ice and selling it is essentially a private business and not so affected with a public interest that a legislature may constitutionally limit the number of those who may engage in it, in order to control competition. Pp. 273 *et seq.*
2. An Oklahoma statute, declaring that the manufacture, sale and distribution of ice is a public business, forbids anyone to engage in it without first having procured a license from a state commission; no license is to issue without proof of necessity for the manufacture, sale or distribution of ice in the community or place to which the application relates, and if the facilities already existing and licensed at such place are sufficient to meet the public needs therein, the commission may deny the application. *Held* repugnant to the due process clause of the Fourteenth Amendment. P. 278.
3. A state law infringing the liberty guaranteed to individuals by the Constitution can not be upheld upon the ground that the State is conducting a legislative experiment. P. 279.

52 F. (2d) 349, affirmed.

APPEAL from a decree sustaining the dismissal by the District Court, 42 F. (2d) 913, of a bill by the appellant, a licensed ice company, to enjoin the defendant from engaging in the ice business, at a place in Oklahoma, without having first procured a license.

Messrs. John B. Dudley and *Guy L. Andrews*, with whom *Mr. J. H. Everest* was on the brief, for appellant.

If the act is valid, the license is a property right in the nature of a franchise granted in consideration of the per-

formance of a public service, and is within the protection of the Fourteenth Amendment; and, as between the appellant and the appellee, the franchise is exclusive. *Frost* v. *Corporation Comm.,* 278 U. S. 515; *Peoples Transit Co.* v. *Henshaw,* 20 F. (2d) 87.

The act is presumptively valid, and this Court will assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the act was passed. If there were reasonable doubt as to the validity of the act it should be sustained. The burden is upon the appellee to show a state of facts clearly establishing invalidity. The wisdom or expediency of the legislation is for the Legislature.

Under the original Anti-Trust Act of June 10, 1908, the Commission, in a limited way, regulated prices, service and practice of the ice industry. The Supreme Court has upheld the power of the Commission to fix the prices. *Oklahoma Light & Power Co.* v. *Corporation Comm.,* 96 Okla. 19. It also held that the Commission might regulate the price of ginning cotton and that such an order was not appealable. *Harris-Irby Cotton Co.* v. *State,* 31 Okla. 603.

When the Commission undertook to regulate the price of laundry in Oklahoma City under the original Trust Act, this Court held the order void because there was no right to judicial review. *Oklahoma Operating Co.* v. *Love,* 252 U. S. 331. The case of *Oklahoma Gin Co.* v. *State,* 63 Okla. 10, came to this Court and was reversed for the same reason. 252 U. S. 339.

In 1915, the Legislature passed an act declaring cotton gins a public utility. This act was assumed valid in *Sims* v. *State,* 80 Okla. 254; *Planters Ginning Co.* v. *West Bros.,* 82 Okla. 145; and in *Frost* v. *Corporation Comm.,* 278 U. S. 515. It was held valid in *Chickasha Cotton Oil Co.* v. *Cotton County Gin Co.,* 40 F. (2d) 846.

In 1916 the Commission, in Garner v. Tulsa Ice Co., P. U. R. 1917C 613, treated the ice business as affected

with a public interest and ordered an ice company to furnish a drug store ice at the same rate allowed to a meat market. This was under the original Trust Act. There were many abuses and evils in the industry prior to the passage of the Ice Act. The Commission, through a period of years, called to the attention of the Governor the defects in the Anti-Trust Act as regards its power to regulate and control the prices and practices of ice companies, and urged additional legislation; and as a result of many years discussion of the evils existing in the ice industry, the Ice Act was passed in 1925. This act was acquiesced in and treated as valid by the ice industry for a period of five years after its enactment. There had been little or no competition in the ice industry. Public service corporations owned one-third of the plants and operated them in connection with their public utility business. The evidence discloses that conditions have noticeably improved in the ice industry since the passage of the act. It is fair to assume from the evidence in this case, that this, for the most part, is traceable to the act. Ice is an article of common household necessity, the supply of which must ordinarily be purchased every day. Its use plays a prominent part in the growth and development of the rural communities of the State, the health and comfort of its citizens, and the general welfare of the State. Properties devoted to the manufacture, sale and distribution of ice may reasonably be treated as utilities subject to regulation and control.

This Court will take notice of the climatic conditions of Oklahoma. The evidence of the appellee certainly does not of itself show a state of facts justifying this Court in declaring the act invalid; and, considering the presumptions prevailing as to the validity of a state statute, we believe the act is constitutional under the following cases: *Munn* v. *Illinois,* 94 U. S. 113; *Budd* v. *North Dakota,* 153 U. S. 391; *Spring Valley Waterworks* v. *Schottler,* 110

U. S. 347; *Noble State Bank* v. *Haskell,* 219 U. S. 104; *German Alliance Ins. Co.* v. *Lewis,* 233 U. S. 389; *Wolff Co.* v. *Industrial Court,* 262 U. S. 522; *Terminal Taxicab Co.* v. *Kutz,* 241 U. S. 252; *O'Gorman & Young* v. *Hartford Fire Ins. Co.,* 282 U. S. 251; *Liberty Warehouse Co.* v. *Burley Tobacco Assn.,* 276 U. S. 71; *Texas & Pac. Ry. Co.* v. *Gulf, C. & S. F. Ry. Co.,* 270 U. S. 266.

The power to determine whether or not the public necessity and convenience require an ice plant, or additional facilities, in a given community, is essential in the effective regulation of prices for the common good; because if the Commission is without authority to determine when and under what circumstances an ice plant shall be built in a given community, without regard to the necessity therefor from a public standpoint, then in the end the public will suffer. Distinguishing: *Tyson & Bro.* v. *Banton,* 273 U. S. 418; *Williams* v. *Standard Oil Co.,* 278 U. S. 235; *Ribnik* v. *McBride,* 277 U. S. 350; *Fairmont Creamery Co.* v. *Minnesota,* 274 U. S. 1.

Oklahoma is the only State of the Union, so far as our information goes, which has declared the manufacture, sale and distribution of ice a public business. This is no reason, of course, why the act should be stricken down. Arkansas passed a similar act, and the Supreme Court of that State sustained it as to prices, rates, discrimination, and other matters, but held invalid the part giving the Commission the power to deny one the right to engage in the business in a given community irrespective of the necessity. *Cap F. Bourland Ice Co.* v. *Franklin Utilities Co.,* 180 Ark. 770. Among decisions which help to support our contention are: *Holton* v. *Camailla,* 68 S. E. 472; *Laughlin* v. *Portland,* 90 Atl. 318; *Tombstone* v. *Macia,* 245 Pac. 677; *Denton* v. *Denton Home Ice Co.,* 18 S. W. (2d) 606, s. c., 27 S. W. (2d) 119.

Harris-Irby Cotton Co. v. *State,* 31 Okla. 603, held that an order made by the Commission as to prices for ginning

cotton under the original Trust Act was not appealable, but the Supreme Court has never held that an appeal would not lie from an order granting or denying a permit to manufacture, sell and distribute ice. See *Pioneer Tel. & Tel. Co.* v. *State,* 40 Okla. 417 and *Frost* v. *Corporation Comm.,* 26 F. (2d) 508.

The Commission exercises judicial, executive and legislative powers. *Muskogee Gas & Elec. Co.* v. *State,* 81 Okla. 176; *Pioneer Tel. & Tel. Co.* v. *State,* 40 Okla. 417; *Frost* v. *Corporation Comm.,* 26 F. (2d) 508. In denying or granting a license to manufacture, sell and distribute ice, it acts in a quasi-judicial capacity; but in whatever capacity it may act, a judicial review is provided for under the constitution and laws of the State. Cf. *Baker* v. *Capshaw,* 130 Okla. 86; *In re Farmers Coöperative Gin Co.,* 122 Okla. 115; *Ex parte Tindall,* 102 Okla. 192. This satisfies the due process clause of the Fourteenth Amendment. *Wadley Southern Ry. Co.* v. *Georgia,* 235 U. S. 651.

Mr. George M. Nicholson, with whom *Messrs. Thomas H. Owen* and *M. A. Looney* were on the brief, for appellee.

The proof shows that prior to the passage of the Ice Act, there was no monopoly in the ice business. The public was not compelled to use the ice sold by any particular plant or manufacturer, nor was ice bought and sold in such a manner as to make it of public consequence. True, the secretary of the Ice Association testified he had numerous complaints from patrons of ice companies, some as to quality, some as to price, and others as to delivery service. There was also some proof that in a few instances, where two ice plants were operating in one town, one became bankrupt and the other purchased it at a small price. This falls far short of proof that the manufacturing and selling of ice in Oklahoma City is a public business as defined in §§ 11017 and 11032 of the statute.

The legislative declaration that a business is affected with a public interest, is not conclusive of the question whether attempted prohibition and regulation on that ground is justified; the question is always one of judicial inquiry. *Wolff Co.* v. *Industrial Court,* 262 U. S. 522; *Tyson & Bro.* v. *Banton,* 273 U. S. 418; *Lawton* v. *Steele,* 152 U. S. 133.

Considerable proof was offered as to the extensive use of ice in the preservation of foods and in the shipment of meats and vegetables; also as to the increased output and sale of ice in the State of Oklahoma during the last several years. That ice is generally used in the preservation and preparation of various foods and drinks, including milk for the babies, as testified by the learned chemist, must be admitted by the appellee. But this does not prove the business to be a monopoly or a public utility, nor authorize the legislature to prohibit the defendant from engaging in it without a permit.

There was also proof, by the secretary of the Ice Men's Association, to the effect that, since the passage of the Ice Act, the members had greatly improved their service to the public and were manufacturing a better quality of ice, with improved machinery, all of which could and should have been done prior to the passage of the act.

There is no statute of this State declaring ice plants public utilities. A public utility is required to serve the public, and its rates are fixed so as to guarantee a reasonable return on the investment, including operating expenses. The ice manufacturer may sell or not sell as he sees fit. It is in proof that an increasing number of individuals and corporations are manufacturing ice for their own use.

We may admit, for argument's sake, that ice is a family necessity. So are meat, bread, sugar, coffee, tea, and potatoes.

The fact that competition might result in the bankruptcy of one plant and thereby permit the other to increase the rates, is no argument in favor of the constitutionality of the Act, conceding the importance of ice in the home and as generally used. Cf. *Fairmont Creamery Co.* v. *Minnesota,* 274 U. S. 1.

The volume and extent of the business does not determine its character. *Williams* v. *Standard Oil Co.,* 278 U. S. 235.

The power to regulate prices does not, necessarily, carry with it the power to prohibit from engaging in the business. Prior to the Ice Act the Corporation Commission was regulating the ice business, under §§ 11017 and 11032 of the statute, but was not granting or refusing permits to engage in the business. The Commission was regulating only where it was made to appear that a monopoly existed or an unfair price was being charged to the buying public. The State may or may not have the power to regulate the price to be charged. That question is not presented here.

The right to prohibit was involved in the case of *Adams* v. *Tanner,* 244 U. S. 590; *Weaver* v. *Palmer Bros. Co.,* 270 U. S. 402; *Burns Baking Co.* v. *Bryan,* 264 U. S. 504. Cf. *Myers* v. *Nebraska,* 262 U. S. 390; *Smith* v. *Texas,* 233 U. S. 630; *Liggett Co.* v. *Baldridge,* 278 U. S. 105; *Allgeyer* v. *Louisiana,* 165 U. S. 578; *Butchers' Union* v. *Crescent City,* 111 U. S. 746.

Appellant admits that the permit under which it is operating is not exclusive. If appellee's operation in competition with appellant would deprive appellant of its property, this damage would result with a permit as well as without. Since the State does not guarantee to appellant a reasonable return on its investment, it can not be heard to complain of competition. If the effect of the act is to destroy and prevent competition, it violates the provisions of the constitution for that reason.

Appellant has no property right to sell ice without competition. *Choctaw Cotton Oil Co.* v. *Corporation Comm.*, 121 Okla. 51.

Many state courts have passed upon kindred questions, holding statutes invalid. *State* v. *Santee*, 111 Iowa 1; *Matter of Jacobs*, 98 N. Y. 98; *Hall* v. *Nebraska*, 100 Neb. 84; *State* v. *Smith*, 84 Pac. 851; *Cap F. Bourland Ice Co.* v. *Utilities Co.*, 22 S. W. (2d) 993.

The act is void for the further reason that there is no appeal from the order of the Commission granting or refusing a license. *Muskogee County* v. *Muskogee Gas & Elec. Co.*, 83 Okla. 167; *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331; *Oklahoma Gin Co.* v. *Oklahoma*, 255 U. S. 339; *Grand Rapids & I. Ry. Co.* v. *Hunt*, 78 N. E. 358; *Pioneer Tel. & Tel. Co.* v. *State*, 40 Okla. 417; *Baker* v. *Capshaw*, 130 Okla. 86; *In re Farmers Coöperative Gin Co.*, 122 Okla. 115; *Ex parte Tindall*, 102 Okla. 192.

The penalties imposed for the violation of the act are so severe as to render it unconstitutional.

If the act is valid, there is no limitation upon the power of the Legislature to regulate, control or prohibit any business, conducted in such a manner as to make it of public consequence or to affect the community at large as to supply, demand or price. "In a sense, the public is concerned about all lawful business because it contributes to the prosperity and well-being of the people." *Wolff Co.* v. *Industrial Court*, 262 U. S. 522.

In *Frost* v. *Corporation Comm.*, 278 U. S. 515, the validity of the act declaring cotton gins public utilities was definitely conceded by both parties. The Court called attention to this fact, and stated that for the purpose of that case that view was accepted. The right of the Legislature to declare a private business a public one was not involved in that case.

There is no similarity between the service rendered by a cotton gin, and the manufacture, sale and distribution of ice.

The cotton gin merely renders a service for a stated charge. It does not manufacture or sell anything, but merely separates the seed from the lint cotton and bales the lint for the owner. A gin is built and the business conducted solely to furnish this service to the public. The cotton grower can gin his cotton in no other way.

The manufacturer of ice does not render a service; he manufactures and sells a commodity. He may sell, or refuse to sell, to whom he pleases. The business is a common occupation, which may be engaged in by anyone. There is no distinction between the business of selling ice, and that of selling groceries, meats, bread, milk or any of the other necessities or conveniences of life. So common is the business that many persons manufacture ice for their own use, with individual plants in their homes (and a strict construction of the act in question will render all those who make their own ice guilty of a misdemeanor, unless they obtain a license from the Corporation Commission).

The evidence clearly shows that the business was not a monopoly, and the facts and circumstances clearly demonstrate that the sole purpose of the act is to protect the appellant, and a few other large interests, from competition. The act is being administered solely to that end.

The only attempt made to show that the business was monopolistic was that in various towns in the State there was but one ice plant; and appellant's witness who testified to this fact, also testified that ice was shipped and hauled in trucks to the smaller places, and even delivered to the rural communities.

The appellant cites *Tombstone* v. *Macia,* 245 Pac. 677; *Holton* v. *Camailla,* 68 S. E. 472; and *Denton* v. *Denton Home Ice Co.,* 18 S. W. (2d) 608, holding that a municipal ice plant constitutes a public purpose for taxation; and while those cases have little or no bearing upon the question here presented, because the question of the right of

the individual to engage in business was not involved, we may cite *Union Ice & Coal Co.* v. *Ruston,* 135 La. 898; *State* v. *O'Rear,* 227 Mo. 303; and *State* v. *Thompson,* 149 Wis. 488, as holding that a municipal ice plant does not constitute a public purpose for taxation.

Mr. Justice Sutherland delivered the opinion of the Court.

The New State Ice Company, engaged in the business of manufacturing, selling and distributing ice under a license or permit duly issued by the Corporation Commission of Oklahoma, brought this suit against Liebmann in the federal district court for the western district of Oklahoma to enjoin him from manufacturing, selling and distributing ice within Oklahoma City without first having obtained a like license or permit from the commission. The license or permit is required by an act of the Oklahoma legislature, c. 147, Session Laws, 1925. That act declares that the manufacture, sale and distribution of ice is a public business; that no one shall be permitted to manufacture, sell or distribute ice within the state without first having secured a license for that purpose from the commission; that whoever shall engage in such business without obtaining the license shall be guilty of a misdemeanor, punishable by fine not to exceed $25, each day's violation constituting a separate offense, and that by general order of the commission, a fine not to exceed $500 may be imposed for each violation.

Section 3 of the act provides:

"That the Corporation Commission shall not issue license to any person, firm or corporation for the manufacture, sale and distribution of ice, or either of them, within this State, except upon a hearing had by said Commission at which said hearing, competent testimony and proof shall be presented showing the necessity for the manufacture, sale or distribution of ice, or either of them,

at the point, community or place desired. If the facts proved at said hearing disclose that the facilities for the manufacture, sale and distribution of ice by some person, firm or corporation already licensed by said commission at said point, community or place, are sufficient to meet the public needs therein, the said Corporation Commission may refuse and deny the applicant [application] for said license. In addition to said authority, the said Commission shall have the right to take into consideration the responsibility, reliability, qualifications and capacity of the person, firm or corporation applying for said license and of the person, firm or corporation already licensed in said place or community, as to afford all reasonable facilities, conveniences and services to the public and shall have the power and authority to require such facilities and services to be afforded the public; provided, that nothing herein shall operate to prevent the licensing of any person, firm or corporation now engaged in the manufacture, sale and distribution of ice, or either of them, in any town, city or community of this State, whose license shall be granted and issued by said Commission upon application of such person, firm or corporation and payment of license fee."

The portion of the section immediately in question here is that which forbids the commission to issue a license to any applicant except upon proof of the necessity for a supply of ice at the place where it is sought to establish the business, and which authorizes a denial of the application where the existing licensed facilities " are sufficient to meet the public needs therein." The district court dismissed the bill of complaint for want of equity, on the ground that the manufacture and sale of ice is a private business which may not be subjected to the foregoing regulation. 42 F. (2d) 913. The court of appeals affirmed. 52 F. (2d) 349.

It must be conceded that all businesses are subject to some measure of public regulation. And that the business of manufacturing, selling or distributing ice, like that of the grocer, the dairyman, the butcher or the baker may be subjected to appropriate regulations in the interest of the public health cannot be doubted; but the question here is whether the business is so charged with a public use as to justify the particular restriction above stated. If this legislative restriction be within the constitutional power of the state legislature, it follows that the license or permit, issued to appellant, constitutes a franchise, to which a court of equity will afford protection against one who seeks to carry on the same business without obtaining from the commission a license or permit to do so. *Frost* v. *Corporation Commission,* 278 U. S. 515, 519–521. In that view, engagement in the business is a privilege to be exercised only in virtue of a public grant, and not a common right to be exercised independently (*id.*) by any competent person conformably to reasonable regulations equally applicable to all who choose to engage therein.

The *Frost* case is relied on here. That case dealt with the business of operating a cotton gin. It was conceded that this was a business clothed with a public interest, and that the statute requiring a showing of public necessity as a condition precedent to the issue of a permit was valid. But the conditions which warranted the concession there are wholly wanting here. It long has been recognized that mills for the grinding of grain or performing similar services for all comers are devoted to a public use and subject to public control, whether they be operated by direct authority of the state or entirely upon individual initiative. At a very early period a majority of the states had adopted general acts authorizing the taking and flowage, *in invitum,* of lands for their erection and maintenance. In passing these acts, the attention of the legislatures no

doubt was directed principally to grist mills; but some of the acts, either in precise terms or in their application, were extended to other kinds of mills. *Head* v. *Amoskeag Mfg. Co.,* 113 U. S. 9, 16–19; *State* v. *Edwards,* 86 Me. 102, 104–106; 29 Atl. 947. The mills were usually operated by the use of water power, but this method of operation has been said not to be essential. *State* v. *Edwards, supra,* at p. 106. It was open to the proprietor of a mill to maintain it as a private mill for grinding his own grain, and thus free from legislative control; but if the proprietor assumed to serve the general public he thereby dedicated his mill to the public use and subjected it to such legislative control as was appropriate to that status. In such cases the mills were regarded as so necessary to the existence of the communities which they served as to justify the government in fostering and maintaining them, and imposing limitations upon their operation for the protection of the public. *Id.*

In *Chickasha Cotton Oil Co.* v. *Cotton County Gin Co.,* 40 F. (2d) 846, three circuit judges passed upon the constitutionality of the Oklahoma cotton ginning act. Opinions were delivered *seriatim,* all to the effect, but for varying reasons, that the business of operating cotton gins in Oklahoma was clothed with a public interest. One of the judges thought that the rule in respect of grist mills should apply by analogy, on the ground of the similarity of service. The rule that mills whose services are open to all comers are clothed with a public interest was formulated in the light, and upon the basis, of historical usage, which had survived the limitations that otherwise might be imposed by the due process clause of the Fourteenth Amendment. While the cotton gin has no such background of ancient usage, and, as the opinion by Judge Phillips points out, there is always danger of our being led afield by relying over-much upon analogies, the analogy here is not without helpful significance.

In that connection we also may consider *Clark* v. *Nash*, 198 U. S. 361, and *Strickley* v. *Highland Boy Mining Co.*, 200 U. S. 527, which dealt with the cognate question of what is a public use in respect of which the right of eminent domain may be exercised. The cases involved a statute of the State of Utah, which declared:

"The cultivation and irrigation of the soil, the production and reduction of ores, are of vital necessity to the people of the State of Utah; are pursuits in which all are interested and from which all derive a benefit; and the use and application of the unappropriated waters of the natural streams and water courses of the State to the generation of electrical force or energy to be employed in industrial pursuits are of great public benefit and utility. So irrigation of land, the mining, milling, smelting or other reduction of ores, and such use and application of such waters for the generation of electrical power to be employed as aforesaid are hereby declared to be for the public use, and the right of eminent domain may be exercised in behalf thereof." c. 95, § 1, Laws of Utah, 1896.

In the *Nash* case, this court, applying that statute, sustained the condemnation of a right of way across the lands of one private owner for a ditch to convey water for the purpose of irrigating the lands of another private owner. The decision was rested explicitly upon the existence of conditions peculiar to the state. These conditions are epitomized in the legislative declaration above quoted. The court said (pp. 369–370) that its decision was not to be understood as approving the broad proposition that private property might be taken in all cases where the taking might promote the public interest and tend to develop the natural resources of the state, but, having reference to the conditions there appearing, "that the use is a public one, although the taking of the right of way is for the purpose simply of thereby obtaining the water for an individual, where it is absolutely necessary to

enable him to make any use whatever of his land, and which will be valuable and fertile only if water can be obtained."

This was followed in the *Strickley* case, where, mining being one of the chief industries of the state and its development peculiarly important for the public welfare, the condemnation of a right of way for an aerial bucket line across private lands, for the purpose of transporting ores from a mine in private ownership, was upheld under the same statute.

These cases, though not strictly analogous, furnish persuasive ground for upholding the declaration of the Oklahoma legislature in respect of the public nature of cotton gins in that state. The production of cotton is the chief industry of the State of Oklahoma, and is of such paramount importance as to justify the assertion that the general welfare and prosperity of the state in a very large and real sense depend upon its maintenance. Cotton ginning is a process which must take place before the cotton is in a condition for the market. The cotton gin bears the same relation to the cotton grower that the old grist mill did to the grower of wheat. The individual grower of the raw product is generally financially unable to set up a plant for himself; but the service is a necessary one with which, ordinarily, he cannot afford to dispense. He is compelled, therefore, to resort for such service to the establishment which operates in his locality. So dependent, generally, is he upon the neighborhood cotton gin that he faces the practical danger of being placed at the mercy of the operator in respect of exorbitant charges and arbitrary control. The relation between the growers of cotton, who constitute a very large proportion of the population, and those engaged in furnishing the service, is thus seen to be a peculiarly close one in respect of an industry of vital concern to the general public. These considerations render it not unreasonable

to conclude that the business "has been devoted to a public use and its use thereby, in effect, granted to the public." *Tyson & Bro.* v. *Banton,* 273 U. S. 418, 434; *Wolff Co.* v. *Industrial Court,* 262 U. S. 522, 535, 538; same case, 267 U. S. 552, 563, *et seq.*

We have thus, with some particularity, discussed the circumstances which, so far as the State of Oklahoma is concerned, afford ground for sustaining the legislative pronouncement that the business of operating cotton gins is charged with a public use, in order to put them in contrast with the completely unlike circumstances which attend the business of manufacturing, selling and distributing ice. Here we are dealing with an ordinary business, not with a paramount industry upon which the prosperity of the entire state in large measure depends. It is a business as essentially private in its nature as the business of the grocer, the dairyman, the butcher, the baker, the shoemaker, or the tailor, each of whom performs a service which, to a greater or less extent, the community is dependent upon and is interested in having maintained; but which bears no such relation to the public as to warrant its inclusion in the category of businesses charged with a public use. It may be quite true that in Oklahoma ice is not only an article of prime necessity, but indispensable; but certainly not more so than food or clothing or the shelter of a home. And this court has definitely said that the production or sale of food or clothing cannot be subjected to legislative regulation on the basis of a public use; and that the same is true in respect of the business of renting houses and apartments, except as to temporary measures to tide over grave emergencies. See *Tyson & Bro.* v. *Banton, supra,* pp. 437–438, and cases cited.

It has been said that the manufacture of ice requires an expensive plant beyond the means of the average citizen, and that since the use of ice is indispensable, patronage

of the producer by the consumer is unavoidable. The same might, however, be said in respect of other articles clearly beyond the reach of a restriction like that here under review. But, for the moment conceding the materiality of the statement, it is not now true, whatever may have been the fact in the past. We know, since it is common knowledge, that today, to say nothing of other means, wherever electricity or gas is available (and one or the other is available in practically every part of the country), anyone for a comparatively moderate outlay may have set up in his kitchen an appliance by means of which he may manufacture ice for himself. Under such circumstances it hardly will do to say that people generally are at the mercy of the manufacturer, seller and distributer of ice for ordinary needs. Moreover, the practical tendency of the restriction, as the trial court suggested in the present case, is to shut out new enterprises, and thus create and foster monopoly in the hands of existing establishments, against, rather than in aid of, the interest of the consuming public.

Plainly, a regulation which has the effect of denying or unreasonably curtailing the common right to engage in a lawful private business, such as that under review, cannot be upheld consistently with the Fourteenth Amendment. Under that amendment, nothing is more clearly settled than that it is beyond the power of a state, " under the guise of protecting the public, arbitrarily [to] interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them." *Burns Baking Co.* v. *Bryan,* 264 U. S. 504, 513, and authorities cited; *Liggett Co.* v. *Baldridge,* 278 U. S. 105, 113.

Stated succinctly, a private corporation here seeks to prevent a competitor from entering the business of making and selling ice. It claims to be endowed with state authority to achieve this exclusion. There is no question

now before us of any regulation by the state to protect the consuming public either with respect to conditions of manufacture and distribution or to insure purity of product or to prevent extortion. The control here asserted does not protect against monopoly, but tends to foster it. The aim is not to encourage competition, but to prevent it; not to regulate the business, but to preclude persons from engaging in it. There is no difference in principle between this case and the attempt of the dairyman under state authority to prevent another from keeping cows and selling milk on the ground that there are enough dairymen in the business; or to prevent a shoemaker from making or selling shoes because shoemakers already in that occupation can make and sell all the shoes that are needed. We are not able to see anything peculiar in the business here in question which distinguishes it from ordinary manufacture and production. It is said to be recent; but it is the character of the business and not the date when it began that is determinative. It is not the case of a natural monopoly, or of an enterprise in its nature dependent upon the grant of public privileges. The particular requirement before us was evidently not imposed to prevent a practical monopoly of the business, since its tendency is quite to the contrary. Nor is it a case of the protection of natural resources. There is nothing in the product that we can perceive on which to rest a distinction, in respect of this attempted control, from other products in common use which enter into free competition, subject, of course, to reasonable regulations prescribed for the protection of the public and applied with appropriate impartiality.

And it is plain that unreasonable or arbitrary interference or restrictions cannot be saved from the condemnation of that Amendment merely by calling them experimental. It is not necessary to challenge the authority of the states to indulge in experimental legislation; but

it would be strange and unwarranted doctrine to hold that they may do so by enactments which transcend the limitations imposed upon them by the federal Constitution. The principle is imbedded in our constitutional system that there are certain essentials of liberty with which the state is not entitled to dispense in the interest of experiments. This principle has been applied by this court in many cases. *Dorchy* v. *Kansas,* 264 U. S. 286; *Wolff Co.* v. *Industrial Court,* 262 U. S. 522, 267 U. S. 552; *Pierce* v. *Sisters,* 268 U. S. 510; *Nixon* v. *Herndon,* 273 U. S. 536; *Tumey* v. *Ohio,* 273 U. S. 510; *Manley* v. *Georgia,* 279 U. S. 1; *Washington* v. *Roberge,* 278 U. S. 116; *Chicago, St. P., M. & O. Ry. Co.* v. *Holmberg,* 282 U. S. 162; *Stromberg* v. *California,* 283 U. S. 359; *Near* v. *Minnesota,* 283 U. S. 697. In the case last cited the theory of experimentation in censorship was not permitted to interfere with the fundamental doctrine of the freedom of the press. The opportunity to apply one's labor and skill in an ordinary occupation with proper regard for all reasonable regulations is no less entitled to protection.

Decree affirmed.

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

MR. JUSTICE BRANDEIS, dissenting.

Chapter 147 of the Session Laws of Oklahoma, 1925, declares that the manufacture of ice for sale and distribution is "a public business"; confers upon the Corporation Commission in respect to it the powers of regulation customarily exercised over public utilities; and provides specifically for securing adequate service. The statute makes it a misdemeanor to engage in the business without a license from the Commission; directs that the license shall not issue except pursuant to a prescribed written application, after a formal hearing upon adequate notice

both to the community to be served and to the general public, and a showing upon competent evidence, of the necessity " at the place desired;" and it provides that the application may be denied, among other grounds, if " the facts proved at said hearing disclose that the facilities for the manufacture, sale and distribution of ice by some person, firm or corporation already licensed by said Commission at said point, community or place are sufficient to meet the public needs therein."

Under a license, so granted, the New State Ice Company is, and for some years has been, engaged in the manufacture, sale and distribution of ice at Oklahoma City, and has invested in that business $500,000. While it was so engaged, Liebmann, without having obtained or applied for a license, purchased a parcel of land in that city and commenced the construction thereon of an ice plant for the purpose of entering the business in competition with the plaintiff. To enjoin him from doing so this suit was brought by the Ice Company. Compare *Frost* v. *Corporation Commission,* 278 U. S. 515. Liebmann contends that the manufacture of ice for sale and distribution is not a public business; that it is a private business and, indeed, a common calling; that the right to engage in a common calling is one of the fundamental liberties guaranteed by the due process clause; and that to make his right to engage in that calling dependent upon a finding of public necessity deprives him of liberty and property in violation of the Fourteenth Amendment. Upon full hearing the District Court sustained that contention and dismissed the bill. 42 F. (2d) 913. Its decree was affirmed by the Circuit Court of Appeals. 52 F. (2d) 349. The case is here on appeal. In my opinion, the judgment should be reversed.

First. The Oklahoma statute makes entry into the business of manufacturing ice for sale and distribution dependent, in effect, upon a certificate of public convenience

and necessity. Such a certificate was unknown to the common law. It is a creature of the machine age, in which plants have displaced tools and businesses are substituted for trades. The purpose of requiring it is to promote the public interest by preventing waste. Particularly in those businesses in which interest and depreciation charges on plant constitute a large element in the cost of production, experience has taught that the financial burdens incident to unnecessary duplication of facilities are likely to bring high rates and poor service.[1] There, cost is usually dependent, among other things, upon volume; and division of possible patronage among competing concerns may so raise the unit cost of operation as to make it impossible to provide adequate service at reasonable rates. The introduction in the United States of the certificate of public convenience and necessity marked the growing conviction that under certain circumstances free competition might be harmful to the community and that, when it was so, absolute freedom to enter the business of one's choice should be denied.

Long before the enactment of the Oklahoma statute here challenged a like requirement had become common in the United States in some lines of business. The certificate was required first for railroads; then for street railways; then for other public utilities whose operation is dependent upon the grant of some special privilege.[2]

[1] Compare Sumner H. Slichter, "Modern Economic Society," p. 56, 326–328; Eliot Jones and T. C. Bigham, "Principles of Public Utilities," p. 70; Eliot Jones, "Is Competition in Industry Ruinous," 34 Quarterly Journal of Economics, 473, 488.

[2] See Ford P. Hall, "Certificates of Convenience and Necessity," 28 Mich. L. Rev. 107, 276; Waldo O. Willhoft, "Certificates of Convenience and Necessity in Michigan," 10 Mich. State Bar Journal 257; Charles S. Hyneman, "Public Encouragement of Monopoly in the Utility Industries," Annals of American Academy of Political and Social Science, January, 1930, p. 160; 24 Col. L. Rev. 528. Professor Hall lists statutes of forty-three states, most of them

Latterly, the requirement has been widely extended to common carriers by motor vehicle which use the highways, but which, unlike street railways and electric light companies, are not dependent upon the grant of any special privilege.[3] In Oklahoma the certificate was required, as early as 1915, for cotton gins—a business then declared a public one, and, like the business of manufacturing ice, conducted wholly upon private property. Sess. Laws, 1915, c. 176, § 3. See *Frost* v. *Corporation Commission*, 278 U. S. 515, 517. As applied to public utilities, the validity under the Fourteenth Amendment of the requirement of the certificate has never been successfully questioned.

Second. Oklahoma declared the business of manufacturing ice for sale and distribution a "public business;" that is, a public utility. So far as appears, it was the first State to do so.[4] Of course, a legislature cannot by

---

enacted within the last 20 years, requiring a certificate for the operation of various classes of public utilities. Before the advent of the certificate of public convenience and necessity, similar but less flexible control over the entry of many public utilities into business was exercised through the grant of franchises, municipal or state. See Eliot Jones and T. C. Bigham, "Principles of Public Utilities," c. III. The certificate was first introduced into federal law by the Transportation Act, 1920, c. 91, § 402, pars. 18–20, 41 Stat. 456, 477. Compare Thomas H. Kennedy, "The Certificate of Convenience and Necessity Applied to Air Transportation," 1 Journal of Air Law 76.

[3] See D. E. Lilienthal and I. S. Rosenbaum, "Motor Carrier Regulation by Certificates of Necessity and Convenience," 36 Yale L. J. 163, "Motor Carrier Regulation: Federal, State, and Municipal," 26 Col. L. Rev. 954. Compare LaRue Brown and S. N. Scott, "Regulation of the Contract Motor Carrier Under the Constitution," 44 Harv. L. Rev. 530.

[4] Such a law has since been passed in Arkansas. Ark. Acts, 1929, No. 55. The State court held that the measure violated the State constitution insofar as it sanctioned denial of the right to engage in the ice business. *Cap. F. Bourland Ice Co.* v. *Franklin Utilities Co.*, 180 Ark. 770; 22 S. W. (2d) 993. The provisions for the regulation of rates, attacked under the Fourteenth Amendment, were sustained.

mere legislative fiat convert a business into a public utility. *Producers Transportation Co.* v. *Railroad Commission,* 251 U. S. 228, 230. But the conception of a public utility is not static.[5] The welfare of the community may require that the business of supplying ice be made a public utility, as well as the business of supplying water or any other necessary commodity or service. If the business is, or can be made, a public utility, it must be possible to make the issue of a certificate a prerequisite to engaging in it.

Whether the local conditions are such as to justify converting a private business into a public one is a matter primarily for the determination of the state legislature. Its determination is subject to judicial review; but the usual presumption of validity attends the enactment.[6]

See 15 St. Louis L. Rev. 414. Bills declaring the business of manufacturing ice a public utility have been introduced in Kansas, Louisiana, Michigan, New York, and Texas. See 70 Ice & Refrigeration 425; 72 *id.* 172, 239; 74 *id.* 110; 76 *id.* 216, 217; H. P. Hill, "Commission Control of the Ice Industry," *ibid.* 80.

[5] "Neither is it a matter of any moment that no precedent can be found for a statute precisely like this. It is conceded that the business is one of recent origin, that its growth has been rapid, and that it is already of great importance. . . . It presents, therefore, a case for the application of a long-known and well-established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress." *Munn* v. *Illinois,* 94 U. S. 113, 133. See Thomas P. Hardman, "Public Utilities," 37 W. Va. L. Q. 250.

[6] *O'Gorman & Young, Inc.* v. *Hartford Fire Ins. Co.,* 282 U. S. 251. "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government can not encroach upon the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule." *Sinking-Fund Cases,* 99 U. S. 700, 718. See also *Legal Tender Cases,* 12 Wall. 457, 531; *Trade-Mark Cases,* 100 U. S. 82, 96. See James B. Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law," 7 Harv. L. Rev. 129, 142.

The action of the State must be held valid unless clearly arbitrary, capricious or unreasonable. "The legislature being familiar with local conditions is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, . . ." *McLean* v. *Arkansas,* 211 U. S. 539, 547. Whether the grievances are real or fancied, whether the remedies are wise or foolish, are not matters about which the Court may concern itself.[7] "Our present duty is to pass upon the statute before us, and if it has been enacted upon a belief of evils that is not arbitrary we cannot measure their extent against the estimate of the legislature." *Tanner* v. *Little,* 240 U. S. 369, 385. A decision that the legislature's belief of evils was arbitrary, capricious and unreasonable may not be made without enquiry into the facts with reference to which it acted.

Third. Liebmann challenges the statute—not an order of the Corporation Commission. If he had applied for a license and been denied one, we should have been obliged to enquire whether the evidence introduced before

[7] "Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance." *Chicago, B. & Q. R. Co.* v. *McGuire,* 219 U. S. 549, 569.

"Questions of policy are not submitted to judicial determination, and the courts have no general authority of supervision over the exercise of discretion which under our system is reposed in the people or other departments of government." *Green* v. *Frazier,* 253 U. S. 233, 240. See also *Price* v. *Illinois,* 238 U. S. 446, 451, 452; *Rast* v. *Van Deman & Lewis Co.,* 240 U. S. 342, 357; *Merrick* v. *N. W. Halsey & Co.,* 242 U. S. 568, 586, 587.

the Commission justified it in refusing permission to establish an additional ice plant in Oklahoma City. As he did not apply but challenges the statute itself, our enquiry is of an entirely different nature. Liebmann rests his defense upon the broad claim that the Federal Constitution gives him the right to enter the business of manufacturing ice for sale even if his doing so be found by the properly constituted authority to be inconsistent with the public welfare. He claims that, whatever the local conditions may demand, to confer upon the Commission power to deny that right is an unreasonable, arbitrary and capricious restraint upon his liberty.

The function of the Court is primarily to determine whether the conditions in Oklahoma are such that the legislature could not reasonably conclude (1) that the public welfare required treating the manufacture of ice for sale and distribution as a "public business"; and (2) that in order to ensure to the inhabitants of some communities an adequate supply of ice at reasonable rates it was necessary to give the Commission power to exclude the establishment of an additional ice plant in places where the community was already well served. Unless the Court can say that the Federal Constitution confers an absolute right to engage anywhere in the business of manufacturing ice for sale, it cannot properly decide that the legislators acted unreasonably without first ascertaining what was the experience of Oklahoma in respect to the ice business. The relevant facts appear, in part, of record. Others are matters of common knowledge to those familiar with the ice business. Compare *Muller* v. *Oregon*, 208 U. S. 412, 419, 420. They show the actual conditions, or the beliefs, on which the legislators acted. In considering these matters we do not, in a strict sense, take judicial notice of them as embodying statements of uncontrovertible facts. Our function is only to determine the reasonableness of the legislature's belief in the existence of evils and in the effectiveness of the remedy

provided. In performing this function we have no occasion to consider whether all the statements of fact which may be the basis of the prevailing belief are well-founded; and we have, of course, no right to weigh conflicting evidence.

(A) In Oklahoma a regular supply of ice may reasonably be considered a necessary of life, comparable to that of water, gas and electricity. The climate, which heightens the need of ice for comfortable and wholesome living, precludes resort to the natural product.[8] There, as elsewhere, the development of the manufactured ice industry in recent years [9] has been attended by deep-seated alterations in the economic structure and by radical changes in habits of popular thought and living. Ice has come to be regarded as a household necessity, indispensable to the preservation of food and so to economical household management and the maintenance of health.[10] Its com-

[8] The mean normal temperature in the State from May to September is 76.4 degrees. Climatological Data, United States Weather Bureau, vol. xxxix, 193, No. 13, p. 53. The mean normal temperature in January, the coldest month, is 38.3 degrees; in December, 39.2 degrees. *Ibid.* So far as appears, no natural ice is harvested in the State for commercial purposes. See Guy L. Andrews, "State Regulation of Ice Industry in Oklahoma," Refrigerating World, Sept. 1928, p. 32.

[9] The industry first assumed commercial importance in the United States about 1880. See Ice and Refrigeration Blue Book (10th ed.), pp. 12–18. Reports of the Bureau of the Census indicate that in 1869 there were only four establishments producing artificial ice; in 1879, 35; in 1889, 222; in 1899, 775. See Willard L. Thorp, "The Integration of Industrial Operation," United States Census Monographs, III, 1924, pp. 49, 50. In 1929, the Census of Manufactures shows 4,110 establishments making ice as their product of chief value. The Ice and Refrigeration Blue Book for 1927, p. 30, lists 7,338 plants actually producing ice for sale. It estimates the total production for that year at 52,202,160 tons, as against 4,294,439 tons, reported by the Bureau of the Census for 1899.

[10] See Report of Committee on Fundamental Equipment submitted to the President's Conference on Home Building and Home Owner-

mercial uses are extensive. In urban communities, they absorb a large proportion of the total amount of ice manufactured for sale.[11] The transportation, storage and distribution of a great part of the nation's food supply is dependent upon a continuous, and dependable supply of ice.[12] It appears from the record that in certain parts of Oklahoma a large trade in dairy and other products has

---

ship, December 3, 1931, p. 107; Elsie P. Wolcott, "Use and Cost of Ice in Families with Children," published by the Department of Public Welfare of the City of Chicago. Lack of ice, in hot seasons, results in constant waste and danger to health. It compels the purchase of food in small quantities at higher prices. The intimate relation of food preservation to health, and infant mortality, has long been recognized. Ordinary perishable foodstuffs, it is generally considered, cannot be safely kept at temperatures in excess of from 45 to 50 degrees. Report of Committee on Fundamental Equipment, *supra*, p. 110.

[11] See Walter R. Sanders, "Industrial Application of Refrigeration in the United States," Proceedings of the Fourth International Congress of Refrigeration, London, 1924, p. 967. It was testified that in Oklahoma City in April, 1930, 46.4 per cent. of the sales of ice were to the retail trade, 37.12 per cent. to the commercial trade, 13.81 per cent. to the wholesale trade, 2.92 per cent. for car icing, and the remainder for carload shipments out of the city. In 1922 there were loaded in Oklahoma 1676 cars of food products under refrigeration; in 1925, 2940 cars; and in 1929, 3347. The Ice and Refrigeration Blue Book (10th ed.), pp. 22, 23, lists 198 industries using refrigeration. In a great number of these it is impracticable to install a private ice plant.

[12] Were it not for refrigeration, the market for perishable foodstuffs, in warm seasons, would be limited in area to a few miles and in time to a few days, or even hours. A considerable part of this refrigeration is supplied by concerns manufacturing ice for sale. Such concerns commonly supply ice used in car-icing. Mechanical refrigeration is beyond the means of many small retail dealers. Moreover, since decay in food, once begun, cannot be arrested by subsequent refrigeration, ice, or a substitute, is often essential on the farm. See M. E. Pennington and A. D. Greenlee, "The Refrigeration of Dressed Poultry in Transit," Bulletin No. 17, U. S. Department of Agriculture, p. 31.

been built up as a result of rulings of the Corporation Commission under the Act of 1925, compelling licensed manufacturers to serve agricultural communities; [13] and that this trade would be destroyed if the supply of ice were withdrawn.[14] We cannot say that the legislature of Oklahoma acted arbitrarily in declaring that ice is an article of primary necessity, in industry and agriculture as well as in the household, partaking of the fundamental character of electricity, gas, water, transportation and communication.

Nor can the Court properly take judicial notice that, in Oklahoma, the means of manufacturing ice for private use are within the reach of all persons who are dependent upon it. Certainly it has not been so. In 1925 domestic mechanical refrigeration had scarcely emerged from the experimental stage.[15] Since that time, the production and consumption of ice manufactured for sale, far from

[13] More than 80 per cent. of the milk and cream sold from farms in the United States is produced in sections where natural ice can be harvested. See U. S. Department of Agriculture, "Cooling Milk and Cream on the Farm," Farmers' Bulletin No. 976, p. 1. The dairy industry in Oklahoma, however, is wholly dependent upon artificial ice, or its substitutes. Refrigeration on the farm is indispensable to the safe marketing of dairy products, at any season when the temperature exceeds 50 degrees. See John T. Bowen, "The Application of Refrigeration to the Handling of Milk," Bulletin No. 98, U. S. Department of Agriculture, pp. 2, 65 *et seq.*

[14] The power of the Commission to compel this service, of course, depends upon the status of the ice business as a public utility. The evidence shows that the distribution of ice in rural communities not themselves possessing ice plants has developed almost wholly since the passage of the Act of 1925. There was testimony that such distribution would be impracticable without the protection afforded by the Act.

[15] The total number of household refrigerators in the entire country manufactured and sold before 1920 was approximately 10,000. In 1924, the annual production reached 30,000; in 1925, 75,000. Electrical Refrigerating News, February 17, 1932.

diminishing, has steadily increased.[16] In Oklahoma the mechanical household refrigerator is still an article of relative luxury.[17] Legislation essential to the protection of individuals of limited or no means is not invalidated by the circumstance that other individuals are financially able to protect themselves. The businesses of power companies and of common carriers by street railway, steam railroad or motor vehicle fall within the field of public control, although it is possible, for a relatively modest outlay, to install individual power plants, or to purchase

[16] The Secretary of the National Association of Ice Industries testified that the ice business for the last eleven years had increased upon an average of 5.35 per cent. each year; that in 1919 the per capita consumption of ice was 712 pounds; in 1929, 1157 pounds. A great deal of the increase in consumption of ice in Oklahoma, another witness testified, was in rural communities and among urban dwellers of the poorer classes.

[17] The number of domestic electric meters installed in Oklahoma as of August 31, 1930, was only 222,237, according to a tabulation of the Bureau of Foreign and Domestic Commerce. The population of the State in 1930 was 2,396,000. Fifteenth Census, vol. I, p. 18. It is estimated that 965,000 household refrigerators were sold in 1931, of which only 10,146 were sold in Oklahoma. Electrical Refrigerating News, February 24, 1932. Approximately 3,578,000 such refrigerators are now in use throughout the country. *Id.*, February 10, 1932. From these figures it may be calculated that the number of refrigerators in use in Oklahoma is between 35,000 and 40,000. The average cost of a household electric refrigerator in 1925 was $425; in 1931, $245. Electrical Refrigerating News, February 17, 1932. The price of ice for domestic use in Oklahoma varies from 40 to 70 cents the hundredweight. Few families use as much as three or four tons of ice in a year. In view of these facts, this Court can scarcely have judicial knowledge that in Oklahoma all families or businesses which are able to purchase ice are able to purchase a mechanical refrigerator. See Report of Committee on Fundamental Equipment, submitted to the President's Conference on Home Building and Home Ownership, pp. 111, 128–129. This Committee found it impossible to recommend even an ordinary refrigerator, using ice, for families of low income, and suggested the design and marketing of a specially constructed ice-chest.

motor vehicles for private carriage of passengers or goods. The question whether in Oklahoma the means of securing refrigeration otherwise than by ice manufactured for sale and distribution has become so general as to destroy popular dependence upon ice plants is one peculiarly appropriate for the determination of its legislature and peculiarly inappropriate for determination by this Court, which cannot have knowledge of all the relevant facts.

The business of supplying ice is not only a necessity, like that of supplying food or clothing or shelter, but the legislature could also consider that it is one which lends itself peculiarly to monopoly.[18] Characteristically the business is conducted in local plants with a market narrowly limited in area,[19] and this for the reason that ice

[18] It is noteworthy that the ice industry has the characteristic of uniformity of product or service common to most public utilities, and distinguishing it from other businesses in which differences in quality or style make difficult effective regulation. See S. Howard Patterson and Karl W. H. Scholz, "Economic Problems of Modern Life," (2d ed. 1931), p. 426.

The tendency of the industry to be conducted as a public utility is reflected in the widespread entry into it in recent years of electrical, gas, and water utilities, and the like. Such companies in Oklahoma operate more than one-third of the ice plants. See Ice and Refrigeration Blue Book (10th ed.), pp. 1268-88. Compare *Oklahoma Light & Power Co.* v. *Corporation Commission,* 96 Okla. 19, 24; 220 Pac. 54.

Municipalities have engaged extensively in the business of manufacturing and selling ice in foreign countries, and to a lesser extent in the United States. On several occasions, departments of the Federal Government, unable to secure ice at what were regarded as reasonable prices, have installed their own ice plants. Both in the Philippine Islands and in Panama plants have been operated which sell ice to government employees. See Carl D. Thompson, "Public Ownership," pp. 301-305; Jeanie Wells Wentworth, "A Report on Municipal and Government Ice Plants," submitted to the Borough President of Manhattan, December 15, 1913.

[19] See Willard L. Thorp, "The Integration of Industrial Operation," United States Census Monographs, III, 1924, pp. 49, 50. Neither consolidation of ownership nor increase in production has had the

manufactured at a distance cannot effectively compete with a plant on the ground.[20] In small towns and rural communities[21] the duplication of plants, and in larger communities the duplication of delivery service,[22] is wasteful and ultimately burdensome to consumers. At the same time the relative ease and cheapness with which an ice plant may be constructed exposes the industry to destructive and frequently ruinous competition. Competition in the industry tends to be destructive because ice plants have a determinate capacity, and inflexible fixed charges and operating costs, and because in a market of limited area the volume of sales is not readily expanded. Thus, the erection of a new plant in a locality already adequately served often causes managers to go to extremes in cutting prices in order to secure business. Trade journals and reports of association meetings of ice manufacturers bear ample witness to the hostility of the industry to such com-

---

effect of greatly increasing the size of plants in the ice business. Thus in Oklahoma in 1927 there were only twenty plants manufacturing ice for sale which had a capacity exceeding 200 tons a day, of which eight were in Oklahoma City and Tulsa. Ice and Refrigeration Blue Book (10th ed.), pp. 1268-1288.

[20] Several reasons were given in the testimony for this localization of the ice business. Freight rates on ice are high in proportion to value. Handling charges are doubled if the ice is put in cold storage at the point of consignment; and, if kept in the car, the ice loses in weight and deteriorates in quality during the period of a week or more before a carload will be exhausted in a small community. Shrinkage of course varies with the weather, but is at all times considerable.

[21] Oklahoma is predominantly a state of rural population. Only 34.3% of its inhabitants live in towns or cities of more than 2,500. Fifteenth Census of the United States, vol. I, p. 15. It has only four cities over 25,000; 12 cities from 10,000 to 25,000; and 52 cities from 2,500 to 10,000. There are 444 incorporated places of less than 2,500. *Ibid.*, pp. 895-98.

[22] See Editorials, Refrigerating World, May, 1928, p. 5, June 1, 1928, p. 6; J. H. Reed, "Consolidate Ice Delivery in Atlanta," *id.*, May, 1928, p. 15.

petition, and to its unremitting efforts, through trade associations, informal agreements, combination of delivery systems, and in particular through the consolidation of plants, to protect markets and prices against competition of any character.[23]

That these forces were operative in Oklahoma prior to the passage of the Act under review, is apparent from the record. Thus, it was testified that in only six or seven localities in the State containing, in the aggregate, not more than 235,000 of the total population of approximately 2,000,000, was there "a semblance of competition"; [24] and that even in those localities the prices of ice were ordinarily uniform. The balance of the population was, and still is, served by companies enjoying complete monopoly. Compare *Munn* v. *Illinois,* 94 U. S. 113, 131, 132; *Sinking Fund Cases,* 99 U. S. 700, 747; *Wabash, St. L. & P. Ry. Co.* v. *Illinois,* 118 U. S. 557, 569; *Spring Valley Water Works* v. *Schottler,* 110 U. S. 347, 354; *Budd* v. *New York,* 143 U. S. 517, 545; *Wolff Co.* v. *Industrial Court,* 262 U. S. 522, 528. Where there was competition, it often resulted to the disadvantage rather

[23] See *e. g.,* John Nickerson, "Consolidations in the Ice Industry," 73 Ice & Refrigeration 333, 334; 69 *id.* 223; 70 *id.* 357; 72 *id.* 39; *ibid.* 282; Halbert P. Hill, "The Effect of Recent Mergers on the Ice Industry," Refrigerating World, February, 1926, pp. 15, 42; W. F. Stevens, "What the Future Holds for the Ice Manufacturer," 76 Ice & Refrigeration 81, 82; W. L. Foushee, "The Ice Business as a Public Utility," *ibid.* 302. See Tipton *v.* Ada Ice & Fuel Co., 2d & 3d Ann. Rep. Okla. Corp. Comm., p. 358.

[24] The Ice and Refrigeration Blue Book for 1927 shows that of 142 communities containing ice plants manufacturing ice for sale, at least 112 were served either by a single plant or by several plants of common ownership. See pp. 1268–1288, 1645 *et seq.* There is evidence in the record that it was common practice for manufacturing establishments of different ownership, to make use of a jointly-owned delivery company. Out of 217 plants listed as engaged in manufacturing ice for sale, 101 were owned by corporations owning or controlling other plants within or without the State. *Ibid.*

than the advantage of the public, both in respect to prices and to service. Some communities were without ice altogether, and the State was without means of assuring their supply. There is abundant evidence of widespread dissatisfaction with ice service prior to the Act of 1925,[25] and of material improvement in the situation subsequently. It is stipulated in the record that the ice industry as a whole in Oklahoma has acquiesced in and accepted the Act and the status which it creates.

(B) The statute under review rests not only upon the facts just detailed but upon a long period of experience in more limited regulation dating back to the first year of Oklahoma's statehood. For 17 years prior to the passage of the Act of 1925, the Corporation Commission under § 13 of the Act of June 10, 1908, had exercised jurisdiction over the rates, practices and service of ice plants, its action in each case, however, being predicated upon a finding that the company complained of enjoyed a "virtual monopoly" of the ice business in the community which it served.[26] The jurisdiction thus exer-

[25] For accounts of the situation in Oklahoma before the passage of the bill, see Guy L. Andrews, "Regulation of the Ice Business in Oklahoma," 75 Ice & Refrigeration 171, "State Regulation of the Ice Industry," *ibid.*, 437. In the year 1924, 375 formal complaints against ice companies are said to have been filed with the Commission.

[26] Okla. Sess. Laws, 1907–1908, c. 83: "Section 13. Whenever any business, by reason of its nature, extent or the existence of a virtual monopoly therein, is such that the public must use the same, or its services, or the consideration by it given or taken or offered, or the commodities bought or sold therein are offered or taken by purchase or sale in such a manner as to make it of public consequence, or to affect the community at large as to supply, demand or price or rate thereof, or said business is conducted in violation of the first section of this Act, said business is a public business, and subject to be controlled by the State, by the Corporation Commission or by an action in any district court of the State, as to all of its practices, prices, rates and charges. And it is hereby declared to be the duty of any person, firm or corporation engaged in any public business to render its

cised was upheld by the Supreme Court of the State in *Oklahoma Light & Power Co.* v. *Corporation Commission,* 96 Okla. 19; 220 Pac. 54. The court said, at p. 24: "The manufacture, sale, and distribution of ice in many respects closely resemble the sale and distribution of gas as fuel, or electric current, and in many communities the same company that manufactures, sells, and distributes electric current is the only concern that manufactures, sells, and distributes ice, and by reason of the nature and extent of the ice business it is impracticable in that community to interest any other concern in such business. In this situation, the distributor of such a necessity as ice should not be permitted by reason of the impracticability of any one else engaging in the business to charge unreasonable prices, and if such an abuse is persisted in, the regulatory power of the State should be invoked to protect the public." See also *Consumers Light & Power Co.* v. *Phipps,* 120 Okla. 223; 251 Pac. 63.

By formal orders, the Commission repeatedly fixed or approved prices to be charged in particular communities;[27] required ice to be sold without discrimination[28]

---

services and offer its commodities, or either, upon reasonable terms without discrimination and adequately to the needs of the public, considering the facilities of said business."

[27] Powers *v.* Mangum Ice & Cold Storage Co., 2d & 3d Ann. Rep. Okla. Corp. Comm., p. 354; Tipton *v.* Ada Ice & Fuel Co., *ibid.,* p. 358; Scanlon *v.* Sass, *ibid.,* p. 361; Worley *v.* Hill, *ibid.,* p. 390; Gillian *v.* Tishomingo Electric Light & Power Co., 4th Ann. Rep., p. 103; Wadlington *v.* Southern Ice & Utilities Co., 13th Ann. Rep., p. 235; In re General Investigation of Prices, Practices, Rates and Charges of the New State Ice Co., 15th Ann. Rep., p. 176; In re General Investigation of Prices, Practices, Rates and Charges of the Steffens-Bretch Ice & Ice Cream Co., *ibid.,* p. 177; McCartney *v.* Kingfisher Ice Co., *ibid.,* p. 210; In the Matter of the investigation of prices charged for ice at Guthrie, Oklahoma, by the Rummeli-Braun Co., *ibid.,* p. 212.

[28] Brenan v. Tishomingo Ice & Cold Storage Co., 2d & 3d Ann. Rep. Okla. Corp. Comm., p. 353; Tipton *v.* Ada Ice & Fuel Co.,

and to be distributed as equitably as possible to the extent of the capacity of the plant; [29] forbade short weights and ordered scales to be carried on delivery wagons and ice to be weighed upon the customer's request; [30] and undertook to compel sanitary practices in the manufacture of ice [31] and courteous service of patrons.[32] Many of these regulations, other than those fixing prices, were embodied in a general order to all ice companies, issued July 15, 1921, and are still in effect.[33] Informally, the Commis-

---

ibid., p. 358; Scanlon *v.* Sass, *ibid.*, p. 361; Order No. 472, 4th Ann. Rep., p. 40; Nunnery *v.* Mangum Ice & Cold Storage Co., *ibid.*, p. 63; Order No. 641, 6th Ann. Rep., p. 7; Order No. 650, *ibid.*, p. 8; Order No. 708, *ibid.*, p. 10; Garner *v.* Tulsa Ice Co., 10th Ann. Rep., p. 336; Ratner *v.* Imperial Ice Co., 11th Ann. Rep., p. 205; Norton *v.* Chandler Ice Co., 12th Ann. Rep., p. 227; Vance *v.* Tahlequah Light & Power Co, 13th Ann. Rep., p. 194.

[29] In most instances of complaint of insufficient ice the Commission undertook to secure only the equitable distribution of the available supply; and the terms of the statute gave it no greater authority. See, *e. g.*, Powers *v.* Mangum Ice & Cold Storage Co., 2d & 3d Ann. Rep. Okla. Corp. Comm., p. 354; Gardiner *v.* Geary Light & Ice Co., *ibid.*, p. 403. But compare Ratner *v.* Imperial Ice Co., 11th Ann. Rep., p. 205; Ada *v.* Tipton Ice & Fuel Co., 2d & 3d Ann. Rep., p. 358. On no occasion, before 1925, did the Commission undertake to extend ice service to communities not theretofore supplied.

[30] Brenan *v.* Tishomingo Ice & Cold Storage Co., 2d & 3d Ann. Rep. Okla. Corp. Comm., p. 353; Powers *v.* Mangum Ice & Cold Storage Co., *ibid.*, p. 354; Tipton *v.* Ada Ice & Fuel Co., *ibid.*, p. 358; Scanlon *v.* Sass, *ibid.*, p. 361; Worley *v.* Hull, *ibid.*, p. 390; Ralston *v.* Hobart Ice & Bottling Co., 4th Ann. Rep., p. 110; In the Matter of Proposed Order No. 94, 6th Ann. Rep., p. 219, 7th *id.*, p. 266; Langan *v.* McCoy Bros., 8th & 9th Ann. Rep., p. 226; Ratner *v.* Imperial Ice Co., 11th Ann. Rep., p. 205; Norton *v.* Chandler Ice Co., 12th Ann. Rep., p. 227; Vance *v.* Tahlequah Light & Power Co., 13th Ann. Rep., p. 194.

[31] Gardiner v. Geary Light & Ice Co., 2d & 3d Ann. Rep. Okla. Corp. Comm., p. 403.

[32] Worley *v.* Hull, 2d & 3d Ann. Rep. Okla. Corp. Comm., p. 390.

[33] Order No. 1906, 15th Ann. Rep. Okla. Corp. Comm., p. 178.

sion adjusted a much greater volume of complaints of a similar nature.[34] It appears from the record that for some years prior to the Act of 1925 one day of each week was reserved by the Commission to hear complaints relative to the ice business.

As early as 1911, the Commission in its annual report to the Governor, had recommended legislation more clearly delineating its powers in this field:

"There should be a law passed putting the regulation of ice plants under the jurisdiction of the Commission. The Commission is now assuming this jurisdiction under an Act passed by the Legislature known as the anti-trust law. A specific law upon this subject would obviate any question of jurisdiction." [35]

This recommendation was several times repeated, in terms revealing the extent and character of public complaint against the practices of ice companies.[36]

---

[34] See 8th & 9th Ann. Rep. Okla. Corp. Comm., p. 1.

[35] 2d & 3d Ann. Rep. Okla. Corp. Comm., p. 8.

[36] In its Eighth and Ninth Annual Report, dated November 20, 1916, p. 5, the Commission said: "The scope of legislation pertaining to those utilities which serve the public generally should be broadened. Two conspicuous examples are ice plants and cotton compresses. Chapter 93, Session Laws, 1915, extends the jurisdiction of the Corporation Commission over water, heat, light, and power companies, but does not include ice plants. Numerous complaints are received by the Commission each year as to extortionate practices of ice companies and exorbitant prices charged. The same jurisdiction should be given the Corporation Commission over ice plants as it exercises over gas, electric and water companies."

In its Eleventh Annual Report, October 3, 1918, p. xxii, it was said: "The business of manufacturing and distributing ice is as much a matter of public concern as is the business of rendering water, electric or gas service and should be subject to the same regulation. Complaints are continuously being made to the Commission in reference to prices of ice, practices of ice companies, or service rendered by such companies, and the Commission has frequently been called upon to exercise jurisdiction under the so-called Anti-Trust Laws. Specific legislation should be enacted in reference to these

The enactment of the so-called Ice Act in 1925 enlarged the existing jurisdiction of the Corporation Commission by removing the requirement of a finding of virtual monopoly in each particular case, compare *Budd* v. *New York,* 143 U. S. 517, 545, with *Brass* v. *Stoeser,* 153 U. S. 391, 402, 403; by conferring the same authority to compel adequate service as in the case of other public utilities; and by committing to the Commission the function of issuing licenses equivalent to a certificate of public convenience and necessity. With the exception of the granting and denying of such licenses and the exertion of wider control over service, the regulatory activity of the Commission in respect to ice plants has not changed in character since 1925. It appears to have diminished somewhat in volume.[37]

---

companies and the power of regulation should be made definite and certain."

Again, in the Twelfth Annual Report, November 18, 1919, p. 1: "During the past summer season numerous complaints against practices and rates of ice utilities have arisen from at least a hundred towns and cities throughout the State. The same jurisdiction should be given the Corporation Commission over ice plants as it exercises over gas, electric, and water companies."

[37] Besides continuing in effect Order No. 1906, *supra* note 33, the Commission has issued further general orders pertaining particularly to accounting practices. Order No. 3843, 20th Ann. Rep. Okla. Corp. Comm., p. 562. In the following cases it has prescribed rates: In re Application of Marietta Ice & Water Co., 22d Ann. Rep., p. 601; In re Application for Reduction in Ice Rates Charged by the Sallisaw Ice Co., *ibid.,* p. 816; In re Reduction of Rates Charged by the Consumers Ice Co., *ibid.,* p. 859; In re Application of Southwestern Light & Power Co., 23d Ann. Rep. p. 755; In re Application of the Ward Ice Industries for Reduction in Ice Rates, *ibid.,* p. 757. In In re Application of the Shawnee Ice Co. for increase of capacity in its plant, 22d Ann. Rep., p. 834, the applicant was allowed to withdraw its application, and the intervening application of E. A. Liebemann to erect a new plant was denied. In Burbank Ice Co. *v.* Kaw City Ice & Power Co., 23d Ann. Rep., p. 558, the defendant's permit to

In 1916, the Commission urged, in its report to the Governor, that all public utilities under its jurisdiction be required to secure from the Commission "what is known as a 'certificate of public convenience and necessity' before the duplication of facilities."

"This would prevent ruinous competition resulting in the driving out of business of small though competent public service utilities by more powerful corporations, and often consequent demoralization of service, or the requiring of the public to patronize two utilities in a community where one would be adequate." [38]

Up to that time a certificate of public convenience and necessity to engage in the business had been applied only to cotton gins. Okla. Sess. Laws, 1915, c. 176, § 3. In 1917 a certificate from the Commission was declared prerequisite to the construction of new telephone or telegraph lines.[39] In 1923 it was required for the operation of motor carriers.[40] In 1925, the year in which the Ice Act was passed, the requirement was extended also to power, heat, light, gas, electric or water companies pro-

---

distribute ice in the town of Shidler was revoked upon a showing that it distributed during the summer months only and that the plaintiff's local plant was operated throughout the year, was adequate to meet local needs, and could not be maintained in the face of the defendant's competition. See also In re Application of New State Ice Co., *ibid.*, p. 748. Other formal orders of the Commission have been issued without opinion.

[38] 8th & 9th Ann. Rep. Okla. Corp. Comm., pp. 5, 6.

[39] Okla. Sess. Laws, 1917, c. 270.

[40] Okla. Sess. Laws, 1923, c. 113, § 4. This statute was held valid against objections under both the Federal and State Constitutions in *Ex parte Tindall*, 102 Okla. 192; 229 Pac. 125, and *Barbour* v. *Walker*, 126 Okla. 227, 229; 259 Pac. 552. See also *Chicago, R. I. & P. Ry. Co.* v. *State*, 123 Okla. 190; 252 Pac. 849; *Chicago, R. I. & P. Ry. Co.* v. *State*, 126 Okla. 48; 258 Pac. 874. As to certificates of public convenience and necessity for the operation of a cotton gin, see *Hohman* v. *State*, 122 Okla. 45; 250 Pac. 514.

posing to do business in any locality already possessing one such utility.[41]

Fourth. Can it be said in the light of these facts that it was not an appropriate exercise of legislative discretion to authorize the Commission to deny a license to enter the business in localities where necessity for another plant did not exist? The need of some remedy for the evil of destructive competition, where competition existed, had been and was widely felt. Where competition did not exist, the propriety of public regulation had been proven. Many communities were not supplied with ice at all. The particular remedy adopted was not enacted hastily. The statute was based upon a long-established state policy recognizing the public importance of the ice business, and upon 17 years' legislative and administrative experience in the regulation of it. The advisability of treating the ice business as a public utility and of applying to it the certificate of convenience and necessity had been under consideration for many years. Similar legislation had been enacted in Oklahoma under similar circumstances with respect to other public services. The measure bore a substantial relation to the evils found to exist. Under these circumstances, to hold the Act void as being unreasonable, would, in my opinion involve the exercise not of the function of judicial review, but the function of a super-legislature. If the Act is to be stricken down, it must be on the ground that the Federal Constitution guarantees to the individual the absolute right to enter the ice business, however detrimental the exercise of that right may be to the public welfare. Such, indeed, appears to be the contention made.

---

[41] Okla. Sess. Laws, 1925, c. 102, §§ 5, 6. Control over entry into these businesses, power and water plants, and the like, had theretofore been exercised by the requirement of a franchise from the municipality to be served. See *Pawhuska* v. *Pawhuska Oil & Gas Co.*, 28 Okla. 563, 568; 115 Pac. 353; *Huffaker* v. *Fairfax*, 115 Okla. 73; 242 Pac. 254. Cf. Okla. Const., art. IX, § 2, art. XVIII, § 5.

Fifth. The claim is that manufacturing ice for sale and distribution is a business inherently private, and, in effect, that no state of facts can justify denial of the right to engage in it. To supply one's self with water, electricity, gas, ice or any other article, is inherently a matter of private concern. So also may be the business of supplying the same articles to others for compensation. But the business of supplying to others, for compensation, any article or service whatsoever may become a matter of public concern. Whether it is, or is not, depends upon the conditions existing in the community affected.[42] If it is a matter of public concern, it may be regulated, whatever the business. The public's concern may be limited to a single feature of the business, so that the needed protection can be secured by a relatively slight degree of regulation. Such is the concern over possible incompetence, which dictates the licensing of dentists, *Dent* v. *West Virginia,* 129 U. S. 114, 122; *Douglas* v. *Noble,* 261 U. S. 165, 170; or the concern over possible dishonesty, which led to the licensing of auctioneers or hawkers, *Baccus* v. *Louisiana,* 232 U. S. 334, 338. On the other hand, the public's concern about a particular business may be so pervasive and varied as to require constant detailed supervision and a very high degree of regulation. Where this is true, it is common to speak of the business as being a "public" one, although it is privately owned. It is to such businesses that the designation "public utility" is commonly applied; or they are spoken of as "affected with a public interest." *German Alliance Ins. Co.* v. *Lewis,* 233 U. S. 389, 408.

A regulation valid for one kind of business may, of course, be invalid for another; since the reasonableness

[42] "Plainly circumstances may so change in time or so differ in space as to clothe with such an [public] interest what at other times or in other places would be a matter of purely private concern." *Block* v. *Hirsh,* 256 U. S. 135, 155.

of every regulation is dependent upon the relevant facts. But so far as concerns the power to regulate, there is no difference in essence, between a business called private and one called a public utility or said to be "affected with a public interest." Whatever the nature of the business, whatever the scope or character of the regulation applied, the source of the power invoked is the same. And likewise the constitutional limitation upon that power. The source is the police power. The limitation is that set by the due process clause, which, as construed, requires that the regulation shall be not unreasonable, arbitrary or capricious; and that the means of regulation selected shall have a real or substantial relation to the object sought to be obtained. The notion of a distinct category of business "affected with a public interest," employing property "devoted to a public use," rests upon historical error. The consequences which it is sought to draw from those phrases are belied by the meaning in which they were first used centuries ago,[43] and by the decision of this Court, in *Munn* v. *Illinois*, 94 U. S. 113, which first introduced them into the law of the Constitution.[44] In my opinion, the true principle is that the

[43] In Lord Hale's "Treatise on the Ports of the Sea," Hargrave, "Law Tracts," pp. 77–78. Lord Hale was speaking of the particulars, wharves and cranes in ports; and did not purport to generalize the obligation to serve all persons at reasonable rates in other circumstances. See Breck P. McAllister, "Lord Hale and Business Affected With a Public Interest," 43 Harv. L. Rev. 759. He was speaking of duties arising at common law, and not of limitations upon the legislative power of Parliament. See J. A. McClain, Jr., "The Convenience of the Public Interest Concept," 15 Minn. L. Rev. 546. He could not have been speaking of such limitations, for in England they did not exist; and Parliament was accustomed to regulate prices of commodities of all kinds. See note 46, *infra*.

[44] Chief Justice Waite, who wrote the opinion, said generally, p. 126, "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the

State's power extends to every regulation of any business reasonably required and appropriate for the public protection. I find in the due process clause no other limitation upon the character or the scope of regulation permissible.

Sixth. It is urged specifically that manufacturing ice for sale and distribution is a common calling; and that the right to engage in a common calling is one of the fundamental liberties guaranteed by the due process clause. To think of the ice-manufacturing business as a common calling is difficult; so recent is it in origin and so peculiar in character. Moreover, the Constitution does not require that every calling which has been common shall ever remain so. The liberty to engage in a common calling, like other liberties, may be limited in the exercise of the police power. The slaughtering of cattle had been a common calling in New Orleans before the monopoly sustained in *Slaughter-House Cases,* 16 Wall. 36, was created by the legislature. Prior to the Eighteenth Amendment selling liquor was a common calling, but this Court held it to be consistent with the due process clause for a State to abolish the calling, *Bartemeyer* v. *Iowa,* 18 Wall. 129; *Mugler* v. *Kansas,* 123 U. S. 623, or to establish a system limiting the number of licenses, *Crowley* v. *Christensen,* 137 U. S. 86. Every citizen has the right to navigate a river or lake, and may even carry others thereon for hire. But the ferry privilege may be made exclusive in order that the patronage may be sufficient to justify maintaining the ferry service, *Conway* v. *Taylor's Executor,* 1 Black 603, 633, 634.

---

community at large," and referred with approval to statutes regulating the prices of bread and the rates of chimney-sweepers, as well as of persons in other callings still regulated. See Walton H. Hamilton, "Affectation [*sic*] with a Public Interest," 39 Yale L. J. 1089, 1095–1096. See also *German Alliance Ins. Co.* v. *Lewis,* 233 U. S. 389, 408.

It is settled that the police power commonly invoked in aid of health, safety and morals, extends equally to the promotion of the public welfare.[45] The cases just cited show that, while, ordinarily, free competition in the common callings has been encouraged, the public welfare may at other times demand that monopolies be created. Upon this principle is based our whole modern practice of public utility regulation. It is no objection to the validity of the statute here assailed that it fosters monopoly. That, indeed, is its design. The certificate of public convenience and invention is a device—a recent social-economic invention—through which the monopoly is kept under effective control by vesting in a commission the power to terminate it whenever that course is required in the public interest. To grant any monopoly to any person as a favor is forbidden even if terminable. But where, as here, there is reasonable ground for the legislative conclusion that in order to secure a necessary service at reasonable rates, it may be necessary to curtail the right to enter the calling, it is, in my opinion, consistent with the due process clause to do so, whatever the nature of the business. The existence of such power in the legislature seems indispensable in our ever-changing society.

It is settled by unanimous decisions of this Court, that the due process clause does not prevent a State or city from engaging in the business of supplying its inhabitants with articles in general use, when it is believed that they

[45] *Lake Shore & M. S. Ry. Co.* v. *Ohio,* 173 U. S. 285, 292; *Chicago & Alton R. Co.* v. *Tranbarger,* 238 U. S. 67, 77; *Chicago, B. & Q. R. Co.* v. *Drainage Commissioners,* 200 U. S. 561, 592; *Bacon* v. *Walker,* 204 U. S. 311, 317. "But it was recognized in the cases cited, as in many others, that freedom of contract is a qualified and not an absolute right. There is no absolute freedom to do as one wills or to contract as one chooses." *Chicago, B. & Q. R. Co.* v. *McGuire,* 219 U. S. 549, 567. Compare *Walls* v. *Midland Carbon Co.* 254 U. S. 300.

cannot be secured at reasonable prices from the private dealers. Thus, a city may, if the local law permits, buy and sell at retail coal and wood, *Jones* v. *Portland,* 245 U. S. 217; or gasoline, *Standard Oil Co.* v. *Lincoln,* 275 U. S. 504. And a State may, if permitted by its own Constitution, build and operate warehouses, elevators, packinghouses, flour mills or other factories, *Green* v. *Frazier,* 253 U. S. 233. As States may engage in a business, because it is a public purpose to assure to their inhabitants an adequate supply of necessary articles, may they not achieve this public purpose, as Oklahoma has done, by exercising the lesser power of preventing single individuals from wantonly engaging in the business and thereby making impossible a dependable private source of supply? As a State so entering upon a business may exert the taxing power all individual dealers may be driven from the calling by the unequal competition. If States are denied the power to prevent the harmful entry of a few individuals into a business, they may thus, in effect, close it altogether to private enterprise.

Seventh. The economic emergencies of the past were incidents of scarcity. In those days it was preëminently the common callings that were the subjects of regulation. The danger then threatening was excessive prices. To prevent what was deemed extortion, the English Parliament fixed the prices of commodities and of services from time to time during the four centuries preceding the Declaration of Independence.[46] Like legislation was en-

[46] "In Lord Hale's time . . . all activity comprehended under what we call business, was public, and all of it subject to price control." Walton H. Hamilton, "Affectation [sic] With a Public Interest," 39 Yale L. J. 1089, 1094. For voluminous collections of statutes and materials relating to Parliamentary control of business in England prior to the American Revolution, see the references in Edward A. Adler, "Business Jurisprudence," 28 Harv. L. Rev. 135; J. A. McClain, Jr., "The Convenience of the Public Interest Concept," 15

acted in the Colonies; and in the States, after the Revolution.[47] When the first due process clause was written into the Federal Constitution, the price of bread was being fixed by statute in at least two of the States, and this practice continued long thereafter.[48] Dwelling houses when occupied by the owner are preëminently private property. From the foundation of our Government those who wished to lease residential property had been free to charge to tenants such rentals as they pleased. But for years after the World War had ended, the scarcity of dwellings in the City of New York was such that the State's legislative power was invoked to ensure reasonable rentals. The constitutionality of the statute was sustained by this Court. *Marcus Brown Holding Co.* v. *Feldman,* 256 U. S. 170. Similar legislation of Congress for the City of Washington was also upheld. *Block* v. *Hirsh,* 256 U. S. 135.

Eighth. The people of the United States are now confronted with an emergency more serious than war. Misery is wide-spread, in a time, not of scarcity, but of over-abundance. The long-continued depression has brought unprecedented unemployment, a catastrophic fall in commodity prices and a volume of economic losses which threatens our financial institutions.[49] Some people

---

Minn. L. Rev. 546; Breck P. McAllister, "Lord Hale and Business Affected With a Public Interest," 43 Harv. L. Rev. 759, 767; Milton Handler, "The Constitutionality of Investigations by the Federal Trade Commission," 28 Col. L. Rev. 708, 712–714.

[47] Statutes of eight of the thirteen States passed during the Revolution, and fixing the price of almost every commodity in the market, are listed in 33 Harv. L. Rev. 838, 839.

[48] Maryland Laws of 1789, c. 8, § 2, Herty's Digest of the Laws of Maryland, 1799, p. 250; 5 Statutes of South Carolina 186, 1 South Carolina Acts of Assembly, 1791–1794, p. 88.

[49] See Hearings before the La Follette subcommittee of the Senate Committee on Manufactures, Seventy-second Congress, First Session,

believe that the existing conditions threaten even the stability of the capitalistic system.[50] Economists are searching for the causes of this disorder and are reëxamining the bases of our industrial structure. Business men are seeking possible remedies. Most of them realize that failure to distribute widely the profits of industry has been a prime cause of our present plight. But rightly or wrongly, many persons think that one of the major contributing causes has been unbridled competition.[51] Increasingly, doubt is expressed whether it is economically wise, or morally right, that men should be permitted to

---

on Senate Bill 6215 (71st Congress), to establish a National Economic Council, Parts 1 and 2 (October 22 to December 19, 1931), particularly the testimony of Dr. E. A. Goldenweiser, director of research and statistics of the Federal Reserve Board, of Mr. L. H. Sloan, vice-president of the Standard Statistics Company, and of Miss Frances Perkins, Industrial Commissioner of the State of New York, pp. 3–150; "When We Choose To Plan," Graphic Survey, March 1, 1932. See also Hearings on December 28, 1931–January 9, 1932, the La Follette-Costigan Bills, Senate Bills Nos. 174, 262, and 3045 (72d Congress).

[50] See Edward S. Corwin, "Social Planning under the Constitution," 26 American Political Science Review 1; W. B. Donham, "Business Adrift," (1931), p. 165; "America Faces the Future," edited by Charles A. Beard, (1932), pp. 1–10; Paul M. Mazur, "New Roads to Prosperity," (1931), c. V.

[51] W. B. Donham, "Business Adrift," pp. 141, 142; "The Swope Plan," edited by J. George Frederick, (1931), pp. 70, 73, 128; Richard T. Ely, "Hard Times, The Way In and the Way Out," (1931), pp. 62–64, 135, 137; "The Menace of Overproduction," edited by Scoville Hamlin, (1930); Dexter M. Keezer and Stacy May, "The Public Control of Business," (1930), p. 83; Walker D. Hines, "Planning in a Particular Industry," Bulletin of the Taylor Society, October, 1931; Philip Cabot, "The Vices of Free Competition," The Yale Review, Autumn, 1931; Julius H. Barnes, "Business Looks at Unemployment," Atlantic Monthly, August, 1931; "The Federal Anti-Trust Laws: A Symposium," edited by Milton Handler (December, 1931).

add to the producing facilities of an industry which is already suffering from over-capacity. In justification of that doubt, men point to the excess-capacity of our productive facilities resulting from their vast expansion without corresponding increase in the consumptive capacity of the people. They assert that through improved methods of manufacture, made possible by advances in science and invention and vast accumulation of capital, our industries had become capable of producing from thirty to one hundred per cent. more than was consumed even in days of vaunted prosperity; and that the present capacity will, for a long time, exceed the needs of business.[52] All agree that irregularity in employment—the greatest of our evils—cannot be overcome unless production and consumption are more nearly balanced. Many insist there must be some form of economic control. There are plans for proration. There are many proposals for stabilization.[53] And some thoughtful men

[52] The depression which began in 1929 has greatly reduced the present consumptive capacity; and the loss of export trade, and the arrest in the growth in population (resulting from the lessened birth-rate and the practical stoppage of immigration), apparently preclude the rapid increase of consumptive capacity which followed the earlier periods of depression.

[53] See Charles A. Beard, "America Faces the Future," (1932), pp. 117–140; "The Swope Plan," edited by J. George Frederick (1931); Report No. 12 of the Committee on Continuity of Business and Employment of the United States Chamber of Commerce, October 2–3, 1931; Report of the Executive Council, American Federation of Labor to the 51st Annual Convention, October 5, 1931; Stuart Chase, "A Ten Year Plan for America," Harpers' Magazine, June, 1931; George Soule, "What Planning Might Do," New Republic, March 11, 1931; "When We Choose to Plan," Graphic Survey, March 1, 1932; "The New Challenge to Scientific Management," Bulletin of the Taylor Society, April, 1931; Robert J. McFall, "Planning Industry," *id.*, June, 1931; Horace B. Drury, "The Hazard of Business," *id.*, December, 1931; Grover A. Whalen, "National Planning," *id.*, February,

of wide business experience insist that all projects for stabilization and proration must prove futile unless, in some way, the equivalent of the certificate of public convenience and necessity is made a prerequisite to embarking new capital in an industry in which the capacity already exceeds the production schedules.[54]

Whether that view is sound nobody knows. The objections to the proposal are obvious and grave. The remedy might bring evils worse than the present disease. The

---

1932; J. Russell Smith, "The End of An Epoch," Graphic Survey, July 1, 1931; Mary van Kleeck, "Planning and the World Paradox," *id.*, November 1, 1931; Lewis L. Lorwin, "The Origins of Economic Planning," *id.*, February 1, 1932; H. S. Person, "Scientific Management as a Philosophy and Technique of Progressive Industrial Stabilization," paper presented at World Social Economic Congress, August, 1931; "When Will America Begin to Plan?" Christian Century, March 11, 1931. See, generally, Hearings before the La Follette subcommittee, on S. 6215, *supra*, note 49. Compare Editorial Research Reports, Washington, D. C., August 1, August 8, December 3, 1931.

[54] See Charles R. Stevenson, "The Way Out," (1932), particularly pp. 27, 31, 33; Philip Cabot, "The Vices of Free Competition," The Yale Review, Autumn, 1931; J. A. Hobson, "The State as an Organ of Rationalization," Political Quarterly, January–March, 1931; and the discussions by Professor Beard and Messrs. Swope, Chase, Soule and Smith, *supra*, note 53. Concerning the bituminous coal business, see United States Coal Commission, Final Report 1925, Part I, pp. 268, 269; "Opening New Mines on the Public Domain: A Way of Order for Bituminous Coal," by Walter H. Hamilton and Helen R. Wright, pp. 35–37; "The Case of Bituminous Coal," by Walton H. Hamilton and Helen R. Wright, pp. 170–173; 263, 264; Willard E. Atkins, *et al.*, "Economic Behavior," (1931), c. XXII; Senate Bill No. 2935, §§ 2, 8 (72d Congress), introduced by Senator Davis, and report of Hearings, U. S. Daily, March 15, 1932, p. 1. Concerning petroleum and gas, see Ralph H. Fuchs, "Legal Technique and National Control of the Petroleum Industry," 16 St. Louis L. Rev. 389; J. Howard Marshall and Norman L. Meyers, "Legal Planning of Petroleum Production," 41 Yale L. J. 33; Samuel H. Slichter, "Modern Economic Society," 861, 862.

obstacles to success seem insuperable.[55] The economic and social sciences are largely uncharted seas. We have been none too successful in the modest essays in economic control already entered upon. The new proposal involves a vast extension of the area of control. Merely to acquire the knowledge essential as a basis for the exercise of this multitude of judgments would be a formidable task; and each of the thousands of these judgments would call for some measure of prophecy. Even more serious are the obstacles to success inherent in the demands which execution of the project would make upon human intelligence and upon the character of men. Man is weak and his judgment is at best fallible.

Yet the advances in the exact sciences and the achievements in invention remind us that the seemingly impossible sometimes happens. There are many men now living who were in the habit of using the age-old expression: "It is as impossible as flying." The discoveries in physical science, the triumphs in invention, attest the value of the process of trial and error. In large measure, these advances have been due to experimentation. In those fields experimentation has, for two centuries, been not only free but encouraged. Some people assert that our present plight is due, in part, to the limitations set

[55] Compare Sumner H. Slichter, "Modern Economic Society," (1931), pp. 872–888; Charles Whiting Baker, "Pathways Back to Prosperity," (1932), pp. 59–61; Samuel Crowther, "A Basis for Stability," (1932), pp. 3–17; J. Franklin Ebersole, "National Planning," Bulletin of the Taylor Society, August, 1931; Virgil Jordan, "Some Aspects of National Stabilization," Mechanical Engineering, January, 1932; "What Price Stability," The Annalist, October 9, 1931; Warren Bishop, "The Rain of Plans," The Nation's Business, October, 1931; Myron W. Watkins, "The Economic Philosophy of Anti-Trust Legislation," Annals of the American Academy of Political and Social Science, January, 1930; Albert W. Atwood, "The Craze for National Planning," Saturday Evening Post, March 19, 1932.

by courts upon experimentation in the fields of social and economic science; and to the discouragement to which proposals for betterment there have been subjected otherwise. There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs. I cannot believe that the framers of the Fourteenth Amendment, or the States which ratified it, intended to deprive us of the power to correct the evils of technological unemployment and excess productive capacity which have attended progress in the useful arts.[56]

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment.[57] We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.

MR. JUSTICE STONE joins in this opinion.

---

[56] Compare Charles Warren, "The New 'Liberty' under the Fourteenth Amendment," 39 Harv. L. Rev. 431.

[57] Compare Felix Frankfurter, "The Public and Its Government," pp. 49–51.

HEINER, COLLECTOR OF INTERNAL REVENUE, *v.* DONNAN ET AL.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 514. Argued February 26, 1932.—Decided March 21, 1932.

1. The second sentence of § 302 (c) of the Revenue Act of 1926, which creates a conclusive presumption that gifts made within two years prior to the death of the donor were made in contemplation of death, requiring the value of such gifts to be included in computing the value of the estate of the decedent subject to the graduated death transfer tax, and thus burdening the estate beneficiaries because of acts bearing no relation to the estate or to death as the generating cause of its transfer, violates the due process clause of the Fifth Amendment. *Schlesinger* v. *Wisconsin,* 270 U. S. 230; *Hoeper* v. *Tax Commission,* 284 U. S. 206. P. 322.
2. A statute which imposes a tax upon an assumption of fact which the taxpayer is forbidden to controvert is so arbitrary and unreasonable that it can not stand under the Fourteenth Amendment. *Schlesinger* v. *Wisconsin,* 270 U. S. 230. P. 325.
3. The restraint imposed upon legislation by the due process clauses of the Fourteenth Amendment and the Fifth Amendment is the same P. 326.
4. The claimed necessity of preventing frauds and evasions of the death transfer tax can not justify the otherwise unconstitutional exaction imposed by the statute; the constitutional rights of the individual are superior to this supposed necessity. P. 328.
5. The conclusive presumption created by the statute is invalid whether it be treated as a rule of evidence or of substantive law. *Id.*
6. Section 302 (c) can not be sustained as imposing a gift tax, (1) because the intent of Congress to enact the provision as an incident of the death tax is unmistakable; and (2) as a gift tax it would be arbitrary and capricious in violation of the due process clause of the Fifth Amendment. P. 330.

CERTIFICATE from the Circuit Court of Appeals upon an appeal from a judgment of the District Court against the Collector on a claim for refund of taxes alleged to have been illegally exacted. 48 F. (2d) 1058.

Assistant Attorney General Youngquist, with whom *Solicitor General Thacher,* and *Messrs. Claude R. Branch, Sewall Key, A. H. Conner,* and *Erwin N. Griswold* were on the brief, for Heiner, Collector.

Section 302 (c) of the Revenue Act of 1926 is a necessary and proper exercise of the power of Congress to lay and collect taxes, and in the judgment of Congress was the only way in which the evasion of estate taxes could be prevented.

The difficulty of determining whether a particular transfer was or was not made in contemplation of death is apparent. The question depends largely on the intent of the donor. *United States* v. *Wells,* 283 U. S. 102, 117. Proving a person's state of mind is almost always a matter of difficulty, and this is especially true when the person is dead. Furthermore, the motives which prompt persons to make gifts are exceedingly complex, and a man may easily lead himself to believe that he makes a gift solely for some purpose to be served during his lifetime, although the fact is that his motive is mixed and that he would not have made it had there been no estate tax in force. The difficulties are clearly illustrated by the fact that, up to the time of the committee report on this provision, the Government failed to establish that the transfer in question was made in contemplation of death, in every reported case on the subject.

To prevent such evasions, Congress, in 1924, adopted the gift tax (§§ 319–324 of the Revenue Act of 1924; U. S. C., Title 26, §§ 1131–1136), upheld in *Bromley* v. *McCaughn,* 280 U. S. 124. The reports of the committees and the debates in Congress show that the gift tax in itself was not expected to produce large revenue, but was intended to supplement the estate tax and make the latter effective. But the gift tax proved to be exceedingly difficult to administer and enforce; it resulted in inequalities, the revenue which it produced was small, and its provi-

sions were easily evaded. For these reasons it was repealed by § 324 of the Revenue Act of 1926. As a substitute for the gift tax and the rebuttable presumption as to transfers made within two years of death, Congress enacted the provision under consideration.

It is obvious that no estate tax can be effective without some means for taxing such transfers *inter vivos* as are made to evade the tax imposed at death. Fourteen of the States had found it necessary to adopt similar safeguards for their succession taxes, and it can not be said that there was no basis for this widespread conviction. See *Purity Extract Co.* v. *Lynch,* 226 U. S. 192, 205; *Silz* v. *Hesterberg,* 211 U. S. 31, 40.

Considered as creating a conclusive presumption, the statute establishes a rule of substantive law and not a mere rule of evidence. Such statutes have been upheld in many cases. See: *Hawkins* v. *Bleakly,* 243 U. S. 210; *Orient Ins. Co.* v. *Daggs,* 172 U. S. 557; *Hawker* v. *New York,* 170 U. S. 189, 195; *Jones* v. *Brim,* 165 U. S. 180, 183; *Street* v. *Farmers' Elevator Co.,* 34 S. D. 523; *Conrad* v. *Smith,* 6 N. D. 337, 342, 343; *State* v. *District Court,* 139 Minn. 409, 411; *State* v. *Lapointe,* 81 N. H. 227; *Matter of Buchanan,* 184 App. Div. 237. Cf. *Mobile, J. & K. C. R. Co.* v. *Turnipseed,* 219 U. S. 35.

The creation of a conclusive presumption is "after all but an illustration of the power to classify." *Jones* v. *Brim,* 165 U. S. 180, 183.

Congress has power to levy a tax upon testamentary transfers as well as upon transfers *inter vivos.* The inclusion of transfers of the kind here involved is not forbidden merely because they do not technically pass at the decedent's death as a part of his estate. *United States* v. *Wells,* 283 U. S. 102; *Milliken* v. *United States,* 283 U. S. 15; *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339; *Tyler* v. *United States,* 281 U. S. 497.

So, the sole constitutional objection must be based upon the proposition that the classification is so arbitrary and unreasonable as to offend against the general language of the due process clause.

The statute is entirely prospective in operation. The decedent was fully informed that the value of the transfer would be included in his gross estate should his death occur within two years thereafter. See *Milliken* v. *United States,* 283 U. S. 15, 23–24; *Orient Ins. Co.* v. *Daggs,* 172 U. S. 557.

The means by which a law may be avoided or defeated is a proper basis for classification. *St. John* v. *New York,* 201 U. S. 633; *District of Columbia* v. *Brooke,* 214 U. S. 138, 150; *Shevlin-Carpenter Co.* v. *Minnesota,* 218 U. S. 57, 69; *Tyler* v. *United States,* 281 U. S. 497, 505; *Milliken* v. *United States,* 283 U. S. 15, 20.

The only objection that can be raised to the classification is that it may include transfers which were made without intent to evade the estate tax. But the inclusion within the tax of some gifts which in fact were not made to evade the estate tax is not an insuperable objection. This Court has frequently upheld statutes that included innocent articles or activities within the proscribed class, because their inclusion was necessary in order effectively to accomplish the purpose to which the law was directed. *Powell* v. *Pennsylvania,* 127 U. S. 678; *Jones* v. *Brim,* 165 U. S. 180; *Hawker* v. *New York,* 170 U. S. 189, 195; *Otis* v. *Parker,* 187 U. S. 606; *Silz* v. *Hesterberg,* 211 U. S. 31; *Purity Extract Co.* v. *Lynch,* 226 U. S. 192, 201; *Hawkins* v. *Bleakly,* 243 U. S. 210; *Hebe Co.* v. *Shaw,* 248 U. S. 297, 303; *Pierce Oil Corp.* v. *Hope,* 248 U. S. 498, 500; *Ruppert* v. *Caffey,* 251 U. S. 264, 283; *National Prohibition Cases,* 253 U. S. 350, 387, 388; *Everard's Breweries* v. *Day,* 265 U. S. 545, 560; *Euclid* v. *Ambler Realty Co.,* 272 U. S. 365, 389; *Lambert* v. *Yel-*

lowley, 272 U. S. 581. Cf. *United States* v. *Doremus,* 249 U. S. 86, 94. A provision may be valid as a necessary adjunct to a matter that lies within the legislative power, even though standing alone its constitutionality might have been subject to doubt. *Milliken* v. *United States,* 283 U. S. 15, 20; *Tyler* v. *United States,* 281 U. S. 497, 505; *Corliss* v. *Bowers,* 281 U. S. 376, 378; *Taft* v. *Bowers,* 278 U. S. 470, 482. Cf. *Fawcus Machine Co.* v. *United States,* 282 U. S. 375. And it has been held that it is permissible incidentally to include in the measure of an excise tax property exempt from taxation. *Flint* v. *Stone Tracy Co.,* 220 U. S. 107; *Educational Films Corp.* v. *Ward,* 282 U. S. 379.

So-called "conclusive presumptions," which are in reality rules of substantive law, are found in the common law and have for many years been included in statutes. See *Allen* v. *United States,* 150 U. S. 551, 558; *Holland* v. *State,* 161 Ga. 492; *Callanan* v. *Hurley,* 93 U. S. 387, 390, 392; *Webb* v. *Den,* 17 How. 576; *Chicago* v. *Sturges,* 222 U. S. 313; *Atlantic Coast Line* v. *Riverside Mills,* 219 U. S. 186; *Douglas* v. *Edwards,* 298 Fed. 229, reversed on other grounds, 269 U. S. 204; *Harder* v. *Irwin,* 285 Fed. 402; *Leland* v. *Commissioner,* 50 F. (2d) 523, certiorari denied, 284 U. S. 656; cf. *Mason* v. *Routzahn,* 8 F. (2d) 56, reversed, 13 F. (2d) 702; *Farrington* v. *Commissioner,* 30 F. (2d) 915.

There is no basis for an objection to the classification on the ground that the operation of the act is limited to transfers made within two years of death. Such a result is inherent in any classification. See *King* v. *Mullins,* 171 U. S. 404; *Metropolis Theatre Co.* v. *Chicago,* 228 U. S. 61; *United States* v. *Wells,* 283 U. S. 102, 117. It is enough if the classification is reasonably founded in the purposes and policies of taxation. *Watson* v. *Comptroller,* 254 U. S. 122, 124; *Stebbins* v. *Riley,* 268 U. S. 137, 143.

The case is not controlled by *Schlesinger* v. *Wisconsin,* 270 U. S. 230; the difference between the equal protection clause in the Fourteenth Amendment and the due process clause in the Fifth is indicated in *LaBelle Iron Works* v. *United States,* 256 U. S. 377, 392. See also *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 161.

The extremely long period embraced in the Wisconsin statute undoubtedly influenced the Court. Cf. *United States* v. *Wells,* 283 U. S. 102, 117. There is an adequate basis for including recent transfers and excluding others more remote. *Klein* v. *Board of Supervisors,* 282 U. S. 19, 23.

The *Schlesinger* case did not repudiate the principle that Congress may include all that is reasonably necessary to carry its powers into execution. Another difference is that the Wisconsin statute levied an excise upon the privilege of receiving property by succession.

Mr. William G. Heiner for Donnan et al., Executors.

The case is ruled by *Schlesinger* v. *Wisconsin,* 270 U. S. 230; *Uihlein* v. *Wisconsin,* 273 U. S. 642; *Tax Commission* v. *Robinson's Executor,* 28 S. W. (2d) 491.

The provision in question has been declared unconstitutional by three other district courts, two circuit courts of appeals and the Board of Tax Appeals in the cases of *Hall* v. *White,* 48 F. (2d) 1060, affirmed, 53 F. (2d) 210; *Guinzburg* v. *Anderson,* 51 F. (2d) 592, affirmed, CCA 2, December 7, 1931; *Delaware Trust Co.* v. *Handy,* 51 F. (2d) 867, s. c., 53 F. (2d) 1042, 285 U. S. 352; and Lincoln *v.* Commissioner, 24 B. T. A. 334.

Whenever the question was squarely raised and decided, no court has ever held valid a conclusive presumption of fact. *United States* v. *Klein,* 13 Wall. 128; *Manley* v. *Georgia,* 279 U. S. 1; *Stuart* v. *Palmer,* 74 N. Y. 183; *Missouri, K. & T. Ry. Co.* v. *Simonson,* 64 Kan. 802, 803; *Vega S. S. Co.* v. *Consolidated Elec. Co.,* 75 Minn.

308; *Graves* v. *Northern Pac. R. Co.,* 5 Mont. 556; *McCready* v. *Sexton,* 29 Iowa 356; *Taylor* v. *Anderson,* 40 Okla. 316; *Winn* v. *Whitehouse,* 96 Ark. 42; *Wantlan* v. *White,* 19 Ind. 470. These cases are accentuated by those which uphold the constitutional presumption when it is rebuttable. *Marz* v. *Hawthorn,* 148 U. S. 172; *Fong Yue Ting* v. *United States,* 149 U. S. 698; *Turpin* v. *Lemon,* 187 U. S. 51; *Minneapolis & St. L. R. Co.* v. *Minnesota,* 193 U. S. 53; *Mobile, J. & K. C. R. Co.* v. *Turnipseed,* 219 U. S. 35; *Lindsley* v. *Natural Gas Co.,* 220 U. S. 61; *Reitler* v. *Harris,* 223 U. S. 437; *Luria* v. *United States,* 231 U. S. 9; *Meeker & Co.* v. *Lehigh Valley R. Co.,* 236 U. S. 412; *Cockrill* v. *California,* 268 U. S. 258; *Wickwire* v. *Reinecke,* 275 U. S. 101; *Ferry* v. *Ramsey,* 277 U. S. 88; *Goodlett* v. *Goodman Coal & Coke Co.,* 192 Fed. 775; *Shwab* v. *Doyle,* 269 Fed. 321; *Flannery* v. *Willcuts,* 25 F. (2d) 951; *In re Allen,* 82 Vt. 365; *New Orleans, M. & C. R. Co.* v. *Cole,* 101 Miss. 173; *Columbia Valley Trust Co.* v. *Smith,* 56 Ore. 6. Distinguishing: *Harder* v. *Irwin,* 285 Fed. 402; *United States* v. *Davis,* 50 F. (2d) 903; *Cardinel* v. *Smith,* 5 Fed. Cas. 45, No. 2395; *Michel* v. *Nunn,* 101 Fed. 423; *Edwards* v. *Douglas,* 269 U. S. 204; and *Leland* v. *Commissioner,* 50 F. (2d) 523, certiorari denied, 284 U. S. 656; *Ruppert* v. *Caffey,* 251 U. S. 264; *National Prohibition Cases,* 253 U. S. 350.

An estate tax cannot be laid merely upon complete and irrevocable gifts made within two years of the donor's death, because there is no transfer as "at death," and consequently no theory at all upon which to base such a tax.

The legislature may not lay an income tax based upon a fiction which is contrary to the fact. *Hoeper* v. *Tax Commission,* 284 U. S. 206.

The reasonableness of the length of any given period is immaterial to the question here involved. The decision in the *Schlesinger* case did not rest upon the unreasonable-

ness of a six year period but upon the disregard for actualities and the discrimination between like gifts made at different times.

If the conclusive presumption here involved be declared valid by this Court, upon what ground shall this Court hereafter reject another conclusive presumption? It is submitted that there is no middle course for this Court to follow.

It is respectfully urged that this Court disaffirm the type of legislation which provides for fiction instead of fact, unless there exists a national emergency.

The collector also urges that the rebuttable presumption is ineffective. Yet the federal courts and the Board of Tax Appeals, to say nothing of unreported cases in the Bureau of Internal Revenue, have effectively enforced the rebuttable presumption under prior revenue acts in many cases, in which the gifts were held to have been made in contemplation of death.

The provision in question also violates the due process clause of the Fifth Amendment, in that it denies equal protection of the laws. This Court has repeatedly held that, where there is no reasonable ground for selecting particular individuals or corporations, or classes, a legislative enactment directed against them amounts to a denial of due process of law as far as their property is concerned. *Smyth* v. *Ames,* 169 U. S. 466.

There is no adequate basis for selecting non-testamentary gifts made within two or six years of death and taxing them and exempting like gifts made beyond such periods. *Schlesinger* v. *Wisconsin,* 270 U. S. 230; *Louisville Gas & Elec. Co.* v. *Coleman,* 277 U. S. 32.

In determining the validity of classification, the practical operation and effect of the legislation must be considered. *Quaker City Cab Co.* v. *Pennsylvania,* 277 U. S. 389, 401; *Near* v. *Minnesota,* 283 U. S. 697.

By leave of Court, briefs of *amici curiae* were filed, *viz.*: By *Mr. Wayne Johnson; Mr. James Marshall; Messrs. E. F. Colladay, Wilton H. Wallace, David O. Dunbar, Clinton Merrick*, and *James O. Moore*, on behalf of the Continental Illinois Bank & Trust Co.; and *Messrs. Samuel W. Fordyce, Henry J. Richardson*, and *C. Powell Fordyce*, on behalf of the St. Louis Union Trust Co. et al.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This case is here on a certificate from the Circuit Court of Appeals for the Third Circuit. On March 1, 1927, John W. Donnan, by complete and irrevocable gift *inter vivos*, transferred without consideration certain securities to trustees for his four children, and also, without consideration, advanced a sum of money to his son. He died on December 23, 1928, less than two years after the gifts and advancement were made. The Commissioner of Internal Revenue included in the gross estate of decedent the value of the property transferred, and imposed a death transfer tax accordingly, on authority of the clause in § 302 (c) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 70 (U. S. C., Sup. V, Title 26, § 1094), which, without regard to the fact, provides that such a transfer made within two years prior to the death of the decedent shall "be deemed and held to have been made in contemplation of death within the meaning of this title."*

---

*"Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

. . . . . .

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate

The executors paid the tax, and, after rejection of a claim for refund, brought this action in the federal district court for the western district of Pennsylvania to recover the amount of the tax attributable to the inclusion of the property in question by the commissioner. The trial court found that neither the transfer in trust nor the advancement was made in contemplation of death. Judgment was rendered in favor of the executors on the ground that the foregoing provision of § 302 (c) was unconstitutional as contravening the due process clause of the Fifth Amendment, and void as being repugnant to other sections of the act. 48 F. (2d) 1058. An appeal was taken, and the circuit court of appeals has certified to this court two questions of law upon which instruction is desired:

"1. Does the second sentence of section 302 (c) of the revenue act of 1926 violate the due process clause of the fifth amendment to the Constitution of the United States?

"2. If the answer to the first question be in the negative, is the second sentence of section 302 (c) of the revenue act of 1926 void because repugnant to sections 1111, 1113 (a), 1117, and 1122 (c) of the same act?"

---

and full consideration in money or money's worth. *Where within two years prior to his death* but after the enactment of this Act and without such a consideration the decedent has made a transfer or transfers by trust or otherwise, of any of his property, or an interest therein, not admitted or shown to have been made in contemplation of or intended to take effect in possession or enjoyment at or after his death, and the value or aggregate value, at the time of such death, of the property or interest so transferred to any one person is in excess of $5,000, then, to the extent of such excess, *such transfer or transfers shall be deemed and held to have been made in contemplation of death within the meaning of this title.* Any transfer of a material part of his property in the nature of a final disposition or distribution thereof made by the decedent within two years prior to his death but prior to the enactment of this Act, without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title."

137818°—32——21

A negative answer to the first question, if made, must rest either upon the ground that Congress has the constitutional power to deny to the representatives of the estate of a decedent the right to show by competent evidence that a gift made within two years prior to the death of the decedent was in fact not made in contemplation of death; or upon the theory that, although the tax in question is imposed as a death transfer tax, it nevertheless may be sustained as a gift tax.

First. Section 301 of the Revenue Act of 1926 imposes a tax "upon the transfer of the net estate of every decedent," etc. There can be no doubt as to the meaning of this language. The thing taxed is the transmission of property from the dead to the living. It does not include pure gifts *inter vivos.* The tax rests, in essence, "upon the principle that death is the generating source from which the particular taxing power takes its being and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested. . . . it is the power to transmit or the transmission or receipt of property by death which is the subject levied upon by all death duties." *Knowlton* v. *Moore,* 178 U. S. 41, 56, 57. The value of property transferred without consideration and in contemplation of death is included in the value of the gross estate of the decedent for the purposes of a death tax, because the transfer is considered to be testamentary in effect. *Milliken* v. *United States,* 283 U. S. 15, 23. But such a transfer, not so made, embodies a transaction begun and completed wholly by and between the living, taxable as a gift (*Bromley* v. *McCaughn,* 280 U. S. 124), but obviously not subject to any form of death duty, since it bears no relation whatever to death. The "generating source" of such a gift is to be found in the facts of life and not in the circumstance of death. And the death afterward of the donor in no way changes the situation; that is to say, the

death does not result in a shifting, or in the completion of a shifting, to the donee of any economic benefit of property, which is the subject of a death tax, *Chase Nat. Bank* v. *United States,* 278 U. S. 327, 338; *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, 346; *Saltonstall* v. *Saltonstall,* 276 U. S. 260, 271; nor does the death in such case bring into being, or ripen for the donee or anyone else, so far as the gift is concerned, any property right or interest which can be the subject of any form of death tax. Compare *Tyler* v. *United States,* 281 U. S. 497, 503. Complete ownership of the gift, together with all its incidents, has passed during the life of both donor and donee, and no interest of any kind remains to pass to one or cease in the other in consequence of the death which happens afterward.

The phrase "in contemplation of or intended to take effect . . . at or after his death," found in the provisions of § 302 (c) of the act of 1926 and prior acts, as applied to fully executed gifts *inter vivos,* puts them in the same category for purposes of taxation with gifts *causa mortis.* In this light, the meaning and purpose of the provision were considered, in a recent decision of this court dealing with the Revenue Act of 1918. *United States* v. *Wells,* 283 U. S. 102, 116–117, 118:

"The dominant purpose is to reach substitutes for testamentary dispositions and thus to prevent the evasion of the estate tax. *Nichols* v. *Coolidge,* 274 U. S. 531, 542; *Milliken* v. *United States, ante,* p. 15. As the transfer may otherwise have all the indicia of a valid gift *inter vivos,* the differentiating factor must be found in the transferor's motive. Death must be 'contemplated,' that is, the motive which induces the transfer must be of the sort which leads to testamentary disposition. As a condition of body or mind that naturally gives rise to the feeling that death is near, that the donor is about to reach the moment of inevitable surrender of ownership,

is most likely to prompt such a disposition to those who are deemed to be the proper objects of his bounty, the evidence of the existence or non-existence of such a condition at the time of the gift is obviously of great importance in determining whether it is made in contemplation of death. The natural and reasonable inference which may be drawn from the fact that but a short period intervenes between the transfer and death, is recognized by the statutory provision creating a presumption in the case of gifts within two years prior to death. But this presumption, by the statute before us, [Act of 1918] is expressly stated to be a rebuttable one, and the mere fact that death ensues even shortly after the gift does not determine absolutely that it is in contemplation of death. The question, necessarily, is as to the state of mind of the donor.

. . . . .

"If it is the thought of death, as a controlling motive prompting the disposition of property, that affords the test, it follows that the statute does not embrace gifts *inter vivos* which spring from a different motive. Such transfers were made the subject of a distinct gift tax, since repealed."

There is no doubt of the power of Congress to provide for including in the gross estate of a decedent, for purposes of the death tax, the value of gifts made in contemplation of death; and likewise no doubt of the power of that body to create a rebuttable presumption that gifts made within a period of two years prior to death are made in contemplation thereof. But the presumption here created is not of that kind. It is made definitely conclusive—incapable of being overcome by proof of the most positive character. Thus stated, the first question submitted is answered in the affirmative by *Schlesinger* v. *Wisconsin,* 270 U. S. 230, and *Hoeper* v. *Tax Commission,* 284 U. S. 206. The only difference between the present

case and the *Schlesinger* case is that there the statute fixed a period of six years as limiting the application of the presumption, while here it is fixed at two; and there the Fourteenth Amendment was involved, while here it is the Fifth Amendment. The length of time was not a factor in the case. The presumption was held invalid upon the ground that the statute made it conclusive without regard to actualities, while like gifts at other times were not thus treated; and that there was no adequate basis for such a distinction. "The presumption and consequent taxation," the court said (p. 240), "are defended upon the theory that, exercising judgment and discretion, the legislature found them necessary in order to prevent evasion of inheritance taxes. That is to say, 'A' may be required to submit to an exactment forbidden by the Constitution if this seems necessary in order to enable the State readily to collect lawful charges against 'B.' Rights guaranteed by the federal Constitution are not to be so lightly treated; they are superior to this supposed necessity. The State is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever."

The *Schlesinger* case has since been applied many times by the lower federal courts, by the Board of Tax Appeals, and by state courts; * and none of them seem to have been at any loss to understand the basis of the decision, namely, that a statute which imposes a tax upon an assumption of fact which the taxpayer is forbidden to controvert, is so arbitrary and unreasonable that it cannot stand under the Fourteenth Amendment.

---

* See for example, *Hall* v. *White*, 48 F. (2d) 1060; *Donnan* v. *Heiner*, 48 F. (2d) 1058 (the present case); *Guinzburg* v. *Anderson*, 51 F. (2d) 592; American Security & Trust Co., 24 B. T. A. 334; *State Tax Commission* v. *Robinson's Executor*, 234 Ky. 415; 28 S. W. (2d) 491 (involving a three year period).

Nor is it material that the Fourteenth Amendment was involved in the *Schlesinger* case, instead of the Fifth Amendment, as here. The restraint imposed upon legislation by the due process clauses of the two amendments is the same. *Coolidge* v. *Long,* 282 U. S. 582, 596. That a federal statute passed under the taxing power may be so arbitrary and capricious as to cause it to fall before the due process of law clause of the Fifth Amendment is settled. *Nichols* v. *Coolidge,* 274 U. S. 531, 542; *Brushaber* v. *Union Pac. R. Co.,* 240 U. S. 1, 24–25; *Tyler* v. *United States, supra,* p. 504.

In *Hoeper* v. *Tax Commission, supra,* this court had before it for consideration a statute of Wisconsin which provided that in computing the amount of income taxes payable by persons residing together as members of a family, the income of the wife should be added to that of the husband and assessed to and payable by him. We held that, since in law and in fact the wife's income was her separate property, the state was without power to measure his tax in part by the income of his wife. At page 215 we said:

"We have no doubt that, because of the fundamental conceptions which underlie our system, any attempt by a state to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the Fourteenth Amendment. That which is not in fact the taxpayer's income cannot be made such by calling it income. Compare *Nichols* v. *Coolidge,* 274 U. S. 531, 540."

The suggestion of the state court that the provision was valid as necessary to prevent frauds and evasions of the tax by married persons was definitely rejected on the ground that such claimed necessity could not justify an otherwise unconstitutional exaction.

In substance and effect, the situation presented in the *Hoeper* case is the same as that presented here. In the

first place, the tax, in part, is laid in respect of property shown not to have been transferred in contemplation of death and the complete title to which had passed to the donee during the lifetime of the donor; and secondly, the tax is not laid upon the transfer of the gift or in respect of its value. It is laid upon the transfer, and calculated upon the value, of the estate of the decedent, such value being enhanced by the fictitious inclusion of the gift, and the estate made liable for a tax computed upon that value. Moreover, under the statute the value of the gift when made is to be ignored, and its value arbitrarily fixed as of the date of the donor's death. The result is that upon those who succeed to the decedent's estate there is imposed the burden of a tax, measured in part by property which comprises no portion of the estate, to which the estate is in no way related, and from which the estate derives no benefit of any description. Plainly, this is to measure the tax on A's property by imputing to it in part the value of the property of B, a result which both the *Schlesinger* and *Hoeper* cases condemn as arbitrary and a denial of due process of law. Such an exaction is not taxation but spoliation. "It is not taxation that government should take from one the profits and gains of another. That is taxation which compels one to pay for the support of the government from his own gains and of his own property." *United States* v. *Railroad Co.*, 17 Wall. 322, 326.

The presumption here excludes consideration of every fact and circumstance tending to show the real motive of the donor. The young man in abounding health, bereft of life by a stroke of lightning within two years after making a gift, is conclusively presumed to have acted under the inducement of the thought of death, equally with the old and ailing who already stands in the shadow of the inevitable end. And although the tax explicitly is based upon the circumstance that the thought of death must be the impelling cause of the transfer (*United*

States v. *Wells, supra,* p. 118), the presumption, nevertheless, precludes the ascertainment of the truth in respect of that requisite upon which the liability is made to rest, with the result, in the present case and in many others, of putting upon an estate the burden of a tax measured in part by the value of property never owned by the estate or in the remotest degree connected with the death which brought it into existence. Such a statute is more arbitrary and less defensible against attack than one imposing arbitrarily retroactive taxes, which this court has decided to be in clear violation of the Fifth Amendment. As said by Judge Learned Hand in *Frew* v. *Bowers,* 12 F. (2d) 625, 630, "Such a law is far more capricious than merely retroactive taxes. Those do indeed impose unexpected burdens, but at least they distribute them in accordance with the taxpayer's wealth. But this section distributes them in accordance with another's wealth; that is a far more grievous injustice."

To sustain the validity of this irrebuttable presumption it is argued, with apparent conviction, that under the *prima facie* presumption originally in force there had been a loss of revenue, and decisions holding that particular gifts were not made in contemplation of death are cited. This is very near to saying that the individual, innocent of evasion, may be stripped of his constitutional rights in order to further a more thorough enforcement of the tax against the guilty—a new and startling doctrine, condemned by its mere statement and distinctly repudiated by this court in the *Schlesinger* (p. 240) and *Hoeper* (p. 217) cases involving similar situations. Both emphatically declared that such rights were superior to this supposed necessity.

The government makes the point that the conclusive presumption created by the statute is a rule of substantive law, and, regarded as such, should be upheld; and decisions tending to support that view are cited. The

earlier revenue acts created a *prima facie* presumption, which was made irrebuttable by the later act of 1926. A rebuttable presumption clearly is a rule of evidence which has the effect of shifting the burden of proof, *Mobile, J. & K. C. R. Co.* v. *Turnipseed,* 219 U. S. 35, 43; and it is hard to see how a statutory rebuttable presumption is turned from a rule of evidence into a rule of substantive law as the result of a later statute making it conclusive. In both cases it is a substitute for proof; in the one open to challenge and disproof, and in the other conclusive. However, whether the latter presumption be treated as a rule of evidence or of substantive law, it constitutes an attempt, by legislative fiat, to enact into existence a fact which here does not, and cannot be made to, exist in actuality, and the result is the same, unless we are ready to overrule the *Schlesinger* case, as we are not; for that case dealt with a conclusive presumption and the court held it invalid without regard to the question of its technical characterization. This court has held more than once that a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the Fourteenth Amendment. For example, *Bailey* v. *Alabama,* 219 U. S. 219, 238, *et seq.; Manley* v. *Georgia,* 279 U. S. 1, 5–6. "It is apparent," this court said in the *Bailey* case (p. 239) "that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions."

If a legislative body is without power to enact as a rule of evidence a statute denying a litigant the right to prove the facts of his case, certainly the power cannot be made to emerge by putting the enactment in the guise of a rule of substantive law.

Second. The provision in question cannot be sustained as imposing a gift tax, (1) because the intent of Congress to enact the provision as an incident of the death tax and not as a gift tax is unmistakable; and (2) because, if construed as imposing a gift tax, it is in that aspect still so arbitrary and capricious as to cause it to fall within the ban of the due process clause of the Fifth Amendment.

1. The intent of Congress to include gifts made in contemplation of death as integral parts of the decedent's estate for the purposes of the death tax only is so clear as, reasonably, to preclude argument to the contrary. In *United States* v. *Wells, supra,* this court held, as already shown, that since it is the thought of death, as a controlling motive prompting the gift, that affords the test whether it is made in contemplation of death, " it follows that the statute does not embrace gifts *inter vivos* which spring from a different motive. Such transfers were made the subject of a distinct gift tax, since repealed." And see *Reinecke* v. *Trust Co., supra,* at p. 347. It is significant that the repeal of the gift tax referred to was made by the same act (c. 27, § 1200 (a), 44 Stat. 9, 125), which contains the provision here in question. The tax is imposed upon the transfer of the net estate, but it is first necessary to ascertain the value of the gross estate, and the statute provides that this is to be determined by including, among other things, the value of any interest in property of which the decedent has at any time made a transfer in contemplation of his death. The statute requires that this value shall be determined as of the time of the decedent's death, without regard to the value of the gift when received. The event upon which the tax is made to depend is not the transfer of the gift, but the transfer of the estate of the decedent. The tax falls upon the estate and not upon the gift, and is computed not upon the value of the gift, but, by progressively

graduated percentages, upon the value of the entire estate. It is so apparent from a consideration of these features of the statute that Congress could not have had, even remotely, in mind the imposition of a gift tax, that to construe the provision in question as imposing such a tax is to disregard the plain language and the plain intent of the act. For this court to do so would be to enact a law under the pretense of construing one and thus pronounce itself guilty of a flagrant perversion of the judicial power.

2. But if we assume, contrary to what is reasonable, that a gift tax is imposed by providing that the value of property transferred without consideration by a decedent within two years prior to his death shall be included in the value of the gross estate, the case for the government is no better. In the *Schlesinger* case, the Supreme Court of Wisconsin had expressly held that the tax could not be supported as one on gifts *inter vivos* only, saying, "Under such taxation the classification is wholly arbitrary and void. We perceive no more reason why such gifts *inter vivos* should be taxed than gifts made within six years of marriage or any other event. It is because only one class of gifts closely connected with and a part of the inheritance tax law is created that the law becomes valid." *Estate of Schlesinger,* 184 Wis. 1, 10; 199 N. W. 951. This court accepted that view in these words (p. 239): "The court below declared that a tax on gifts *inter vivos* only could not be so laid as to hit those made within six years of the donor's death and exempt all others—this would be 'wholly arbitrary.' We agree with this view and are of opinion that such a classification would be in plain conflict with the Fourteenth Amendment." And it follows that the present provision, written in almost identical terms, is in plain conflict with the Fifth Amendment. The provisions of the statute referred to in the preceding paragraph of this opinion necessarily condition the tax, however it be char-

acterized. If it be a gift tax, it, nevertheless, is based, not upon the transfer of the gift, but upon the transfer of the estate; and upon the value of the estate, and not that of the gift. Obviously these are bases having no relation whatever to the gift. Moreover, the value of the gift is not to be determined as of the time when made, but, considered as a part of the estate, is to be fixed as of the date of the decedent's death—a condition so obviously arbitrary and capricious as, by itself, to condemn the tax, viewed as a gift tax, as violative of due process. It is to be paid by the beneficiaries of the decedent, although it is impossible for them to share in the gift which has passed beyond recall. It is, therefore, a contribution to the government exacted of one person, based *pro tanto* upon the wealth of another.

Considered as a gift tax, these conditions demonstrate the entire lack of relation between the taxpayer and the transfer which is the subject of the tax. They disclose that there is no rational ground for measuring the tax, considered as a gift tax and not as a death tax, by the value of an estate coming into being after the gift has become complete and irrevocable, and of which the gift comprises no part. And they show that to impose liability for the tax, as a gift tax, upon the estate, as they in terms require, is, in effect, to exact tribute from the gains or property of one measured by the gains or property of another.

The first question must be answered in the affirmative and this makes it unnecessary to answer the second.

It is so ordered.

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

MR. JUSTICE STONE, dissenting.

I think the tax involved in this and its companion case, *Handy* v. *Delaware Trust Co., post,* p. 352, is in all respects

valid, and that the certified questions in both cases should be answered in the negative.

The present federal estate tax, enacted in 1916, Title II of the Revenue Act of 1916, c. 463, 39 Stat. 777, has been continued in each successive Revenue Act. Although levied upon the privilege of transferring property passing at death and imposed on the estates of decedents, the prescribed tax was not limited to such transfers. By § 202 (b) and (c) of the 1916 Act it was extended to gifts *inter vivos,* made in contemplation of death, and to gifts of property upon joint tenancy or tenancy by the entirety, the benefit of which inured to the surviving tenant upon the death of the donor. Both classes of gifts were taxed as a part of the decedent's estate at the rates prescribed by the estate tax. The obvious purpose of these provisions was to prevent or compensate for the withdrawal of property by gifts *inter vivos* from the operation of the estate tax. The 1918 Revenue Act, § 402 (c) and (f), c. 18, 40 Stat. 1057, 1097, included in the donor's estate, subject to the estate tax, all gifts effected by any trust taking effect in possession or enjoyment at the time of the donor's death, and the proceeds in excess of $40,000 of life insurance purchased by the decedent in his lifetime and payable to named beneficiaries at his death.

As a further measure for preventing avoidance of the tax by gifts *inter vivos,* Congress, in 1924, adopted the gift tax, §§ 319–324 of the Revenue Act of that year, c. 234, 43 Stat. 253, 313–316. That it was adopted as a measure to prevent avoidance of the estate tax sufficiently appears from the fact that the graduated rates and exemptions of the tax were the same as in the case of testamentary transfers, §§ 301 (a), 319, 303 (a) (4), 321 (a) (1),[1] and from the fact that in the Revenue Act of 1926

[1] See also House Report No. 179, 68th Congress, 1st Sess., p. 75; Congressional Record, Vol. 65, Part 3, pp. 3119, 3120, 3122; Part 4, pp. 3371, 3372, 3373; Part 8, pp. 8094, 8095, 8096.

the retroactive reductions in rates of the estate tax were extended to the rates of the gift tax. §§ 301, 324, Revenue Act of 1926, c. 27, 44 Stat. 9, 69, 86. Provisions were also made for crediting the gift tax against the estate tax where the amount of the gift was later required to be included in the decedent's gross estate. § 322, Revenue Act of 1924, 43 Stat. 316; § 404, Revenue Act of 1928, c. 852, 45 Stat. 791, 863.

Because of inequalities and inconvenience, expense and other difficulties in its operation and administration, the gift tax was repealed by § 1200 of the Revenue Act of 1926, 44 Stat. 125;[2] and as a result of ten years' experience in the administration of the estate tax and particularly of the provision taxing gifts in contemplation of death, the present provision of § 302 (c) of the Revenue Act of 1926, 44 Stat. 70, was added, which operates to impose the tax on all gifts made within two years of death, regardless of the purpose or motive of the donor. The Ways and Means Committee of the House of Representatives, in its report recommending this legislation (House Report No. 1, 69th Congress, 1st Sess., p. 15), pointed out that the tax on gifts in contemplation of death had been ineffective in its practical administration, with a great loss of revenue to the Government in consequence, and that "the difficulty of enforcement will be even more serious in view of the repeal of the gift tax." It stated, without qualification, that the amendment was one imposing the tax on all gifts made within two years of death, and said that "the inclusion of this provision will prevent most of the evasion and is the only way in which it can be prevented." [3]

---

[2] See Senate Report No. 52, 69th Congress, 1st Sess., p. 9.

[3] This consideration seems also to have motivated the corresponding English legislation. In 1881 England adopted a statute, 44 Vict. c. 12, § 38 (2) (a), which included gifts *inter vivos*, made within three months of the death, in the donor's estate, subject to death

As we are concerned here only with the power of Congress to tax such gifts, I shall take no time in discussing the particular form of language by which Congress has sought to accomplish its purpose. In this statute taxing gifts *inter vivos*, as though they were legacies, it can be of no consequence whether the enactment says that all gifts within two years of death of the donor are irrebuttably presumed to be in contemplation of death or whether more directly it imposes the tax on all gifts made within two years of the donor's death. In either case, we are concerned only with the power which, here, the legislative body has indisputably sought to exert, and not with the particular choice of words by which it has expressed that purpose.

The question, reduced to its simplest terms, is whether Congress possesses the power to supplement an estate tax, and protect the revenue derived from it, as was its declared purpose, by a tax on all gifts *inter vivos*, made within two years of the death of the donor, at the same rate and in the same manner as though the gift were made at death. I think it has.

At the outset it is to be borne in mind that gifts *inter vivos* are not immune from federal taxation. Whatever doubts may formerly have been entertained, it is now settled that the national Government may tax all gifts

---

duties. The three months was increased to one year, in 1889, 52 Vict. c. 7, § 11 (1), and to three years in 1910, 10 Edw. VII, c. 8, § 59 (1), the last provision remaining in force, except in some particular circumstances not now necessary to mention, until the present time.

The brief for the Government in No. 514, Appendix B, lists fourteen states which, prior to the enactment of the present statute in 1926, had found it necessary or expedient to adopt similar legislation; the state statutes subjected to inheritance taxation gifts made within periods ranging from one to six years of the donor's death. See also Sabine, "Transfers in Contemplation of Death," 5 Internal Revenue News, September, 1931, p. 8.

inter vivos and at rates comparable to those which may be imposed on gifts at death. *Bromley* v. *McCaughn,* 280 U. S. 124. That the present gifts were *inter vivos,* made in the lifetime of the donors and effected as are any other dispositions of property passing from the donors independently of death, is not in dispute. The question then is, not whether they may be taxed, but, more narrowly, whether the Congressional selection of some such gifts—those made within two years of death—and their taxation as though made at death, as an adjunct to the estate tax, is so arbitrary and unreasonable as to amount to a taking of property without due process of law, prohibited by the Fifth Amendment.

That question was not answered by *Schlesinger* v. *Wisconsin,* 270 U. S. 230. If it had been, this case could and doubtless would be disposed of *per curiam* on the authority of that one. This case comes to us after ten years of experience in the administration of the estate tax, an experience which was not available, or at least not presented, in the *Schlesinger* case. There, all gifts made within six years of death were taxed. Here, only those within two years of death are within the statute. There, the tax was a succession tax and so was a burden on the right to receive, *Leach* v. *Nichols, ante,* p. 165, and necessarily payable by the donee, but at rates and valuations prevailing at the time of the donor's death. Here, the tax was upon the transfer effected by the donor's gift after the enactment of the statute, and is payable from the donor's estate at the same rates and values as though it had passed at his death. It burdens the estate of the donor before distribution, exactly as does the estate tax. *New York Trust Co.* v. *Eisner,* 256 U. S. 345; *Leach* v. *Nichols, supra.* In the *Schlesinger* case, the Court declared (p. 240) that the gifts were "subjected to graduated taxes which could not properly be laid on all gifts or, indeed, upon any gift without testamentary character."

And in stating the argument presented and rejected there, the Court said (p. 240):

"The presumption and consequent taxation are defended upon the theory that, exercising judgment and discretion, the legislature found them necessary in order to prevent evasion of inheritance taxes. That is to say 'A' may be required to submit to an exactment forbidden by the Constitution if this seems necessary in order to enable the State readily to collect lawful charges against 'B.'"

Here, a graduated tax imposed by Congress on gifts *inter vivos* is not forbidden, *Bromley* v. *McCaughn, supra,* and the case is not one where A's property is taxed to enable the Government to collect lawful charges against B. Here A's gift, which may be lawfully taxed, is in this instance, taxed because it removes property from the operation of another tax, which, but for the gift, would be applied to the property at A's death. Concededly there is nothing in the Federal Constitution or laws which necessarily precludes taxation of gifts at the same rate and value as if they had passed at the donor's death, rather than at the rate and value prevailing at the time of the gift. The tax upheld in *Bromley* v. *McCaughn, supra,* taxed all gifts *inter vivos* at the same rates and with the same exemptions as in the case of testamentary transfers. In *Milliken* v. *United States,* 283 U. S. 15, 20, a selected class of gifts *inter vivos,* which were not testamentary although made in contemplation of death, were so taxed as a part of the donor's estate. See *Phillips* v. *Dime Trust & Safe Deposit Co.,* 284 U. S. 160. In *Tyler* v. *United States,* 281 U. S. 497, we upheld taxation, as a part of the donor's estate, of another selected class of gifts *inter vivos,* estates by the entirety donated by one spouse for the benefit of both, although the gift was not testamentary and neither title, possession, nor enjoyment passed at death. Similar taxation of gifts made *inter*

vivos, but finally effective only at death, was sustained in *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, and *Chase National Bank* v. *United States,* 278 U. S. 327; see *Taft* v. *Bowers,* 278 U. S. 470, 482.

In the *Schlesinger* case the classification of the gifts selected for taxation under the state statute was deemed to be so arbitrary as to violate the Fourteenth Amendment, which forbids state legislation denying equal protection of the laws. Here, we are concerned only with the Fifth Amendment. As was said by this Court in *LaBelle Iron Works* v. *United States,* 256 U. S. 377, 392:

"The Fifth Amendment has no equal protection clause; and the only rule of uniformity prescribed with respect to duties, imposts and excises laid by Congress is the territorial uniformity required by Art. I, § 8. . . . The difficulty of adjusting any system of taxation so as to render it precisely equal in its bearing is proverbial, and such nicety is not even required of the States under the equal protection clause, much less of Congress under the more general requirement of due process of law in taxation." See *Treat* v. *White,* 181 U. S. 264, 269; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 158; *Barclay & Co.* v. *Edwards,* 267 U. S. 442, 450.

No tax has been held invalid under the Fifth Amendment because based on an improper classification, and it is significant that in the entire one hundred and forty years of its history, the only taxes held condemned by the Fifth Amendment were those deemed to be arbitrarily retroactive. See *Nichols* v. *Coolidge,* 274 U. S. 531; *Untermyer* v. *Anderson,* 276 U. S. 440; *Coolidge* v. *Long,* 282 U. S. 582.

It is, I think, plain, then, that this tax cannot rightly be held unconstitutional on its face. These gifts *inter vivos,* not being immune from taxation, and the obvious and permissible purpose of the present and related sections being to protect the revenue derived from the tax-

ation of estates,[4] want of due process in taxing them can arise only because the selection of this class of gifts within two years of death, for taxation at the prescribed rates, is so remote from the permissible policy of taxing transfers at death or so unrelated to it as to be palpably arbitrary and unreasonable.

It is evident that the practice of disposing of property by gift *inter vivos,* if generally adopted, would, regardless of the age or motive of the donor, defeat or seriously impair the operation of the estate tax, and that the practice would be encouraged if such gifts, made shortly before the death of the donor, were left free of any form of taxation. That in itself would be a legitimate ground for taxing all gifts at the same rates as legacies, as was done by the gift tax; but since the object is to protect the revenue to be derived from the estate tax, the Government is not bound to tax every gift without regard to its relation to the end sought or the convenience and expense of the Government in levying and collecting it. It may aim at the evil where it exists and select for taxation that class of gifts which experience has shown tends most to defeat the estate tax. This Court has held explicitly that the Fourteenth Amendment does not forbid the selection of subjects for one form of taxation for the very reason that they may not be readily or effectively reached by another tax which it is the legislative policy to maintain. *Watson* v. *State Comptroller,* 254 U. S. 122, 124, 125. And since the imposition of the one tax is induced by the purpose to compensate for the loss of the other, the effect in accomplishing this result may itself be the basis of the selection of subjects of taxation. *St. John* v. *New York,* 201 U. S. 633; *District of Columbia*

[4] House Report, Ways and Means Committee, No. 1, 69th Congress, 1st Sess., p. 15. See *Tyler* v. *United States,* 281 U. S. 497, 505; *Milliken* v. *United States,* 283 U. S. 15, 20.

v. *Brooke,* 214 U. S. 138, 150; *Shevlin-Carpenter Co.* v. *Minnesota,* 218 U. S. 57, 69.

That being the object here, it is not imperative that the motive of the donor be made the exclusive basis of the selection of these gifts for taxation, as in the case of gifts made in contemplation of death. The fact that such gifts, made shortly before death, regardless of motive, chiefly contribute to the withdrawal of property from operation of the estate tax, is enough to support the selection, even though they are not conscious evasions of the estate tax, and opprobrious epithets can not certainly be applied to them. The opinion of the Court does not deny that Congress has power to select, on this basis, certain gifts to be taxed as estates are taxed. In fact, this Court has recently held that Congress does possess that power and has said so in language completely applicable to the present tax. In *Tyler* v. *United States,* 281 U. S. 497, 505, the tax on estates by the entirety, as a part of the decedent's estate passing to the surviving spouse, was upheld regardless of the motive which inspired it, and the decision was rested on the sole and only possible ground that " the evident and legitimate aim of Congress was to prevent an avoidance in whole or in part, of the estate tax by this method of disposition during the lifetime of the spouse who owned the property, or whose separate funds had been used to procure it; and the provision under review is an adjunct of the general scheme of taxation of which it is a part entirely appropriate as a means to that end." See also *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339; *Taft* v. *Bowers,* 278 U. S. 470, 482.

The gifts taxed may, in some instances, as the present opinion states, bear no relation whatever to death, except that all are near death. But that all do have an intimate and vital relation to the policy of taxing the estates of decedents at death, cannot be gainsaid, for what would

otherwise be taxed is, by the gift, withdrawn from the operation of the taxing act, and the revenue derived from the taxation of estates necessarily impaired, unless the act which impairs it, the giving away of property *inter vivos,* is itself taxed. It cannot be said generally that gifts made near the time of death do not have a greater tendency to defeat the estate tax than gifts made at periods remote from it, both because of the greater number and amounts of the former and because such gifts more certainly withdraw the property from the operation of the estate tax than do the earlier and relatively infrequent gifts of property which may be lost or destroyed before the donor's death. Gifts of amounts in excess of $5,000 to one donee in any one year, which alone are taxed, are usually made from substantial fortunes which, in the generality of cases, are accumulated relatively late in life, and the great bulk of which, if not given away in life, would pass at death. Nor can it be denied that the cost and inconvenience of collecting the tax on earlier, generally smaller, and less frequent gifts, which led to the repeal of the gift tax, may not themselves require or justify a distinction between them and gifts made nearer to the time of death.

Since Congress has power to make the selection if the facts warrant, we cannot say *a priori* that such facts do not exist or that in making the selection which it did, Congress acted arbitrarily or without the exercise of the judgment or discretion which rightfully belong to it. *Stebbins* v. *Riley,* 268 U. S. 137, 143. As was said in *Ogden* v. *Saunders,* 12 Wheat. 213, 270, it is but a proper

". . . respect due to the wisdom, the integrity, and the patriotism of the legislative body, by which any law is passed, to presume in favour of its validity, until its violation of the constitution is proved beyond all reasonable doubt."

The existence of facts underlying constitutionality is always to be presumed, and the burden is always on him who assails the selection of a class for taxation to establish that there could be no reasonable basis for the legislative judgment in making it.[5]

But even if that presumption is not to be indulged, in passing on the power of Congress to impose this tax, we cannot rightly disregard the nature of the difficulties involved in the effective administration of a scheme for taxing transfers at death, and we cannot close our eyes to those perhaps less apparent, which have been disclosed by the experience with this form of taxation in the United States, which led to the enactment of the present statute.

It is evident that the estate tax, if not supplemented by an effective provision taxing gifts tending to defeat it, would, to a considerable extent, fail of its purpose. The tax on gifts made in contemplation of death, devised for this purpose, has been upheld by this Court, *Milliken* v. *United States,* 283 U. S. 15, but the difficulties of its successful administration have become apparent. The donor of property which would otherwise be subject to heavy taxes at his death does not usually disclose his purpose in making the gift, even if he does not conceal it. He may not, and often does not, analyse his motives or determine for himself whether his dominating purpose is to substitute the gift for a testamentary disposition which would subject it to the tax, see *Milliken* v. *United States, supra,* p. 23; *United States* v. *Wells,* 283 U. S. 102, or

[5] *Sinking-Fund Cases,* 99 U. S. 700, 718; *Nicol* v. *Ames,* 173 U. S. 509, 514–515; *Buttfield* v. *Stranahan,* 192 U. S. 470, 492; *Graves* v. *Minnesota,* 272 U. S. 425, 428; *Zahn* v. *Board of Public Works,* 274 U. S. 325, 328; *Euclid* v. *Ambler Realty Co.,* 272 U. S. 365, 395; *Hardware Dealers Mut. Fire Ins. Co.* v. *Glidden Co.,* 284 U. S. 151, 158; *O'Gorman & Young, Inc.* v. *Hartford Fire Ins. Co.,* 282 U. S. 251, 257–258.

whether it is so combined with other motives as to preclude its taxation, even though in making it the donor cannot be unaware that he, like others, must die and that his donation will, in the natural course of events, escape the tax which will be imposed on his other property passing at death. See *United States* v. *Wells, supra.* The difficulty of searching the motives and purposes of one who is dead, the proofs of which, so far as they survive, are in the control of his personal representatives, need not be elaborated. As the event has proved, the difficulties of establishing the requisite mental state of the deceased donor has rendered the tax on gifts in contemplation of death a weak and ineffective means of compensating for the drain on the revenue by the withdrawal of vast amounts of property from the operation of the estate tax.

The Government has been involved in 102 cases arising under § 202 (b) of the 1916 Revenue Act and its successors.[6] This number does not include any of the cases arising under § 302 (c) of the Revenue Act of 1926, the statute under present consideration. And it includes only those cases, decision of which was determined by the answer made to the question of fact, whether a gift had been made in contemplation of death.

In 20 cases involving gifts of approximately $4,250,000, the Government was successful.[7] In 3 it was partially

[6] Revenue Act of 1916, § 202 (b), c. 463, 39 Stat. 756, 778; Revenue Act of 1918, § 402 (c), c. 18, 40 Stat. 1057, 1097; Revenue Act of 1921, § 402 (c), c. 136, 42 Stat. 227, 278; Revenue Act of 1924, § 302 (c), c. 234, 43 Stat. 253, 304.

[7] In 18 of these cases the gifts were made within two years of death. The value of the gifts so made was approximately $3,000,000, exclusive of certain realty and personalty, the value of which was not definitely indicated in the reports. Among this group of cases was one in which the gift was $880,100, made when the donor was advised by his physician that he was about to die, *Phillips* v. *Gnichtel,* 27 F. (2d)

successful; [8] and in 78 involving gifts largely in excess of $120,000,000, it was unsuccessful. In another the jury disagreed.[9]

In 56 of the total of 78 cases decided against the Government, the gifts were made within two years of death. In this group of 56 donors, two were more than ninety years of age at the time of death; ten were between eighty and ninety; twenty-seven were between seventy and eighty; six were between sixty and seventy; six were between fifty and sixty; and only one was younger than fifty.[10] There was one gift of $46,000,000, made within two months of death by a donor seventy-one years of age at death; [11] one of $36,790,000 made by a donor over eighty, who consulted a tax expert before making the

662, cert. den. 278 U. S. 636; another of $421,200 made within four months of death by a donor seventy-two years of age, *Luscomb* v. *Commissioner,* 30 F. (2d) 818; one of over $1,000,000, *Brown* v. *Routzahn,* 58 F. (2d) 329 (N. D. Ohio); and one of $312,000, *Kunhardt* v. *Bowers,* 57 F. (2d) 1054 (S. D. N. Y.). Two of the gifts were of more than $200,000, *Rengstorff* v. *McLaughlin,* 21 F. (2d) 177; Green *v.* Commissioner, 6 B. T. A. 278. Six were of more than $100,000, Farmers Bank & Trust Co. *v.* Commissioner, 10 B. T. A. 43; Burling *v.* Commissioner, 13 B. T. A. 264; Hale *v.* Commissioner, 18 B. T. A. 342; Sugerman *v.* Commissioner, 20 B. T. A. 960; *McClure* v. *Commissioner,* 56 F. (2d) 548 (C. C. A. 5th); *Neal* v. *Commissioner,* 53 F. (2d) 806. Two were of more than $50,000, Second National Bank *v.* Commissioner, 12 B. T. A. 1066; Latham *v.* Commissioner, 16 B. T. A. 48. The others were either less than that amount, Kahn *v.* Commissioner, 4 B. T. A. 1289; Wheelock *v.* Commissioner, 13 B. T. A. 828; Rolfe *v.* Commissioner, 16 B. T. A. 519; or the appraised value of the gifts is not shown, *Schoenheit* v. *Lucas,* 44 F. (2d) 476; Lehman *v.* Commissioner, 6 B. T. A. 791; Appeal of Ward, 3 B. T. A. 879.

[8] Serrien *v.* Commissioner, 7 B. T. A. 1129; *Bloch* v. *McCaughn,* not reported (E. D. Pa.); Kelly *v.* Commissioner, 8 B. T. A. 1193.

[9] *Byron* v. *Tait,* not reported (D. Md.).

[10] The age of four of the donors is not shown definitely by the reports, but as to at least three of these, there are indications that the decedents were of advanced years.

[11] *Estate of Astor,* not yet reported (S. D. N. Y.).

gift;[12] one of over $10,400,000 made by a donor aged seventy-six, six months before death;[13] and one by a donor aged seventy-five at death, in which the tax assessed was over $1,000,000.[14] There was one other in excess of $2,000,000;[15] 5 others largely in excess of $1,000,000;[16] 4 others in excess of $500,000;[17] 13 in excess of $250,000;[18] and 14 in excess of $100,000.[19] The value of the gifts was not shown definitely in 3 cases;[20] 12 involved gifts total-

---

[12] *Commissioner* v. *Nevin,* 47 F. (2d) 478; cert. den. 283 U. S. 835.

[13] *Rea* v. *Heiner,* 6 F. (2d) 389.

[14] *Flannery* v. *Willcuts,* 25 F. (2d) 951.

[15] White *v.* Commissioner, 21 B. T. A. 500.

[16] Crilly *v.* Commissioner, 15 B. T. A. 470; Gimbel *v.* Commissioner, 11 B. T. A. 214; *Stieff* v. *Tait,* not reported (D. Md.); *Loughran* v. *McCaughn,* not reported (E. D. Pa.); American Security & Trust Co. *v.* Commissioner, 24 B. T. A. 334.

[17] *Esty* v. *Mitchell,* unreported (D. Mass.); *Brehmen* v. *McCaughn,* unreported (E. D. Pa.); *United States* v. *Wells,* 283 U. S. 102; Appeal of Borden, 6 B. T. A. 255.

[18] *Mather* v. *McLaughlin,* 57 F. (2d) 223 (E. D. Pa.); *Pohlman* v. *United States,* not reported (D. Neb.); *Apperson* v. *Thurman,* not reported (D. Ind.); *Beltzhoover* v. *Donald,* not reported (S. D. Miss.); *Safford* v. *United States,* 65 Ct. Cl. 242; Romberger *v.* Commissioner, 21 B. T. A. 193; Moore *v.* Commissioner, 21 B. T. A. 279; Lavelle *v.* Commissioner, 8 B. T. A. 1150; Boggs *v.* Commissioner, 11 B. T. A. 824; White *v.* Commissioner, 15 B. T. A. 470; Jaeger *v.* Commissioner, 16 B. T. A. 897; Fidelity-Philadelphia Trust Co. *v.* Commissioner, 17 B. T. A. 910; *Vaughn* v. *Riordan,* 280 Fed. 742.

[19] *Wilfley* v. *Helmich,* 56 F. (2d) 845 (E. D. Mo.); *Richardson* v. *Tait,* not reported (D. Md.); *Armstrong* v. *Rose,* not reported (S. D. Ga.); *Off* v. *United States,* 35 F. (2d) 222; *Loetscher* v. *Burnet,* 60 App. D. C. 38; 46 F. (2d) 835; *Howard* v. *United States,* 65 Ct. Cl. 332; Allen *v.* Commissioner, 20 B. T. A. 713; Rogers *v.* Commissioner, 21 B. T. A. 1124; Mississippi Valley Trust Co. *v.* Commissioner, 22 B. T. A. 136; Gerry *v.* Commissioner, 22 B. T. A. 748; Estate of Connell, 11 B. T. A. 1254; United States Trust Co. *v.* Commissioner, 14 B. T. A. 312; Pratt *v.* Commissioner, 18 B. T. A. 377; *Meyer* v. *United States,* 60 Ct. Cl. 474.

[20] *Beeler* v. *Motter,* 33 F. (2d) 788; Lozier *v.* Commissioner, 7 B. T. A. 1050; Heipershausen *v.* Commissioner, 18 B. T. A. 218.

ling less than $100,000.[21] In the remaining 22 cases the gifts were made more than two years before the death of the donor.[22]

The judgment of the Ways and Means Committee that the provision of § 302 (c) of the 1926 Act was required to stop the drain on the revenues from the estate tax, is strikingly confirmed by these 56 cases. The value of the gifts in those cases alone, was $113,401,157, a total that does not include realty and personalty of undetermined value or the very large gifts on which the Government, in the case already noted, sought to collect a tax of more than $1,000,000.

In many of the cases, notably those in which large amounts were involved, the gift was substantially all the donor's estate. In the others, the addition of the amount

[21] *Root* v. *United States,* 56 F. (2d) 857 (S. D. Fla.); *Molton* v. *Sneed,* not reported (N. D. Ala.); *Owen* v. *Gardner,* not reported (E. D. N. Y.); Cromwell *v.* Commissioner, 24 B. T. A. 461; Appeal of Kaufman, 5 B. T. A. 31; Schulz *v.* Commissioner, 7 B. T. A. 900; Davis *v.* Commissioner, 9 B. T. A. 1212; Goldman *v.* Commissioner, 11 B. T. A. 92; Gaither *v.* Miles, 268 Fed. 692; Appeal of Richardson, 1 B. T. A. 1196; Appeal of McDonald, 2 B. T. A. 1295; Appeal of Hillenmeyer, 2 B. T. A. 1322.

[22] The total value of these gifts, exclusive of realty, was $6,707,056. *Tesdell* v. *United States,* not reported (S. D. Iowa); *Mason* v. *United States,* 17 F. (2d) 317; *Tips* v. *Bass,* 21 F. (2d) 460; *Smart* v. *United States,* 21 F. (2d) 188; *McCaughn* v. *Carvill,* 43 F. (2d) 69; Phillips *v.* Commissioner, 7 B. T. A. 1054; Stein *v.* Commissioner, 9 B. T. A. 486; Baum *v.* Commissioner, 21 B. T. A. 176; Appeal of Spafford, 3 B. T. A. 1016; Hausman *v.* Commissioner, 5 B. T. A. 199; Fleming *v.* Commissioner, 9 B. T. A. 419; Brehmer *v.* Commissioner, 9 B. T. A. 423; Hicks *v.* Commissioner, 9 B. T. A. 1226; Wolfermann *v.* Commissioner, 10 B. T. A. 285; Illinois Merchants Trust Co. *v.* Commissioner, 12 B. T. A. 818; Bishop *v.* Commissioner, 14 B. T. A. 130; Fincham *v.* Commissioner, 16 B. T. A. 1418; Hunt *v.* Commissioner, 19 B. T. A. 624; Siegel *v.* Commissioner, 19 B. T. A. 683; *Polk* v. *Miles,* 268 Fed. 175; *Fidelity & Columbia Trust Co.* v. *Lucas,* 7 F. (2d) 146; Appeal of Starck, 3 B. T. A. 514.

of the gifts to the estate of the donor would place the tax on the gifts in the higher brackets, so that the total amount of the tax that might have been collected is much larger than the tax that would have been payable on the gifts considered separately from the estates of which they had been part. It is also fairly inferable that the cases actually litigated constitute only a small portion of the instances in which large gifts were made within two years of the donor's death.

These are but a few of the many details of the administration of the Act supporting the conclusion of Congressional committees that large amounts of money and property were being withdrawn from the operation of the estate tax by gifts *inter vivos* under circumstances which clearly indicated that but for the gifts all would have been taxed as a part of the donor's estates, and that by far the greater number and amount of such gifts had been made within two years of death by persons of advanced age.

The present tax, if objectionable, is not so because motive or intention of the donor is not made the basis of the classification. It is not so because it does not tend to prevent or compensate for the evil aimed at. It is not so because the revenue leak will not be effectively stopped by including in the estate tax all gifts made within two years of death. Legislation to accomplish that end, and reasonably adapted to it, cannot be summarily dismissed as being arbitrary and capricious. Nor can it be deemed invalid on the assumption that Congress has acted arbitrarily in drawing the line between all gifts made within two years of death and those made before. Congress cannot be held rigidly to a choice between taxing all gifts or taxing none, regardless of the practical necessities of preventing tax avoidance, and regardless of experience and practical convenience and expense in administering the tax. Even the equal protection clause of the Four-

teenth Amendment has not been deemed to impose any such inflexible rule of taxation.

The very power to classify involves the power to recognize and distinguish differences in degree between those things which are near and those which are remote from the object aimed at. *Citizens' Telephone Co.* v. *Fuller,* 229 U. S. 322; see *Miller* v. *Wilson,* 236 U. S. 373, 384. It has never occurred to anyone to suggest that a state could not, by statute, fix the age of consent, or the age of competence to make a will or conveyance, although some included within the class selected as competent might be less competent than some who are excluded. In the exercise of the police power, classification may be based on mere numbers or amounts where the distinction between the class appropriately subject to classification and that not chosen for regulation, is one of degree.[23]

As all taxes must be levied by general rules, there is a still larger scope for legislative action in framing revenue laws, even under the Fourteenth Amendment, with its guarantee of equal protection of the laws. The legislature may grant exemptions. *Magoun* v. *Illinois Trust & Savings Bank,* 170 U. S. 283, 300; *Hope Natural Gas Co.* v. *Hall,* 274 U. S. 284, 289; *Missouri* v. *Dockery,* 191 U. S. 165. It may impose graduated taxes on gifts, inheritances, or on income. *Bromley* v. *McCaughn,* 280 U. S. 124; *Knowlton* v. *Moore,* 178 U. S. 41, 109; *Brushaber* v. *Union Pacific R. Co.,* 240 U. S. 1, 25; see also

[23] *Miller* v. *Schoene,* 276 U. S. 272; *Reinman* v. *Little Rock,* 237 U. S. 171; *Welch* v. *Swasey,* 214 U. S. 91. Consider also *Euclid* v. *Ambler Realty Co.,* 272 U. S. 365; *Missouri, K & T. Ry. Co.* v. *May,* 194 U. S. 267; *Murphy* v. *California,* 225 U. S. 623; *Keokee Consolidated Coke Co.* v. *Taylor,* 234 U. S. 224, 227. And see particularly the cases collected in footnote 1 of the dissenting opinion of Mr. Justice Brandeis in *Louisville Gas & Electric Co.* v. *Coleman,* 277 U. S. 32, 42–44.

Stebbins v. *Riley,* 268 U. S. 137.[24] It may impose a tax that falls more heavily on ownership of chain stores than on ownership of a smaller number. *State Board of Tax Commissioners* v. *Jackson,* 283 U. S. 527; *Great Atlantic & Pacific Tea Co.* v. *Maxwell,* 284 U. S. 575. And generally it may create classes for taxation wherever there is basis for the legislative judgment that differences in degree produce differences in kind.[25]

The purpose here being admittedly to impose a tax on a privilege—that of making gifts *inter vivos*—to the extent that its exercise substantially impairs the operation of the tax on estates, it was for Congress to say how far that impairment extends and how far it is necessary to go in the taxation of gifts either to prevent or to compensate for it. Unless the line it draws is so wide of the mark as palpably to have no relation to the end sought, it is not for the judicial power to reject it and substitute another, or to say that no line may be drawn.

[24] Other types of graduated taxes have been upheld in *Clark* v. *Titusville,* 184 U. S. 329, 331; *Metropolis Theatre Co.* v. *Chicago,* 228 U. S. 61, 69–70. And see *Salomon* v. *State Tax Commission,* 278 U. S. 484; *Keeney* v. *New York,* 222 U. S. 525, 536; *McCray* v. *United States,* 195 U. S. 27. See also *McKenna* v. *Anderson,* 31 F. (2d) 1016, cert. den. 279 U. S. 869; *F. Couthoui, Inc.* v. *United States,* 54 F. (2d) 158, cert. den., *post,* p. 548.

[25] Instances of classification for taxation dependent on numbers or amounts are *Quong Wing* v. *Kirkendall,* 223 U. S. 59; *Citizens' Telephone Co.* v. *Fuller,* 229 U. S. 322. See *Bell's Gap R. Co.* v. *Pennsylvania,* 134 U. S. 232, 237. Taxing statutes have been upheld even though the subject of taxation was valued in a manner not necessarily related to real value, where administrative necessities have made such classification desirable. *Hatch* v. *Reardon,* 204 U. S. 152; *New York* v. *Latrobe,* 279 U. S. 421; *International Shoe Company* v. *Shartel,* 279 U. S. 429; *Paddell* v. *New York,* 211 U. S. 446. An annual excise tax on the privilege of selling cigarettes, applicable to retailers and not wholesalers, has been held constitutional, even though set at a flat amount which bore more heavily on small dealers than on large. See *Cook* v. *Marshall County,* 196 U. S. 261.

The objection that the gifts are taxed as a part of the donor's estate, and at the same rates and on values as of the donor's death, has no more force than that made to the selection for taxation of gifts made within two years of death. Since the basis of the tax is that it compensates for the drain on the estate tax, and since it is paid by the donor's estate, which would otherwise be compelled to pay the estate tax on transmission at death, the whole object of the tax on the gifts would be defeated if levied on another basis. In determining the reasonableness of a tax which, like this one, is levied in lieu of another, it is of course necessary to consider all the statutes affecting the subject matter. *Interstate Busses Corp.* v. *Blodgett,* 276 U. S. 245; *Farmers & Mechanics Savings Bank* v. *Minnesota,* 232 U. S. 516, 529. Where the very purpose and justification of the one tax is that it is compensatory for the loss of the other, it is no objection that the one is made the exact equivalent of the other, thus avoiding inequality which, under some circumstances, might be objectionable. See *General American Tank Car Corp.* v. *Day,* 270 U. S. 367. No one has yet indicated precisely in what way this method of measuring the tax works any greater injustice or hardship than the tax on estates. It is certainly not greater where, as here, the tax is paid from the estate of the donor who, regardless of his age, in giving away his property after the statute was in force, took his chances that death within two years would bring it into his estate for taxation where it would have been if the gift had not been made. See *Milliken* v. *United States, supra,* pp. 23, 24. A very different case would be presented if the taxed gift were made before the enactment of the taxing statute and many years before the death, as in *Frew* v. *Bowers,* 12 F. (2d) 625, 630.[26] See *Nichols*

[26] In this case the Government sought to collect the tax on a trust created before the estate tax was passed, and twelve years before

v. *Coolidge, supra.* The application of the estate tax to the other types of gift *inter vivos* mentioned in the Act has uniformly been upheld, even though the gift was made more than two years before death. *Milliken* v. *United States, supra; Phillips* v. *Dime Trust and Safe Deposit Co., supra; Tyler* v. *United States, supra; Reinecke* v. *Northern Trust Co., supra; Taft* v. *Bowers, supra.*

I cannot say that the tax on all gifts made in contemplation of death, supplemented by that imposed on all others made within two years of death, is not adapted to a legitimate legislative object. The history of the litigation over gifts made in contemplation of death, to which reference has been made, and the reports of Congressional Committees prepared after extensive investigation and with expert aid, plainly indicate that it is. I can find no adequate reason for saying that the tax is invalid. The denial of its validity seems to me to rest on no substantial ground and to be itself an arbitrary and unreasonable restriction of the sovereign power of the Federal Government to tax, for which neither the words of the Fifth Amendment nor any judicial interpretation of it affords justification.

The questions should be answered in the negative.

MR. JUSTICE BRANDEIS joins in this opinion.

---

the settlor's death. Judge Learned Hand, concurring, said, p. 630: "As to transfers made after the law went into effect, I have nothing to say; one may insist that settlors take their chances. But as to those made before the law was passed it appears that the result is too whimsical to stand. There are settlements which the settlor outlives for 30 or 40 years."

HANDY, COLLECTOR OF INTERNAL REVENUE, *v.* DELAWARE TRUST CO., EXECUTOR, ET AL.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 546. Argued February 26, 1932.—Decided March 21, 1932.

Decided upon the authority of *Heiner* v. *Donnan, ante,* p. 312.

CERTIFICATE from the Circuit Court of Appeals upon an appeal from a judgment of the District Court, 51 F. (2d) 867, against the Collector on a claim for refund of taxes alleged to have been illegally exacted.

Assistant Attorney General Youngquist, with whom *Solicitor General Thacher,* and *Messrs. Claude R. Branch, Sewall Key, A. H. Conner,* and *Erwin N. Griswold* were on the brief, for Handy, Collector.

Mr. James H. Hughes, Jr., with whom *Mr. Frank S. Bright* was on the brief, for the Delaware Trust Co., Executor.

The provision in question can not be supported under the Fifth Amendment if it be construed as a tax directed at gifts *inter vivos. Schlesinger* v. *Wisconsin,* 270 U. S. 230; *Guinzburg* v. *Anderson,* 51 F. (2d) 592; *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, 347.

It is unconstitutional under the due process clause if it be construed as aiming a tax at property forming the estate of a deceased person.

Transfers *inter vivos* not made in contemplation of death and not intended to take effect in possession or enjoyment at death bear no reasonable relationship to the tax on the transfer of property at death. *Milliken* v. *United States,* 283 U. S. 15; *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339; *Tyler* v. *United States,* 281 U. S. 497; *United States* v. *Wells,* 283 U. S. 102.

There is no reasonable basis of distinction justifying the selection of gifts made within two years of death and exempting those made more than two years prior to death. *Louisville Gas & Elec. Co.* v. *Coleman,* 277 U. S. 32.

The basis of the tax imposed is the circumstance of the transmission of property at death. The time of death is not material. The tax is not laid directly on a transfer *inter vivos.* It is laid on the gross estate of the decedent. The property transferred is not subject to the tax at the time of the transfer. The property becomes taxable only if the accident of death occurs within two years of the transfer. That accident may or may not happen. Cf. *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, 347; American Security & Tr. Co. *v.* Commissioner, 24 B. T. A. 334. The effect of the conclusive presumption of the contested provision is to cause a transfer, which the donor has the right to make and which is not taxable when made, to become taxable in the event that the donor dies within two years from the date of the transfer. It is fundamental that tax laws operate specifically and definitely. The tax attempted is highly speculative, depending on that most unknown of all things, to-wit, the time of death. Certainly it would be improper to base a tax on the estate of "A" on the basis of property owned by " B " at the time of "A's " death. *Hoeper* v. *Tax Commission,* 284 U. S. 206; *Nichols* v. *Coolidge,* 274 U. S. 531, 542.

If gifts in fact not made in contemplation of death can not reasonably be classified with transfers testamentary in character, then Congress for purposes of classification can not conclusively presume them to be in contemplation of death, and, without giving the taxpayer an opportunity to be heard as to the actual facts, attribute to arbitrarily presumed facts the legal significance of actual facts. See *Nichols* v. *Coolidge, supra.*

Congress has no power to establish rules which under guise of regulating the presentation of evidence, conclusively presume the ultimate fact upon which a tax is based, and, without giving an opportunity for a hearing, impute to the fact so presumed the legal significance of actual fact. *Hoeper* v. *Tax Commission,* 284 U. S. 206; *Mobile, J. & K. C. R. Co.* v. *Turnipseed,* 219 U. S. 35; *Manley* v. *Georgia,* 279 U. S. 1; *McFarland* v. *American Sugar Rfg. Co.,* 241 U. S. 79; *Bailey* v. *Alabama,* 219 U. S. 219; *Cockrill* v. *California,* 268 U. S. 258; *Shwab* v. *Doyle,* 269 Fed. 321; *Howard* v. *Moot,* 64 N. Y. 268; *In re Barbour's Estate,* 185 App. Div. 445, affirmed, 226 N. Y. 639; Cooley's Const. Lim., 8th ed., p. 768.

The issue is governed by *Schlesinger* v. *Wisconsin,* 270 U. S. 230. Following that case, the tax provision has been held unconstitutional in the following: *Hall* v. *White,* 48 F. (2d) 1060, affirmed, 53 F. (2d) 210; *Donnan* v. *Heiner,* 48 F. (2d) 1058, s. c., 285 U. S. 312; *Guinzburg* v. *Anderson,* 51 F. (2d) 592, affirmed, CCA 2, December 7, 1931; American Security & Tr. Co. *v.* Commissioner, 24 B. T. A. 334, and in this case below, 51 F. (2d) 867, s. c., 53 F. (2d) 1042.

The Fifth Amendment in its application to the legislation of Congress is similar in scope and effect to the Fourteenth Amendment in its application to the legislation of the States. *Nichols* v. *Coolidge,* 274 U. S. 531, 543.

Mr. Justice Sutherland delivered the opinion of the Court.

This case, like *Heiner* v. *Donnan, ante,* p. 312, is here on a certificate from the Circuit Court of Appeals for the Third Circuit. The question submitted is:

"Does the second sentence of section 302 (c) of the revenue act of 1926 violate the due-process clause of the fifth amendment to the Constitution of the United States?"

In this case, as in *Heiner* v. *Donnan*, the decedent, within two years prior to his death, had made transfers *inter vivos* without consideration which were complete and irrevocable. The commissioner included the value of the property so transferred in the value of the gross estate, and assessed a death transfer tax accordingly. Following a claim for refund and its rejection, the executor brought this action to recover the amount of the tax attributable to such inclusion. The trial court found that in fact none of the transfers had been made in contemplation of death, and rendered judgment for the executor for the amount claimed, on the ground that § 302 (c) violated the due process clause of the Fifth Amendment and was therefore unconstitutional.

Our decision in *Heiner* v. *Donnan* requires an affirmative answer to the question submitted.

It is so ordered.

MR. JUSTICE BRANDEIS and MR. JUSTICE STONE dissent.

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

SMILEY *v.* HOLM, SECRETARY OF STATE.

CERTIORARI TO THE SUPREME COURT OF MINNESOTA.

No. 617. Argued March 16, 17, 1932.—Decided April 11, 1932.

1. The function of a state legislature in prescribing the time, place and manner of holding elections for Representatives in Congress under Constitution, Art. I, § 4, is a law-making function in which the veto power of the state governor participates if, under the state constitution, the governor has that power in the making of state laws. P. 365.
2. The rule giving weight to practical construction is especially applicable in the case of a constitutional provision which governs the exercise of political rights and hence is subject to constant and careful scrutiny. P. 369.

3. Where the number of Representatives in Congress to which a State is entitled under the present apportionment pursuant to the Act of June 18, 1929, is the same as the number under the last previous apportionment (Act of August 8, 1911) and the election districts are unchanged, elections of Representatives may be conducted in the same manner as before the reapportionment. P. 374.
4. Where the number of Representatives for a State has been increased by the new apportionment, the additional Representatives, if no new districts are created, may be elected by the State at large under the clause of the Constitution (Art. I, § 2) providing that "The House of Representatives shall be composed of Members chosen every second year by the People of the several States." *Id.*
5. Where the number of Representatives has been decreased by the new apportionment, all the Representatives must be elected by the State at large unless and until new districts are created. *Id.*
6. The conclusions set forth in the last three paragraphs, *supra*, are consistent with the general provisions (§§ 3–5, inclusive) of the reapportionment Act of August 8, 1911; and it is therefore unnecessary to decide whether those parts of the Act remain in force since the new apportionment. P. 373.
7. Inclusion of an earlier statutory provision in the United States Code does not operate as a re-enactment. *Id.*

184 Minn. 228; 238 N. W. 494, reversed.

CERTIORARI, 284 U. S. 616, to review a judgment affirming the dismissal of a suit to enjoin the Secretary of State of Minnesota from acting under a measure of the legislature purporting to redistrict the State for congressional elections. The bill sought to have all filings for nomination declared illegal. There was first an interlocutory appeal from an order sustaining a demurrer.

Messrs. George T. Simpson and *Alfred W. Bowen,* with whom *Messrs. John A. Weeks* and *W. Yale Smiley* were on the brief, for petitioner.

Messrs. Henry N. Benson, Attorney General of Minnesota, and *William H. Gurnee,* Assistant Attorney General, for respondent.

The word "legislature" is used eleven times in the Constitution and five times in its amendments. In the following instances there can be scarcely any doubt that it refers to the bicameral body holding sessions periodically for the purpose principally of enacting laws for the State:

Art. I, § 2, par. 1, wherein it is required that electors of members of the House of Representatives shall have the qualifications requisite for electors of the most numerous branch of the state legislature; Art. I, § 3, par. 1, relating to the election of two senators from each State chosen by the legislature thereof; Art. I, § 3, par. 2, wherein the Executive of the State is given authority to fill a vacancy in the office of United States Senator in Congress during a recess of the legislature, until the next meeting of the legislature, which shall then fill such vacancy; Art. I, § 8, par. 17, giving the Congress power to exercise legislative authority over all places within the United States purchased by the consent of the legislature of the State in which the same shall be; Art. IV, § 3, par. 1, forbidding the formation of a new State by the junction of two or more States or parts of States without the consent of the legislatures of the States concerned; Art. IV, § 4, wherein the United States guarantees to protect every State against domestic violence on application of the legislature, or of the executive when the legislature can not be convened; Art. V, which deals with amendment of the Constitution; Art. VI, par. 3, which requires members of the several state legislatures to be bound by oath or affirmation to support the Constitution; Seventeenth Amendment, par. 1, which requires that electors of senators shall have the qualifications requisite for electors of the most numerous branch of the state legislatures; Seventeenth Amendment, par. 2, which authorizes the legislature of a State to empower the executive thereof to make tempo-

rary appointments of senators until the people shall fill the vacancies by election.

The other places in which the word "legislature" is used in the Constitution are Art. I, § 4, and Art. II, § 1, par. 2.

Article II, § 1, par. 2, provides that each State shall appoint in such manner as the legislature thereof may direct a number of electors equal to the whole number of senators and representatives to which the State may be entitled in the Congress. In *McPherson* v. *Blacker,* 146 U. S. 1, the expression "in such manner as the legislature thereof may direct" was held not to be a limitation on the power of the legislature, but a limitation on the State in respect to any attempt to limit the legislative power of the legislature by constitutional limitations.

Amendment XVII, par. 2, undoubtedly employs the expression "legislature" in the same sense as is used in the first paragraph thereof and undoubtedly has the effect of putting it beyond the power of any State by constitutional limitation, or otherwise, to deprive the legislature of that State of its constitutional right to authorize the executive to fill vacancies in the office of senator in Congress.

Wherever the term "legislature" is used in the instances above mentioned it refers not to the legislative power of the State as set forth in the constitution of the State, but to the law-making body of each State.

It seems unbelievable that the framers of the Constitution would use a well-understood expression such as "legislature" fifteen times in the Constitution and its Amendments in one sense, and then in Art. I, § 4, use it in an entirely different sense. If the framers had intended that the law-making power of the State, including the power of gubernatorial veto, should be exercised in prescribing the times, places, and manner of holding elections for senators and representatives, they would have

used the word " State " or some expression such as " law-making power of the State," or " by the legislature with the approval of the executive."

This is the more apparent when it is borne in mind that, until the adoption of the Seventeenth Amendment, the legislatures elected the United States Senators. The governor had nothing to do with their selection. Why, then, should he have any voice in regulations for their election? It could not have been intended that the legislatures should act (subject to supervision by Congress) in prescribing regulations for electing senators, but that in regulating the election of representatives in Congress their acts would be subject to the veto power of an executive. The word " legislature " can not have two meanings as used in Art. I, § 4.

The word " prescribe " is here used in its literal sense: to appoint, direct, determine, give direction, or to lay down as a guide, direction or rule of action. The prescribing may be done in any manner the legislature sees fit. The duty imposed upon the legislature in respect to dividing the State into congressional districts is entirely different from its duties in respect to general state legislation. When acting in accordance with Art. I, § 4, the legislature is carrying out a federal mandate, as an agency of the Federal Government.

If the people of Minnesota were to adopt a constitution which provided that in dividing the State into congressional districts there must be a vote of three-fourths of the members of the legislature, or that such action must be approved by the supreme court of the State, or that such action would not become effective until the lapse of one year, could it be seriously contended that such provisions would be effective as against the provisions of Art. I, § 4? See *Baldwin* v. *Trowbridge,* 3 Bartlett on Contested Elections, p. 46.

If Art. I, § 4, is to be construed as requiring gubernatorial approval of the action of the legislature, it will mean that in Minnesota two-thirds of the members of its legislature must agree if the governor disapproves. If the constitution of Minnesota may require a two-thirds vote, it may by the same reasoning require a four-fifths or a unanimous vote. If the state constitution gives the governor no such veto power, certainly he acquires none from the Federal Constitution. Is it within the power of the state constitution so to limit the power of the legislature in prescribing for the election of representatives in Congress? See *Baldwin* v. *Trowbridge, supra;* Cong. Globe, First Sess., 39th Cong., p. 815.

It is true that in prescribing the manner in which congressional elections shall be conducted, the adoption of corrupt practices acts, and regulations for the nomination of candidates by primaries or by conventions, etc., the legislatures of the several States have quite uniformly proceeded by laws regularly enacted in accordance with their several constitutions. This is not strange, but on the other hand was desirable both from considerations of uniformity and economy. Such laws, in so far as they relate to state officers, must necessarily be adopted in this manner. In so far as they relate to federal officers, the approval of the governor is merely surplusage.

In considering the meaning of the term "legislature" as used in Art. I, § 4, it is well to bear in mind that very few of the original States comprising the Union gave such power to their chief executives. Much of the irritation and resentment which led to the war of the Revolution was caused by the arbitrary and unpopular acts of the royal governors. The States were slow to give their chief executives a veto power over the acts of their legislatures.

Whenever the Constitution designates a state agency to perform specified federal functions a clear distinction

is made between the State, the legislature and the executive of the State.

The Act of August 8, 1911 (37 Stat. c. 5, 13) is no longer in force. House File 1456 does not violate the Act of August 8, 1911.

When the question arises as to whether or not the legislature has acted in accordance with the constitution or laws of a State, the judgment of the highest court of that State is conclusive.

There is no violation of the Fourteenth Amendment.

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

Under the re-apportionment following the fifteenth decennial census, as provided by the Act of Congress of June 18, 1929 (c. 28, 46 Stat. 21, 26), Minnesota is entitled to nine representatives in Congress, being one less than the number previously allotted. In April, 1931, the bill known as House File No. 1456, dividing the State into nine congressional districts and specifying the counties of which they should be composed, was passed by the House of Representatives and the Senate of the State and was transmitted to the Governor, who returned it without his approval. Thereupon, without further action upon the measure by the House of Representatives and the Senate, and in compliance with a resolution of the House of Representatives, House File No. 1456 was deposited with the Secretary of State of Minnesota. This suit was brought by the petitioner as a 'citizen, elector and taxpayer' of the State to obtain a judgment declaring invalid all filings for nomination for the office of representative in Congress, which should designate a subdivision of the State as a congressional district, and to enjoin the Secretary of State from giving notice of the holding of elections for that office in such subdivi-

sions. The petition alleged that House File No. 1456 was a nullity in that, after the Governor's veto, it was not repassed by the legislature as required by law, and also in that the proposed congressional districts were not 'compact' and did not 'contain an equal number of inhabitants as nearly as practicable' in accordance with the Act of Congress of August 8, 1911.[1]

The respondent, Secretary of State, demurred to the petition upon the ground that it did not state facts sufficient to constitute a cause of action. He maintained the validity of House File No. 1456 by virtue of the authority conferred upon the legislature by Article I, section 4, of the Federal Constitution, and he insisted that the Act of

[1] The Act of August 8, 1911, c. 5, 37 Stat. 13, provided for the apportionment of representatives in Congress among the several States under the thirteenth census. After fixing the total number of representatives and their apportionment, in sections 1 and 2, the Act provided as follows:

"Sec. 3. That in each State entitled under this apportionment to more than one Representative, the Representatives to the Sixty-third and each subsequent Congress shall be elected by districts composed of a contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants. The said districts shall be equal to the number of Representatives to which such State may be entitled in Congress, no district electing more than one Representative.

"Sec. 4. That in case of an increase in the number of Representatives in any State under this apportionment such additional Representative or Representatives shall be elected by the State at large and the other Representatives by the districts now prescribed by law until such State shall be redistricted in the manner provided by the laws thereof and in accordance with the rules enumerated in section three of this Act; and if there be no change in the number of Representatives from a State, the Representatives thereof shall be elected from the districts now prescribed by law until such State shall be redistricted as herein prescribed.

"Sec. 5. That candidates for Representative or Representatives to be elected at large in any State shall be nominated in the same manner as candidates for governor, unless otherwise provided by the laws of such State."

Congress of August 8, 1911, was no longer in force and that the asserted inequalities in redistricting presented a political and not a judicial question. The trial court sustained the demurrer and its order was affirmed by the Supreme Court of the State. 184 Minn. 228; 238 N. W. 494. The action was then dismissed upon the merits and the Supreme Court affirmed the judgment upon its previous opinion. This Court granted a writ of certiorari.

Article I, section 4, of the Constitution of the United States provides:

"The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

Under the constitution of Minnesota, the 'legislature' consists 'of the Senate and House of Representatives.' Const. Minn., Art. 4, sec. 1. Before any bill passed by the Senate and House of Representatives "becomes a law," it must "be presented to the Governor of the state," and if he returns it, within the time stated, without his approval, the bill may become a law provided it is reconsidered and thereupon passed by each house by a two-thirds vote. *Id.*, Art. 4, sec. 11. The state constitution also provides that after each Federal census "the legislature shall have the power to prescribe the bounds of congressional . . . districts." *Id.*, Art. 4, sec. 23. We do not understand that the Supreme Court of the State has held that, under these provisions, a measure redistricting the State for congressional elections could be put in force by the legislature without participation by the Governor, as required in the case of legislative bills, if such action were regarded as a performance of the function of the legislature as a lawmaking body. No decision to that effect has been cited. It appears that 'on seven occasions' prior to the measure now under consideration, the legislature of Min-

nesota had 'made state and federal reapportionments in the form of a bill for an act which was approved by the Governor.'[2] While, in the instant case, the Supreme Court regarded that procedure as insufficient to support the petitioner's contention as to practical construction, that question was dismissed from consideration because of the controlling effect which the court ascribed to the Federal provision. 184 Minn. 241; 238 N. W. 500. The court expressed the opinion that "the various provisions of our state constitution cited in the briefs are of little importance in relation to the matter now in controversy"; that "the power of the state Legislature to prescribe congressional districts rests exclusively and solely in the language of article I, section 4, of the United States Constitution." *Id.*, 235; 497. Construing that provision, the court reached the conclusion that the legislature in redistricting the State was not acting strictly in the exercise of the lawmaking power but merely as an agency, discharging a particular duty in the manner which the Federal Constitution required. Upon this point the court said (*id.*, 238; 499):

"The Legislature in districting the state is not strictly in the discharge of legislative duties as a law-making body, acting in its sovereign capacity, but is acting as representative of the people of the state under the power granted by said Article I, section 4. It merely gives expression as to district lines in aid of the election of certain federal officials; prescribing one of the essential details serving primarily the federal government and secondly the people of the state. The Legislature is designated as a mere agency to discharge the particular duty. The Governor's veto has no relation to such matters; that power pertains under the state Constitution exclu-

[2] See Laws of Minnesota, 1858, c. 83; 1872, c. 21; 1881, c. 128; 1891, c. 3; 1901, c. 92; 1913, c. 513; 1929, c. 64.

sively to state affairs. The word 'legislature' has reference to the well-recognized branch of the state government—created by the state as one of its three branches for a specific purpose—and when the framers of the Federal Constitution employed this term, we believe they made use of it in the ordinary sense with reference to the official body invested with the functions of making laws, the legislative body of the state; and that they did not intend to include the state's chief executive as a part thereof. We would not be justified in construing the term as being used in its enlarged sense as meaning the state or as meaning the law-making power of the state."

The question then is whether the provision of the Federal Constitution, thus regarded as determinative, invests the legislature with a particular authority and imposes upon it a corresponding duty, the definition of which imports a function different from that of lawgiver and thus renders inapplicable the conditions which attach to the making of state laws. Much that is urged in argument with regard to the meaning of the term 'Legislature' is beside the point. As this Court said in *Hawke* v. *Smith, No. 1,* 253 U. S. 221, 227, the term was not one "of uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for the purpose of interpretation. A Legislature was then the representative body which made the laws of the people." The question here is not with respect to the 'body' as thus described but as to the function to be performed. The use in the Federal Constitution of the same term in different relations does not always imply the performance of the same function. The legislature may act as an electoral body, as in the choice of United States Senators under Article I, section 3, prior to the adoption of the Seventeenth Amendment. It may act as a ratifying body, as in the case of proposed amendments to the Constitution under Article V. *Hawke* v. *Smith, No.*

1, supra; Id., No. 2, 253 U. S. 231; *Leser* v. *Garnett*, 258 U. S. 130, 137. It may act as a consenting body, as in relation to the acquisition of lands by the United States under Article I, section 8, paragraph 17. Wherever the term 'legislature' is used in the Constitution it is necessary to consider the nature of the particular action in view. The primary question now before the Court is whether the function contemplated by Article I, section 4, is that of making laws.

Consideration of the subject matter and of the terms of the provision requires affirmative answer. The subject matter is the "times, places and manner of holding elections for Senators and Representatives." It cannot be doubted that these comprehensive words embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved. And these requirements would be nugatory if they did not have appropriate sanctions in the definition of offenses and punishments. All this is comprised in the subject of "times, places and manner of holding elections" and involves lawmaking in its essential features and most important aspect.

This view is confirmed by the second clause of Article I, section 4, which provides that "the Congress may at any time by law make or alter such regulations," with the single exception stated. The phrase "such regulations" plainly refers to regulations of the same general character that the legislature of the State is authorized to prescribe with respect to congressional elections. In exercising this power, the Congress may supplement these state regula-

tions or may substitute its own. It may impose additional penalties for the violation of the state laws or provide independent sanctions. It 'has a general supervisory power over the whole subject.' *Ex parte Siebold,* 100 U. S. 371, 387; *Ex parte Yarbrough,* 110 U. S. 651, 661; *Ex parte Clarke,* 100 U. S. 399; *United States* v. *Mosley,* 238 U. S. 383, 386; *Newberry* v. *United States,* 256 U. S. 232, 255. But this broad authority is conferred by the constitutional provision now under consideration and is exercised by the Congress in making "such regulations," that is, regulations of the sort which, if there be no overruling action by the Congress, may be provided by the legislature of the State upon the same subject.

The term defining the method of action, equally with the nature of the subject matter, aptly points to the making of laws. The state legislature is authorized to "*prescribe*" the times, places and manner of holding elections. Respondent urges that the fact that the words "*by law*" are found in the clause relating to the action of the Congress, and not in the clause giving authority to the state legislature, supports the contention that the latter was not to act in the exercise of the lawmaking power. We think that the inference is strongly to the contrary. It is the nature of the function that makes the phrase "by law" apposite. That is the same whether it is performed by state or national legislature, and the use of the phrase places the intent of the whole provision in a strong light. Prescribing regulations to govern the conduct of the citizen, under the first clause, and making and altering such rules by law, under the second clause, involve action of the same inherent character.

As the authority is conferred for the purpose of making laws for the State, it follows, in the absence of an indication of a contrary intent, that the exercise of the authority must be in accordance with the method which the State has prescribed for legislative enactments. We find

no suggestion in the Federal constitutional provision of an attempt to endow the legislature of the State with power to enact laws in any manner other than that in which the constitution of the State has provided that laws shall be enacted. Whether the Governor of the State, through the veto power, shall have a part in the making of state laws is a matter of state polity. Article I, section 4, of the Federal Constitution, neither requires nor excludes such participation. And provision for it, as a check in the legislative process, cannot be regarded as repugnant to the grant of legislative authority. At the time of the adoption of the Federal Constitution it appears that only two States had provided for a veto upon the passage of legislative bills; Massachusetts, through the Governor, and New York, through a Council of Revision.[3] But the restriction which existed in the case of these States was well known. That the state legislature might be subject to such a limitation, either then or thereafter imposed as the several States might think wise, was no more incongruous with the grant of legislative authority to regulate congressional elections than the fact that the Congress in making its regulations under the same provision would be subject to the veto power of the President as provided in Article I, section 7.

[3] The constitution of Massachusetts of 1780 provided for the Governor's veto of "bills" or "resolves." Part Second, Chap. I, sec. I, Art. II; 3 Thorpe, American Charters, Constitutions and Organic Laws, 1893, 1894. The Council of Revision in New York, which had the veto power under the first constitution of 1777 (Art. III), was composed of the Governor, the Chancellor, and the Judges of the Supreme Court, "or any two of them, together with the Governor." The veto power was given to the Governor alone by the constitution of 1821. Art. I, sec. 12, 3 Thorpe, *op. cit.*, 2628, 2641, 2642. In South Carolina, the veto power had been given by the constitution of 1776 to the "president" (Art. VII), but under the constitution of 1778 the Governor had no veto power; see Art. XVI, 6 Thorpe, *op. cit.*, 3244, 3252.

The latter consequence was not expressed but there is no question that it was necessarily implied, as the Congress was to act by law; and there is no intimation, either in the debates in the Federal Convention or in contemporaneous exposition, of a purpose to exclude a similar restriction imposed by state constitutions upon state legislatures when exercising the lawmaking power.

The practical construction of Article I, section 4, is impressive. General acquiescence cannot justify departure from the law, but long and continuous interpretation in the course of official action under the law may aid in removing doubts as to its meaning. This is especially true in the case of constitutional provisions governing the exercise of political rights and hence subject to constant and careful scrutiny. Certainly, the terms of the constitutional provision furnish no such clear and definite support for a contrary construction as to justify disregard of the established practice in the States. *McPherson* v. *Blacker,* 146 U. S. 1, 36; *Missouri Pacific Ry. Co.* v. *Kansas,* 248 U. S. 276, 284; *Myers* v. *United States,* 272 U. S. 52, 119, 136; *The Pocket Veto Case,* 279 U. S. 655, 688–690. That practice is eloquent of the conviction of the people of the States, and of their representatives in state legislatures and executive office, that in providing for congressional elections, and for the districts in which they were to be held, these legislatures were exercising the lawmaking power and thus were subject, where the state constitution so provided, to the veto of the Governor as a part of the legislative process. The early action in Massachusetts under this authority was by 'resolves' and these, under the constitution of 1780, were required to be submitted to the Governor and it appears that they were so submitted and approved by him.[4] In New York,

[4] Const. Mass. 1780; 3 Thorpe, *op cit.,* 1893, 1894; Mass. Resolves, Oct.–Nov., 1788, c. XLIX, p. 52; May–June, 1792, c. LXIX, p. 23.

from the outset, provision for congressional districts was made by statute [5] and this method was followed until 1931. The argument based on the disposition, during the early period, to curtail executive authority in the States, and on the long time which elapsed in a number of States before the veto power was granted to the Governor, is of slight weight in the light of the fact that this power was given in four States shortly after the adoption of the Federal Constitution,[6] that the use of this check has gradually been extended, and that the uniform practice (prior to the questions raised in relation to the present reapportionment) has been to provide for congressional districts by the enactment of statutes with the participation of the Governor wherever the state constitution provided for such participation as part of the process of making laws. See *Moran* v. *Bowley* (Ill.) 179 N. E. 526, 527; *Koenig* v. *Flynn,* 258 N. Y. 292, 300; 179 N. E. 705; *Carroll* v. *Becker* (Mo.), 45 S. W. (2d) 533; *State ex rel. Schrader* v. *Polley,* 26 S. D. 5, 7; 127 N. W. 848. The Attorney General of Minnesota, in his argument in the instant case, states: "It is conceded that until 1931 whenever the State of Minnesota was divided into districts for the purpose of congressional elections such action was taken by the legislature in the form of a bill and presented to and approved by the governor."

---

[5] New York, Laws of 1789, Chap. 11; 1797, Chap. 62; 1802, Chap. 72. See *Koenig* v. *Flynn,* 258 N. Y. 292; 179 N. E. 705.

[6] Georgia, Const. 1789, Art. II, sec. 10, 2 Thorpe, *op. cit.,* 788; Pennsylvania, Const. 1790, Art. I, sec. 22, 5 Thorpe, *op. cit.,* 3094; New Hampshire, Const. 1792, Part Second, sec. XLIV, 4 Thorpe, *op. cit.,* 2482; Kentucky, Const. 1792, Art. I, sec. 28, 3 Thorpe, *op. cit.,* 1267. In Vermont, the constitution of 1793 (Chap. II, sec. 16) gave the Governor and Council a power of suspension similar to that for which provision had been made in the constitution of 1786 (Chap II, sec. XVI) before the admission of Vermont to the Union. See, also, constitution of 1777 (Chap. II, sec. XIV), 6 Thorpe, *op. cit.,* 3744, 3757, 3767.

That the constitutional provision contemplates the exercise of the lawmaking power was definitely recognized by the Congress in the Act of August 8, 1911,[7] which expressly provided in section 4 for the election of representatives in Congress, as stated, "by the districts now prescribed by law until such state shall be redistricted in the manner provided by the laws thereof and in accordance with the rules enumerated in section three of this Act." The significance of the clause "in the manner provided by the laws thereof" is manifest from its occasion and purpose. It was to recognize the propriety of the referendum in establishing congressional districts where the State had made it a part of the legislative process. "It is clear," said this Court in *Davis* v. *Hildebrant,* 241 U. S. 565, 568, "that Congress in 1911 in enacting the controlling law concerning the duties of the States through their legislative authority, to deal with the subject of the creation of congressional districts expressly modified the phraseology of the previous acts relating to that subject by inserting a clause plainly intended to provide that where by the state constitution and laws the referendum was treated as part of the legislative power, the power as thus constituted should be held and treated to be the state legislative power for the purpose of creating congressional districts by law."

The case of *Davis* v. *Hildebrant, supra,* arose under the amendment of 1912 to the constitution of Ohio reserving the right "by way of referendum to approve or disapprove by popular vote any law enacted by the General Assembly." *Id.,* p. 566. The act passed by the General Assembly of Ohio in 1915, redistricting the State for the purpose of congressional elections, was disapproved under the referendum provision and the validity of that action was challenged under Article I, section 4, of the Federal

[7] See Note 1.

Constitution. The Supreme Court of the State, denying a mandamus to enforce the disapproved act, "held that the provision as to referendum was a part of the legislative power of the State, made so by the Constitution, and that nothing in the Act of Congress of 1911 or in the constitutional provision operated to the contrary and that therefore the disapproved law had no existence." *Id.*, p. 567. This Court affirmed the judgment of the state court. It is manifest that the Congress had no power to alter Article I, section 4, and that the Act of 1911, in its reference to state laws, could but operate as a legislative recognition of the nature of the authority deemed to have been conferred by the constitutional provision. And it was because of the authority of the State to determine what should constitute its legislative process that the validity of the requirement of the state constitution of Ohio, in its application to congressional elections, was sustained. This was explicitly stated by this Court as the ground of the distinction which was made in *Hawke* v. *Smith, No. 1, supra,* where, referring to the *Davis* case the Court said: "As shown in the opinion in that case, Congress had itself recognized the referendum as part of the legislative authority of the State for the purpose stated. It was held, affirming the judgment of the Supreme Court of Ohio, that the referendum provision of the state constitution when applied to a law redistricting the State with a view to representation in Congress was not unconstitutional. Article I, section 4, plainly gives authority to the State to legislate within the limitations therein named. Such legislative action is entirely different from the requirement of the Constitution as to the expression of assent or dissent to a proposed amendment to the Constitution. In such expression no legislative action is authorized or required."

It clearly follows that there is nothing in Article I, section 4, which precludes a State from providing that

legislative action in districting the State for congressional elections shall be subject to the veto power of the Governor as in other cases of the exercise of the lawmaking power. Accordingly, in this instance, the validity of House File No. 1456 cannot be sustained by virtue of any authority conferred by the Federal Constitution upon the legislature of Minnesota to create congressional districts independently of the participation of the Governor as required by the state constitution with respect to the enactment of laws.

The further question has been presented whether the Act of Congress of August 8, 1911, is still in force. The state court held that it was not, that it had been wholly replaced by the Act of June 18, 1929. Sections 1 and 2 of the former Act, making specific provision for the apportionment under the thirteenth census, are of course superseded; the present question relates to the other sections. These have not been expressly repealed. The Act of 1929 repeals "all other laws and parts of laws" that are inconsistent with its provisions (§ 21). The petitioner urges that this Act contains nothing inconsistent with sections 3, 4 and 5 [8] of the Act of 1911, and the only question is whether these sections by their very terms have ceased to be effective. It is pointed out that the provisions of the Act of 1911 were carried into the United States Code. U. S. C., Tit. 2, §§ 2–5. Inclusion in the Code does not operate as a re-enactment; it establishes "*prima facie* the laws of the United States, general and permanent in their nature, in force on the 7th day of December, 1925." Act of June 30, 1926, c. 712, 44 Stat. 1. While sections 3 and 4 of the Act of 1911 expressly referred to 'this apportionment' (the one made by that Act), the argument is pressed that they contain provisions setting forth a general policy which was intended to apply

[8] See Note 1.

to the future creation of congressional districts, and the election of representatives, until Congress should provide otherwise.

There are three classes of States with respect to the number of representatives under the present apportionment pursuant to the Act of 1929, (1) where the number remains the same, (2) where it is increased, and (3) where it is decreased. In States where the number of representatives remains the same, and the districts are unchanged, no question is presented; there is nothing inconsistent with any of the requirements of the Congress in proceeding with the election of representatives in such States in the same manner as heretofore. Section 4 of the Act of 1911 provided that in case of an increase in the number of representatives in any State, " such additional representative or representatives shall be elected by the State at large and the other representatives by the districts now prescribed by law " until such State shall be redistricted. The Constitution itself provides in Article I, section 2, that " The House of Representatives shall be composed of Members chosen every second Year by the People of the several States," and we are of the opinion that under this provision, in the absence of the creation of new districts, additional representatives allotted to a State under the present reapportionment would appropriately be elected by the State at large. Such a course, with the election of the other representatives in the existing districts until a redistricting act was passed, would present no inconsistency with any policy declared in the Act of 1911.

Where, as in the case of Minnesota, the number of representatives has been decreased, there is a different situation as existing districts are not at all adapted to the new apportionment. It follows that in such a case, unless and until new districts are created, all representatives allotted to the State must be elected by the State at

large. That would be required, in the absence of a redistricting act, in order to afford the representation to which the State is constitutionally entitled, and the general provisions of the Act of 1911 cannot be regarded as intended to have a different import.

This conclusion disposes of all the questions properly before the Court. Questions in relation to the application of the standards defined in section 3 of the Act of 1911 to a redistricting statute, if such a statute should hereafter be enacted, are wholly abstract. The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed.

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

KOENIG ET AL. *v.* FLYNN, SECRETARY OF STATE, ET AL.

CERTIORARI TO THE SUPREME COURT OF NEW YORK.

No. 731. Argued March 24, 1932.—Decided April 11, 1932.

Decided upon the authority of *Smiley* v. *Holm, ante,* p. 355. 258 N. Y. 292; 179 N. E. 705, affirmed.

CERTIORARI* to review a judgment affirming the refusal of a writ of mandamus.

Messrs. Abraham S. Gilbert and *Benjamin L. Fairchild* for petitioners.

The word " legislature " in § 4 of Art. I means the same representative body referred to in Art. II, § 1, of the Constitution. It must have the same meaning wherever used in the Constitution.

---

* See table of cases reported in this volume.

When the Constitution was under discussion and adopted, the delegates knew that in Massachusetts the governor had a veto over all legislative activity and that in New York a Council of Revision had a veto power; and that in the remaining States the legislature, (a bicameral body in every State except Pennsylvania), was supreme. *Hawke* v. *Smith,* 253 U. S. at p. 227.

That care was used in the selection of terms is evident from the language of Art. I, § 8, cl. 17, which, as to property owned by the State, requires state action, but as to private property requires only the consent of the legislature.

Section 3 of Art. I confers upon the "legislature" the power to choose Senators; § 4 the power to prescribe the times, places and manner of electing Senators. In the same sentence the "legislature" is given power to prescribe the times, places and manner of electing Representatives in Congress. The word could not have been used in two different senses in the same sentence. It is inconceivable that the framers intended to exclude the Executive when they authorized the "legislature" to choose Senators, and at the same time to include him when they gave that same body power to determine the times, places and manner of their election. Unless the Constitution gave him a voice in those matters, how can it be said that he was given any voice in fixing the time, place and manner of electing Representatives?

The framers of the Constitution made use of the Congress, the Legislature, the Executive, the State, and did not fail to refer to "appropriate legislation by the State." The delegates would not have voted for a proposition to give the executive of each State a veto over federal legislation. The proposal to give even the President a veto was strenuously combated before final adoption.

In *Hawke* v. *Smith,* 253 U. S. 221, this Court held that the word "legislature" in Art. V, dealing with Amend-

ments, refers to the bicameral body; in *Davis* v. *Hildebrant,* 241 U. S. 565, that the Act of August 8, 1911, required the States to be re-districted according to state laws rather than—as in previous apportionment Acts—by the state legislatures, and that the Act was valid under § 4, Art. I. The same fundamental question seems to have been inherent in that as in the instant case, viz.: in the absence of authorization by Congress, acting under Art. I, § 4, may the discretion of a legislature in prescribing the times, places and manner of holding elections for Representatives be circumscribed by those provisions of a state constitution which regulate enactment of the laws for state governmental purposes. Unless this provision of § 4 was intended to limit the state agency to the "legislature," it was surplusage.

If the framers intended that the State rather than the legislature, should have the power conferred upon the legislature by § 4 of Art. I, but that Congress should always have the right by law to control the election of Senators and Representatives, except as to the places of choosing Senators, the first phrase of clause 1 is entirely unnecessary.

In all of the seventeen subdivisions of § 8, Art. I, conferring jurisdiction on Congress, not one unnecessary word is used. It is impossible to believe that the first phrase of the first clause of § 4 was inserted unnecessarily. Nor is it conceivable that the word "legislature" would have been used in § 4 of Art. I if the framers meant the "State," or anything other than the bicameral body referred to in Art. V, and described by this Court in *Hawke* v. *Smith.*

The power conferred on the "legislature" by the Federal Constitution may not be circumscribed by a State constitution. If the constitution of a State may provide that to re-district a State into congressional districts, pursuant to § 4, Art. I, the legislature must do so by a

bill approved by the governor or passed over his veto by a two-thirds vote, it may require a four-fifths vote, or a unanimous vote, or may provide that no apportionment shall be valid unless approved by the governor. Some of the best minds of the country in the legislative halls and constitutional conventions have spoken against any such power in the State. Election, West Virginia, Forty-third Congress, I Hind's Prec., 653, 654; Massachusetts Constitutional Convention of 1820, per Story, J. (see Journal in Cong. Library); per Webster, I Hind's Prec., 653; Election case of *Baldwin* v. *Trowbridge,* 2 Bartlett Contested Election Cases 46, 38th Cong., Rep. No. 13; *Schrader* v. *Polley,* 26 S. D. 5; *Shiel* v. *Thayer,* 2 Bartlett 349, Cong. Globe, 1st Sess., 39th Cong., pp. 815–823; *Sapp* and *Carpenter Cases,* H. Rep. No. 19, 3d Sess., 46th Cong., I Hind's Prec., 672, I Ellsworth, p. 322; *Davidson* v. *Gilbert,* 56th Cong., I Hind's Prec., 180; *Perkins* v. *Morrison,* Rep. No. 3, 31st Cong., 2d Sess. See also Cong. Rec., vol. 47, 67th Cong., 3436–7, 3507.

Resort to the doctrine of practical construction, if proper at all in the case at bar, does not support the contention that "legislature" in § 4 of Art. I means State. A practice that was wrong should be rejected, *Wendell* v. *Lavan,* 246 N. Y. 115; *People* v. *Tremaine,* 252 N. Y. 27; *Louisville & N. R. Co.* v. *Kentucky,* 161 U. S. 677, 690; Cooley, Const. Lim., 6th ed., p. 85.

The Act of August 8, 1911, c. 5, 37 Stat. 13, was limited to the apportionment therein made and expired with the apportionment under the Act of June 18, 1929.

Mr. Henry Epstein, First Assistant Attorney General of New York, with whom *Mr. John J. Bennett, Jr.,* Attorney General, was on the brief, for Flynn, Secretary of State, respondent.

Messrs. John Godfrey Saxe, Robert F. Wagner, and *John J. O'Connor* were on the brief for Farley, respondent.

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

The petitioners, 'citizens and voters' of the State, sought a writ of mandamus to compel the Secretary of State of New York, in issuing certificates for the election of representatives in Congress, to certify that they are to be elected in the congressional districts defined in the concurrent resolution of the Senate and Assembly of the State, adopted April 10, 1931. The Secretary of State, invoking the provisions of Article I, section 4, of the Constitution of the United States, and those of the Act of Congress of August 8, 1911, c. 5, 37 Stat. 13, and also the requirements of the constitution of the State in relation to the enactment of laws, alleged that the concurrent resolution in question was ineffective, as it had not been submitted to the Governor for approval and had not been approved by him. The Court of Appeals of the State, construing the Federal constitutional provision as contemplating the exercise of the lawmaking power, sustained the respondent's defense and affirmed the decision of the lower courts refusing the writ. 258 N. Y. 292; 179 N. E. 705. This Court granted a writ of certiorari.

The State of New York, under the reapportionment pursuant to the Act of Congress of June 18, 1929, c. 28, 46 Stat. 21, 26, is entitled to forty-five representatives in Congress in place of forty-three, the number allotted under the previous apportionment. The Court of Appeals decided that, in the absence of a new districting statute dividing the State into forty-five congressional districts, forty-three representatives are to be elected in the existing districts as defined by the state law, and the two additional representatives by the State at large.

For the reasons stated in the opinion in *Smiley* v. *Holm,* decided this day, *ante,* p. 355, the judgment is affirmed.

Judgment affirmed.

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

CARROLL *v.* BECKER, SECRETARY OF STATE.

CERTIORARI TO THE SUPREME COURT OF MISSOURI.

No. 805. Argued March 24, 1932.—Decided April 11, 1932.

Decided upon the authority of *Smiley* v. *Holm, ante,* p. 355. 328 Mo. —; 45 S. W. (2d) 533, affirmed.

CERTIORARI* to review a judgment quashing an alternative writ of mandamus.

Messrs. Edward F. Colladay and *Hyman G. Stein* for petitioner.

Whatever the term "legislature" meant to the framers of the Constitution when it was adopted it still means. 1 Cooley's Const. Lim., p. 123.

When the Constitution was agreed upon, eleven of the original States had adopted constitutions in which the word "legislature" or its equivalent was defined, but not in any one of them was the Governor included as a part of the legislature.

The framers must have intended to provide for the uniform operation of the instrument among all of the original States. The carrying out of such intention necessarily required that the word "legislature" should mean the same in each State, and this required the exclusion from that term of the Governor.

As was pointed out in *Hawke* v. *Smith,* 253 U. S. 221, a "legislature" at the time the Constitution was framed was the representative body which made the laws of the people, and the term is often used in the Constitution with this evident meaning.

If the word "legislature" as used in Art. V does not mean the law-making power, then we submit that it does

* See table of cases reported in this volume.

not mean the law-making power when it is used in Art I, § 4.

The Act of August 8, 1911, 37 Stat. 13, has expired by its own limitations. The legislature, in re-districting the State, acted exclusively under Art. I, § 4, of the Constitution.

The clause "by the method used in the last preceding apportionment," in the 1929 Act, related only to the arithmetical method of computation. The Act of 1911, has been repealed by the repealing clause (§ 21) of the Act of 1929.

Mr. Ray Weightman, Assistant Attorney General of Missouri, with whom *Messrs. Stratton Shartel,* Attorney General, and *L. Cunningham* were on the brief, for respondent.

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

The State of Missouri, under the reapportionment of representatives in Congress (Act of June 18, 1929, c. 28, 46 Stat. 21, 26) is entitled to thirteen representatives in place of sixteen as theretofore. The petitioner brought this proceeding to obtain a writ of mandamus to compel the Secretary of State of Missouri to file a declaration of the petitioner's candidacy for the office of representative in Congress in one of the congressional districts alleged to have been created by a bill passed by the House of Representatives and the Senate of Missouri in April 1931. An alternative writ was issued, and respondent, Secretary of State, alleged in his return that the bill in question had been vetoed by the Governor and hence had not become a valid law of the State. The Supreme Court of the State, in the view that Article I, section 4, of the Federal Constitution, provided for the enactment

of laws, upheld the action of the Secretary of State and quashed the alternative writ. The court also decided that "since the number of representatives for Missouri has been reduced the former districts no longer exist and representatives must be elected at large." 45 S. W. (2d) 533. A writ of certiorari was granted by this Court.

The questions are substantially the same as those which were presented in *Smiley* v. *Holm*, decided this day, *ante*, p. 355, and the judgment is affirmed.

Judgment affirmed.

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

CLAIBORNE-ANNAPOLIS FERRY CO. *v.* UNITED STATES ET AL.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

No. 454. Argued February 18, 1932.—Decided April 11, 1932.

1. Paragraphs 18, 19 and 20 of § 1 of the Interstate Commerce Act, respecting extension and new construction of railroads, are restricted to carriers engaged in transporting persons or property in interstate and foreign commerce and were intended to affect intrastate commerce only as that may be incidental to the effective regulation of interstate commerce. P. 390.
2. A company operating a ferry within a State under a state charter *held* capable, as a "party in interest," of instituting suit for the purpose of annulling an order and certificate of the Interstate Commerce Commission whereby permission was granted a railway company to extend its line by a ferry over the same waters, and for the purpose of enjoining the railway from constructing and operating such proposed ferry, it appearing from the bill that such action might directly and adversely affect the welfare of the plaintiff by changing the transportation situation. *Id.*
3. A suit of this kind is to be tried by the specially constituted District Court, under the Urgent Deficiencies Act of October 22, 1913; 28 U. S. C., § 47. *Id.*

4. The statute (28 U. S. C., §§ 46, 47) provides that suits to set aside orders of the Interstate Commerce Commission shall be brought in the District Court against the United States, etc., and shall be heard before three judges, at least one of whom must be a circuit judge. *Held,* that for the District of Columbia, such suits are triable in the Supreme Court of the District before two judges of that court and a judge of the Court of Appeals of the District. P. 390.
5. In such a suit an order of the Commission permitting extension of a railroad line by adding a ferry is not open to attack upon the ground that the railroad has not corporate power to operate a ferry. P. 391.
6. Where the right of a plaintiff to enjoin an interstate carrier from constructing and operating an extension of its line depends upon the provisions of the Interstate Commerce Act (§ 1, pars. 18–20,) forbidding such construction and operation unless a certificate of convenience and necessity for the extension was granted the defendant carrier by the Commission, the fact that the Commission granted such an order, in a case within its jurisdiction, and upon sufficient evidence, is a complete defense. *Id.*
7. Evidence before the Commission *held* enough to support its conclusion that extension of the railway company's line across Chesapeake Bay by means of a ferry would bring material advantages to the public in the way of additional facilities for interstate transportation. P. 392.

59 Wash. L. R. 410, affirmed.

APPEAL from a decree of the Supreme Court of the District of Columbia, which dismissed a bill to set aside an order and a certificate of the Interstate Commerce Commission and for an injunction. 166 I. C. C. 293.

Messrs. Philip B. Perlman and *Jesse I. Miller,* with whom *Mr. George E. Edelin* was on the brief, for appellant.

The certificate could be lawfully issued only upon a showing that public convenience and necessity require the establishment and operation of the ferry as a railroad ferry or extension of the railway line, that is, a ferry to be "used by or operated in connection with" the rail line. Application of Utah Terminal Ry., 72 I. C. C. 89,

92; *St. Clair Co.* v. *Interstate Transfer Co.*, 192 U. S. 454, 466–467; *New York* v. *New England Transfer Co.*, 14 Blatchf. 159, 167; *Golden Gate Ferry Co.* v. *Railroad Commission*, 204 Cal. 305. See also *Fitch* v. *New Haven, N. L. & S. Ry. Co.*, 30 Conn. 38; *The Maverick*, 16 Fed. Cas. 1186; *Chesapeake Ferry Co.* v. *Hampton Roads Transp. Co.*, 133 S. E. 561.

The distinction is plain between a general ferry, which is a link in the local public highways, and a railroad ferry, which is merely a moving bridge to enable a railroad to begin, continue or complete travel over its rails.

Unless there was a showing of urgent public need for a railroad ferry, the existence of a public need for a general ferry was not sufficient to authorize the certificate.

It is submitted that the Congress has no power to provide for a certificate based upon a need for a general ferry operating entirely within a single State; but Congress has not attempted to exercise any such power.

There was no evidence showing any need for a railroad ferry.

Where there is no evidence, or no substantial evidence, to support a necessary finding, the certificate is void. *Interstate Commerce Comm.* v. *Louisville & N. R. Co.*, 227 U. S. 88, 91; *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557; *Baltimore & O. R. Co.* v. *United States*, 264 U. S. 258; *Tagg Bros.* v. *United States*, 280 U. S. 420, 442.

The railroad has no authority, under the provisions of its charter, to engage in a general ferry business.

Unless the certificate is set aside, appellant will suffer great and irreparable damage.

It appearing that the certificate is void and that, unless it be set aside, appellant will suffer great and irreparable legal damage, appellant is entitled to institute and maintain this action. Jud. Code. § 212; *Baltimore & O. R. Co.* v. *United States*, 264 U. S. 258.

Appellant is the proper party to maintain the suit. *Skinner & Eddy Corp.* v. *United States,* 249 U. S. 557; *Baltimore & O. R. Co.* v. *United States,* 264 U. S. 258; *Chesapeake & O. Ry. Co.* v. *United States,* 283 U. S. 35; *Anchor Coal Co.* v. *United States,* 25 F. (2d) 462, 478; *Cleveland Ry. Co.* v. *Jackson,* 22 F. (2d) 509; *Western Pacific Cal. R. Co.* v. *Southern Pacific Co.,* 284 U. S. 47.

Distinguishing: *Sprunt & Son* v. *United States,* 281 U. S. 249; *Pittsburgh & W. Va. Ry. Co.* v. *United States,* 281 U. S. 479; *Pennsylvania Co.* v. *United States,* 40 F. (2d) 921; *Edward Hines Yellow Pine Trustees* v. *United States,* 263 U. S. 143.

Assistant to the Attorney General O'Brian, with whom *Solicitor General Thacher* and *Messrs. Charles H. Weston, Hammond E. Chaffetz, Daniel W. Knowlton,* and *Nelson Thomas* were on the brief, for the United States and Interstate Commerce Commission, appellees.

Mr. Jonathan C. Gibson, with whom *Mr. George E. Holmes* was on the brief, for the Chesapeake Beach Railway Co., appellee.

Messrs. William Preston Lane, Jr., Attorney General of Maryland, *G. C. A. Anderson,* Assistant Attorney General, and *Willis R. Jones,* Deputy Attorney General, by leave of Court, filed a brief on behalf of the State of Maryland, as *amicus curiae.*

MR. JUSTICE MCREYNOLDS delivered the opinion of the Court.

The Chesapeake Beach Railway Company, incorporated under Maryland laws and carrier by railroad subject to the Interstate Commerce Act, operates a line twenty-nine miles long which commences in the District of Columbia and passes southeastward through Maryland to Chesapeake Beach, twenty miles south of Annapolis. Connec-

tions are made and freight interchanged with the Baltimore & Ohio and Pennsylvania railroads. The charter empowers it to build and operate a railroad, etc., to construct docks, piers, bridges and retaining walls along the bay shore and to "own and employ steamboats or other vessels to connect the said railroad or railroads with other points by water communication."

December 26, 1929, proceeding under § 1, pars. 18, 19, 20, Interstate Commerce Act, as amended by Transportation Act, 1920, 49 U. S. C., the Railway Company petitioned the Interstate Commerce Commission to grant a certificate declaring "that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation," of the proposed addition or extension to its line. It stated the purpose "to establish and operate, either directly or through a wholly owned subsidiary, a ferry for the transportation of passengers and property between the terminus of its said line at Chesapeake Beach, across Chesapeake Bay [16 miles], and a point on Trippe's Bay in Dorchester County, Maryland." And it averred that "the present and future public convenience and necessity require the establishment of the proposed ferry so as to afford a direct route by rail and water between the City of Washington and surrounding territory and the eastern shore of Maryland and also to provide a direct route for the transportation of automobiles and other vehicles between such points."

Notice was given to the Governor of Maryland; publication followed; all as required by the statute.

The Claiborne-Annapolis Ferry Company (appellant), Maryland corporation, which operates a ferry from Annapolis across Chesapeake Bay, intervened and opposed the Railway's application "for the reason that the ferry service proposed to be operated by the applicant from

Chesapeake Beach, Calvert County, Maryland, to a point on Trippe's Bay in Dorchester County, Maryland, will interfere with and hamper the efforts of your petitioner to give adequate service on its present route "—twenty miles further north. It denied that present and future public convenience and necessity require establishment of the proposed ferry. No other party asked to intervene or offered objection to the requested certificate.

The Commission took evidence, heard the parties, made a report, and, August 1, 1930, certified " that the present and future public convenience and necessity require the establishment by the Chesapeake Beach Railway Company of ferry service across Chesapeake Bay, in Calvert and Dorchester Counties, Md., as set forth in the application and said report."

The Ferry Company asked modification of the report, order and certificate " in such manner as the Commission may deem best to remove any doubt that the permission granted the applicant is only for an extension of railroad and not for the establishment of a general ferry service." Among other things, the petition therefor stated: " Your petitioner does not question the authority or the wisdom of this Honorable Commission in granting to the applicant a Certificate of Public Convenience and Necessity if the Commission construes the application of the Chesapeake Beach Railway Company in this case to be an application for a certificate authorizing an extension of its railroad. That, although the jurisdiction of this Honorable Commission in this case is limited in law to the grant of authority to the applicant to extend its line of railroad across the Chesapeake Bay by means of vessels, the Report, Order and Certificate filed in this case on their face would seem to indicate that the Commission has attempted to grant to the applicant authority to operate a general ferry across the Chesapeake Bay between the points known as Chesa-

peake Beach, Calvert County, Maryland, and Trippe's Bay, Dorchester County, Maryland. While your petitioner does not suggest that this Honorable Commission has granted or attempted to grant to the applicant such a certificate, which could be granted only by the State of Maryland, yet the use of the language by the Commission as follows: 'It is hereby certified, That the present and future public convenience and necessity require the establishment by the Chesapeake Beach Railway Company of ferry service across Chesapeake Bay, in Calvert and Dorchester Counties, Md., as set forth in the application and said report' is, we most respectfully submit, misleading and confusing." The request was denied October 13, 1930.

December 24, 1930, appellant here, as sole complainant, filed an original bill in the Supreme Court, District of Columbia, against the Chesapeake Beach Railway Company and all members of the Interstate Commerce Commission, individually and as members thereof. Subsequently, the United States were made parties defendant. No others asked to come in or were added. After stating complainant's business, and that the Interstate Commerce Commission had granted the above described certificate of public convenience and necessity, the bill alleged that the order and certificate were null and without effect because the evidence before the Commission showed the carrier lacked corporate power to operate the ferry and had no actual use therefor in connection with its road; also, that no present or future public necessity and convenience required such operation. The prayer asked an injunction prohibiting the proposed construction, maintenance and operation, pursuant to the order of August 1, 1930, and "that it be adjudged, ordered and decreed that the said order of the Interstate Commerce Commission of August 1, 1930, be set aside and annulled and held for naught." Also, for general relief.

The proceedings before the Interstate Commerce Commission, the evidence presented there and its action were presented to the court. The cause was heard at a special session held by one judge of the Court of Appeals and two judges of the Supreme Court. A final decree dismissed the bill and the cause is here upon direct appeal. 38 Stat. 208, 220, U. S. C., Title 28, § 345.

Section 1, par. 3, Interstate Commerce Act, as amended by Transportation Act, 1920, provides that the term "railroad" as used in the Act, shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad. Paragraph 18 prohibits carriers from extending their lines, or constructing new ones, "unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad." Paragraph 19 prescribes the procedure in respect of applications for such certificates. Paragraph 20,—"from and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this

section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both." Chap. 91, 41 Stat. 474, 477, 478; U. S. C. A., Title 49, § 1.

Sections 18, 19, and 20 were added to the Act to Regulate Interstate Commerce by the Transportation Act, 1920. They are restricted to carriers engaged in transporting persons or property in interstate and foreign commerce and were intended to affect intrastate commerce only as that may be incidental to the effective regulation of interstate commerce. *Texas* v. *Eastern Texas R. Co.*, 258 U. S. 204, 213, 217.

Considering *Texas* v. *Eastern R. Co., supra, Colorado* v. *United States,* 271 U. S. 153, *Western Pacific California R. Co.* v. *Southern Pacific Co.,* 284 U. S. 47, and *Transit Commission* v. *United States,* 284 U. S. 360, it must be held that appellant is a "party in interest" within the meaning of the statute capable of instituting the present proceeding. The bill disclosed that the proposed and permitted action might directly and adversely affect its welfare by changing the transportation situation. The cause is one of the class to be tried by a specially constituted district court, under the Urgent Deficiencies Act, Oct. 22, 1913, c. 32, 38 Stat. 208, 220 (U. S. C., Title 28, § 47).

U. S. Code, Title 28, § 46 (Jud. Code, § 208) provides that suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the district court against the United States, &c. Section 47 directs that they shall be heard before three judges, at least one of whom must be a circuit judge.

It has been suggested that the Supreme Court of the District of Columbia cannot be regarded as a district court, and judges of the Court of Appeals of the District are not circuit judges within those provisions; conse-

quently the District Supreme Court had no jurisdiction to hear the present cause. The point is without merit.

Section 43, Title 18, District of Columbia Code, 1929, provides that the Supreme Court " shall possess the same powers and exercise the same jurisdiction as the district courts of the United States, and shall be deemed a court of the United States." *Federal Trade Commission* v. *Klesner,* 274 U. S. 145, 156, held that § 5, of the Federal Trade Commission Act, conferring jurisdiction on the Circuit Courts of Appeals to enforce, set aside, or modify orders of the Commission, should be construed as conferring like jurisdiction upon the Court of Appeals of the District of Columbia. " The parallelism between the Supreme Court of the District and the Court of Appeals of the District, on the one hand, and the district courts of the United States and the circuit courts of appeals, on the other, in the consideration and disposition of cases involving what among the States would be regarded as within federal jurisdiction, is complete." And see *Pitts* v. *Peake,* 50 F. (2d) 485.

Whether the Railway Company has corporate power to operate the proposed ferry is a question which cannot be considered in this proceeding. We think Congress never intended to impose upon the Interstate Commerce Commission the duty of determining matters of this nature before granting or withholding assent to the construction of an extension. *Cleveland, C., C. & St. L. Ry. Co.* v. *United States,* 275 U. S. 404, 414.

The right of appellant Ferry Company to institute and maintain this proceeding rests wholly upon the permission granted by paragraph 20, § 1. "Any party in interest " may institute a suit to enjoin proposed construction, operation, or abandonment of a carrier's line unless it has obtained a certificate of public convenience and necessity from the Interstate Commerce Commission. In

the absence of such certificate the doing of any of these things is declared to be unlawful—a crime subject to punishment by fine and imprisonment. And the permission is to apply to the court for an order to arrest the unlawful undertaking. The inhibition applies where there is no certificate in fact, or where the Commission lacked power to grant the outstanding one because of insufficient evidence to support its findings or other reason. An invalid certificate would leave the situation as though none had issued. *Chicago, R. I. & P. Ry. v. United States,* 274 U. S. 29.

Here, undoubtedly, the Commission had power to entertain and act upon the Railway's petition, also to grant the certificate of public convenience and necessity upon sufficient evidence. If the record discloses such evidence, the certificate is not a nullity and the Ferry Company has no right now to demand decision of any other question.

We think there was enough evidence—when material and conflicting we may not pass upon its weight—to support the Commission's conclusion. A large district on the Eastern Shore of Chesapeake Bay lacks adequate railroad connection with Washington and points beyond. The possibilities of the proposed ferry, operated as a part of the Railway's line, were disclosed and the Commission's conclusion that material advantages to the public would result from the additional facilities for interstate transportation is not without support.

The decree below is

Affirmed.

Mr. Justice Cardozo took no part in the consideration or decision of this case.

BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* CORONADO OIL & GAS CO.

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

No. 341. Argued January 15, 1932. Reargued March 16, 1932.—Decided April 11, 1932.

Lands granted by the United States to the State of Oklahoma for the support of common schools and dedicated to that purpose by the state constitution, were leased by the State to a private company for extraction of oil and gas, the State reserving a part of the gross production, the proceeds of which were paid into the public school fund, and the lessee taking the remainder. *Held:*

(1) The lease was an instrumentality of the State in the exercise of a strictly governmental function. P. 398.

(2) Application of the federal income tax to the income derived from the lease by the lessee was therefore unconstitutional. *Gillespie* v. *Oklahoma*, 257 U. S. 501, followed; *Group No. 1 Oil Corp.* v. *Bass*, 283 U. S. 279, distinguished. *Id.*

60 App. D. C. 233; 50 F. (2d) 998, affirmed.

CERTIORARI, 284 U. S. 606, to review a judgment overruling a decision of the Board of Tax Appeals sustaining an income and excess-profits tax, 14 B. T. A. 1214.

Solicitor General Thacher, with whom *Assistant Attorney General Youngquist* and *Messrs. Sewall Key, Hayner N. Larson*, and *Francis H. Horan* were on the brief, for petitioner.

The effect of the federal tax is too indirect and remote to interfere with any governmental function of the State. The tax is less direct and burdensome than those which this Court sustained in *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, and in *Willcuts* v. *Bunn*, 282 U. S. 216. The decision below is contrary to the principle of *Forbes* v. *Gracey*, 94 U. S. 762; *Gromer* v. *Standard Dredging Co.*, 224 U. S. 362; *Baltimore Shipbuilding Co.* v. *Baltimore*,

195 U. S. 375, and the cases following them. It is likewise contrary to the principle of *U. S. Glue Co.* v. *Oak Creek,* 247 U. S. 321; *Shaffer* v. *Carter,* 252 U. S. 37; *Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S. 113.

The respondent is a private corporation engaged in business for its own profit. If for any purpose the respondent is an agency of the State, it is still not exempt from the tax imposed upon income derived from the exercise of nongovernmental functions.

Gillespie v. *Oklahoma,* 257 U. S. 501, rests on the peculiar relation of the United States to its Indian wards, and is in agreement with a recognized federal policy that any activity of the Federal Government in behalf of the Indians shall not be affected even very remotely by state taxation. Further, the question as to whether the lessee was a federal instrumentality was not argued or decided in that case. It dealt with the absolute immunity of activities and instrumentalities of the United States from state taxation; whereas the States enjoy no such immunity unless their activities are strictly governmental. *South Carolina* v. *United States,* 199 U. S. 437.

The implied immunity from taxation of the States by the United States, and of the United States by the States, arises from the provisions of the Constitution which contemplate the maintenance of the independence of the national and state governments within their respective spheres. The reasons underlying the principle mark the limits of its range, and the immunity does not extend to anything lying outside or beyond governmental functions and their exertion. *Indian Motocycle Co.* v. *United States,* 283 U. S. 570, 575–576.

Within the limits of its sovereignty, defined by the Constitution, the power of the national government is supreme, and it follows necessarily that all of its activities are entitled to absolute immunity from state taxation. *McCulloch* v. *Maryland,* 4 Wheat. 316, 436; *California* v.

Pacific R. Co., 127 U. S. 1, 41; *Johnson* v. *Maryland,* 254 U. S. 51, 55–56; *Gillespie* v. *Oklahoma,* 257 U. S. 501, 505; *Jaybird Mining Co.* v. *Weir,* 271 U. S. 609, 613.

In contrast, the powers of a State are both governmental and proprietary. Unlike the United States, it may exercise powers both of a governmental and of a nongovernmental character. Cf. *Van Brocklin* v. *Tennessee,* 117 U. S. 151, 158.

The States retain all the powers of a monarch except so far as they have been surrendered or limited by the provisions of the Federal Constitution (*Hall* v. *Wisconsin,* 103 U. S. 5, 11), and may engage, directly or through agencies and instrumentalities, in activities governmental and nongovernmental in character. It follows that where the exemption from federal taxation is predicated upon interference with the exercise of strictly governmental powers of the State, the inquiry must extend beyond the instrumentality sought to be taxed to its activities with which the imposition of the tax will interfere, and if these activities are not strictly governmental the tax will be sustained. *South Carolina* v. *United States,* 199 U. S. 437.

In this case the tax imposed upon income derived by the lessee from the sale of its own share of the oil and gas produced is imposed upon income derived by the lessee from the sale of its own property and the conduct of its own private business. See *State* v. *Horr,* 165 Minn. 1, 5. Assuming the lease to be an instrumentality of government, the lessee, in marketing its own share of the oil, does not act for the State in its sovereign or governmental capacity. It acts solely on its own account, and for its own profit, in a purely private business undertaking.

Taxation of the property of the agent is not always or generally taxation of the means. *Clallam County* v. *United States,* 263 U. S. 341, 344; *Thomson* v. *Pacific R. Co.,* 9 Wall. 579, 591; *Susquehanna Power Co.* v. *Tax Commission,* 283 U. S. 291.

In principle there is no distinction between this case and *Group No. 1 Oil Corp.* v. *Bass,* 283 U. S. 279.

Messrs. David A. Richardson and *Thos. P. Gore,* with whom *Messrs. Samuel W. Hayes* and *Eugene Jordan* were on the brief, for respondent.

The governmental function of maintaining public schools involves not only their establishment, but also the raising of revenue to carry them on; and, under the Enabling Act and the constitution of the State, it was as much a governmental function of Oklahoma to obtain revenue for its public school fund from these governmental lands as it is to obtain such revenue for that purpose by taxation or by the issuance of bonds. The State's leasing power of these government lands for governmental purposes was as much a governmental power as is its taxing power or its power to issue bonds for school purposes; and the leases themselves were governmental instrumentalities.

The aim of Congress and the State was to raise money for public school purposes, and the lands and their development and operation through leases were intended to be a means to that end. It is the power of the government to raise money for governmental purposes that is protected. That an act is one which may be done by individuals or private corporations does not necessarily stamp it as nongovernmental when done by Government for a recognized governmental purpose. Cf. *McCulloch* v. *Maryland,* 4 Wheat. 316; *Weston* v. *Charleston,* 2 Pet. 449; *Panhandle Oil Co.* v. *Mississippi,* 277 U. S. 218; *Indian Motocycle Co.* v. *United States,* 283 U. S. 570; *Choctaw, O. & G. R. Co.* v. *Harrison,* 235 U. S. 292; *Indian Territory Illuminating Oil Co.* v. *Oklahoma,* 240 U. S. 522; *Howard* v. *Gypsy Oil Co.,* 247 U. S. 503; *Large Oil Co.* v. *Howard,* 248 U. S. 549; *Gillespie* v. *Oklahoma,* 257 U. S. 501; *Jaybird Mining Co.* v. *Weir,* 271 U. S. 609.

A State's operation and development of its own lands for governmental purposes is not to be likened to its engaging in an ordinary business like that of selling intoxicating liquor. If a State in leasing its public lands to obtain revenue for governmental purposes would not be acting in a governmental capacity, performing a governmental function, then the United States does not do so in leasing its public lands containing coal, oil, etc., and any State in which the land lies may tax the lease and the income of the lessee thereunder, without the consent of the United States and against its will. The ownership, leasing, and mineral development of land has been a power and function of sovereignty from earliest common law times.

Under the Constitution delegating to it certain powers of government and reserving to the States those not delegated, and intending that each shall exercise its powers so delegated and reserved without hindrance or obstruction by the other, neither a State nor the United States can tax the property or the governmental functions, agencies or instrumentalities of the other. A tax upon respondent's income derived from its state leases is a tax upon the leases themselves, and a tax upon the leases is a tax upon the power of the State to make them, and interferes with the exercise of and may be used to destroy the power.

Mr. Justice McReynolds delivered the opinion of the Court.

By the Enabling Act Congress required as a condition precedent to the admission of Oklahoma into the Union that her constitution should make provision for common schools; and for their benefit it granted certain lands to the State with the proviso that those valuable for min-

erals, gas and oil should not be sold prior to January 1, 1915, but might be leased. Act of June 16, 1906, 34 Stat. 267, 270, 272, 273. The State Constitution established a common school system and pledged her faith to preserve the lands so conveyed by the United States as a sacred trust, "and to keep the same for the uses and purposes for which they were granted." The legislature prescribed regulations for leasing and directed payment of the proceeds into the school fund. Oklahoma Comp. Statutes of 1921, §§9415, 9417, 9423.

In January, 1914, some of these lands were leased to the Coronado Oil and Gas Company; renewals followed in 1919. Under the first lease the State received fifty per cent. and under the second twelve and one-half per cent. of the gross production of oil and gas. During the years here important the lessee's entire income came from the sale of its portion of such output.

The Commissioner of Internal Revenue assessed income and excess-profits taxes upon the corporation's net income for 1917, 1918 and 1919. The Board of Tax Appeals approved his action; the Court of Appeals, District of Columbia, ruled otherwise. The latter held that the lease to the Coronado Company was an instrumentality of the State for the utilization of lands dedicated to the support of public schools and that to tax the fruits of the lease would burden her in the performance of the governmental function of maintaining such schools. This conclusion, it properly thought, was necessary under *Gillespie* v. *Oklahoma,* 257 U. S. 501.

We are disposed to apply the doctrine of *Gillespie* v. *Oklahoma* strictly and only in circumstances closely analogous to those which it disclosed. In principle, however, the present claim of exemption cannot be distinguished from the one presented in the earlier cause and we adhere to the rule there approved.

True it is, as stated in Group *No. 1 Oil Corp.* v. *Bass,* 283 U. S. 279, 282, 283, " This Court has consistently held that where property or any interest in it has completely passed from the government to the purchaser, he can claim no immunity from taxation with respect to it, merely because it was once government-owned, or because the sale of it effected some government purpose. . . . Property which has thus passed from either the national or a state government to private ownership becomes a part of the common mass of property and subject to its common burdens." And, as there distinctly indicated, the exemption claimed by the Oil Corporation was denied because under the settled rule applied by the Texas Supreme Court the oil and gas from disposal of which the corporate income arose had been purchased, not obtained under a lease—title had passed out of the State by a present sale. Status of the title was matter for determination under laws of the State as construed and applied by her courts. In the present cause there is no basis for saying that, according to the local law, the transaction between the State and the lessee amounted to a sale. The distinction between cases involving sales and those where leases had been made seemed sufficiently apparent when *Group No 1 Oil Corp.* v. *Bass* was decided and is not less obvious now.

" Just what instrumentalities of either a state or the federal government are exempt from taxation by the other cannot be stated in terms of universal application. But this Court has repeatedly held that those agencies through which either government immediately and directly exercises its sovereign powers, are immune from the taxing power of the other." *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514, 522.

The opinion in *Gillespie* v. *Oklahoma, supra,* has often been referred to as the expression of an accepted principle.

Metcalf & Eddy v. *Mitchell, supra; Jaybird Mining Co.* v. *Weir,* 271 U. S. 609, 613; *Northwestern Insurance Co.* v. *Wisconsin,* 275 U. S. 136, 140; *Heiner* v. *Colonial Trust Co.,* 275 U. S. 232, 234; *Shaw* v. *Oil Corp.,* 276 U. S. 575, 579; *Panhandle Oil Co.* v. *Knox,* 277 U. S. 218, 221, 222; *Carpenter* v. *Shaw,* 280 U. S. 363, 366; *Willcuts* v. *Bunn,* 282 U. S. 216, 229; *Group No. 1 Oil Corp.* v. *Bass, supra; Indian Motocycle Co.* v. *United States,* 283 U. S. 570, 576; *Choteau* v. *Burnet,* 283 U. S. 691, 696.

When Oklahoma undertook to lease her public lands for the benefit of the public schools she exercised a function strictly governmental in character. Consequently, *South Carolina* v. *United States,* 199 U. S. 437, much relied upon, is not in point.

The States are essential parts of the plan adopted by the Federal Constitution; and we accept as settled doctrine that the United States can lay no tax upon their governmental instrumentalities. *Texas* v. *White,* 7 Wall. 700, 725; *Collector* v. *Day,* 11 Wall. 113; *Pollock* v. *Farmers Loan & Trust Co.,* 157 U. S. 429, 584; *Farmers Bank* v. *Minnesota,* 232 U. S. 516, 527.

"It is an established principle of our constitutional system of dual government that the instrumentalities, means and operations whereby the United States exercises its governmental powers are exempt from taxation by the States, and that the instrumentalities, means and operations whereby the States exert the governmental powers belonging to them are equally exempt from taxation by the United States." *Indian Motocycle Co.* v. *United States, supra.* Each government is supreme in its sphere; and in order to preserve our dual system this fact must be given practical recognition.

Here the lease to the respondent was an instrumentality of the State for the purpose of carrying out her duty in respect of public schools. To tax the income of the lessee

arising therefrom would amount to an imposition upon the lease itself.

The challenged judgment must be

Affirmed.

MR. JUSTICE STONE, dissenting.

I think the judgment below should be reversed and *Gillespie* v. *Oklahoma,* 257 U. S. 501, should be overruled. Neither can stand as the law of this Court consistently with the principles recently reaffirmed in *Group No. 1 Oil Corp.* v. *Bass,* 283 U. S. 279.

The State of Texas, like the State of Oklahoma, has set apart a portion of its public domain for educational purposes. It has granted oil and gas leases of these lands, not differing in any material respect from the Oklahoma lease involved in this case. The royalties received by the State from the leases are devoted to the University of Texas, as Oklahoma devotes the income derived from its leases to its public schools. In *Group No. 1 Oil Corp.* v. *Bass, supra,* decided less than a year ago, this Court, notwithstanding its decision in the *Gillespie* case that the income of the lessees of Indian oil lands could not be taxed by Oklahoma, upheld the right of the National Government to assess and collect a tax upon the income received by the lessee of one of the Texas leases, from the sale of oil produced from the leased land. It was pointed out that under Texas law the lessee, by virtue of his lease, became the owner of the oil underground and that the taxed income was derived from the sale of oil which was his own property. In upholding the tax the Court said (pp. 282–283):

"Property sold or otherwise disposed of by the government, either state or national, in order to raise revenue for government purposes, is in a broad sense a government instrumentality, with respect to which neither the

property itself before sale, nor its sale by one government, may be taxed by the other. But it does not follow that the same property in the hands of the buyer, or his use or enjoyment of it, or the income he derives from it, is also tax immune. *New Brunswick* v. *United States,* 276 U. S. 547; *Forbes* v. *Gracey,* 94 U. S. 762; *Tucker* v. *Ferguson,* 22 Wall. 527; see *Weston* v. *Charleston,* 2 Pet. 449, 468; *Veazie Bank* v. *Fenno,* 8 Wall. 533, 547. Theoretically, any tax imposed on the buyer with respect to the purchased property may have some effect on the price, and thus remotely and indirectly affect the selling government. We may assume that if the property is subject to tax after sale, the governmental seller will generally receive a less favorable price than if it were known in advance that the property in the hands of later owners, or even of the buyer alone, could not be taxed.

"But the remote and indirect effects upon the one government of such a non-discriminatory tax by the other have never been considered adequate grounds for thus aiding the one at the expense of the taxing power of the other. See *Willcuts* v. *Bunn,* 282 U. S. 216, 231; *Educational Films Corp.* v. *Ward,* 282 U. S. 379; *Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514, 523–524. This Court has consistently held that where property or any interest in it has completely passed from the government to the purchaser, he can claim no immunity from taxation with respect to it, merely because it was once government owned, or because the sale of it effected some government purpose. *New Brunswick* v. *United States, supra; Forbes* v. *Gracey, supra; Tucker* v. *Ferguson, supra;* see *Gromer* v. *Standard Dredging Co.,* 224 U. S. 362, 371; *Choctaw, O. & G. R. Co.* v. *Mackey,* 256 U. S. 531, 537; *Central Pacific R. Co.* v. *California,* 162 U. S. 91, 125; *Railroad Co.* v. *Peniston,* 18 Wall. 5, 35–37; *Weston* v. *Charleston, supra,* p. 468.

"Property which has thus passed from either the national or a state government to private ownership becomes a part of the common mass of property and subject to its common burdens. Denial to either government of the power to tax it, or income derived from it, in order to insure some remote and indirect antecedent benefit to the other, would be an encroachment on the sovereign power to tax, not justified by the implied constitutional restriction. See *Weston* v. *Charleston, supra,* p. 468."

The doctrine thus announced was not a new one. More than fifty years before, and long before the decision in the *Gillespie* case, it had been definitely decided in *Forbes* v. *Gracey,* 94 U. S. 762, that private mining claims granted by the Government in the public lands of the United States, and the ores and minerals derived from them, are subject to state taxation.

In deciding the *Group No. 1 Oil Corp.* case, it was not necessary to determine whether the result in that case would have been different if the oil, from the sale of which the taxpayer derived his income, had become his only when severed from the soil, or whether there were other distinguishing features between that case and the *Gillespie* case. It was enough, there, that, as the taxed income was derived from the lessee's sale of the oil, title to which was, by the lease, vested in him before severance, the case was definitely controlled by precedents whose avowed principles the Court approved. Now, we are concerned with a lease identical with that involved in the *Gillespie* case, and comparison of it with the Texas lease is unavoidable. If we can find no distinction of substance between the operation and effect of the Texas leases and the Oklahoma leases, the *Gillespie* case should no longer be followed. That no such distinction can be drawn is obvious.

The leasing by the National Government of Indian oil lands in Oklahoma to private lessees, for the benefit of the

Indians, and the leasing by Oklahoma of its school lands in like fashion, for the benefit of the schools of the state, are no more and no less governmental enterprises than the leasing by Texas of its oil lands for the benefit of the state university. Whatever the genesis of the particular public duty which each sovereignty has undertaken to perform, the method chosen and the instruments selected for its performance are the same. In each case there was the exercise of a function concededly governmental, but in each the only result, so far as the lessee was concerned, was the acquisition by him of certain property rights exclusively for his own benefit. In each the lessee was taxed on his profits, derived from his private business in the production and sale of oil and gas, which was his property. It cannot be said that the identical tax, thus levied, has any effect on Oklahoma differing from that on Texas. The fact, if it is a fact, that under the Oklahoma leases the lessees do not acquire ownership of the oil or gas until they have severed it from the soil, but before its sale, while the lessees under the Texas leases acquire it immediately on receipt of their leases, presents no distinguishing feature. All acquire private rights by governmental grant, from the exploitation of which they have derived income which, upon principles consistently applied by this Court, except in the Indian oil lease cases, and reiterated in the *Group No. 1 Oil Corp.* case, may be taxed as other income is taxed.

Since comparison of the two methods of disposing of state assets reveals only formal differences, this Court must now deal with an irreconcilable conflict in the theories upon which two of its decisions rest. One, the *Gillespie* case, extends the doctrine of tax immunity, beyond any other case, to income from private business enterprises, merely because the property used in the business was acquired from a sovereign government which ap-

plies the proceeds of it to a governmental purpose. The other, and more recent, case, decided by the Court after full consideration of all the arguments now advanced as supporting the *Gillespie* case, restricted the immunity to the property of the sovereign government itself and to the income which the Government derives from it.

It is plain that if we place emphasis on the orderly administration of justice, rather than on a blind adherence to conflicting precedents, the *Gillespie* case must be overruled. It is true that for ten years the State of Oklahoma has been deprived, by the decision in that case, of taxes upon the income derived from private business of lessees of Indian lands in that state, but that is no reason why it should continue to be so deprived or why the National Government should now be denied the right to like taxes and at the same time be permitted to tax the income of the lessees under the Texas leases. No interest which could be subserved by so rigid an application of *stare decisis,* is superior to that of a system of justice based on a considered and consistent application of the Constitution of the United States.

MR. JUSTICE BRANDEIS, MR. JUSTICE ROBERTS, and MR. JUSTICE CARDOZO join in this opinion.

MR. JUSTICE BRANDEIS, dissenting.

Under the rule of *Gillespie* v. *Oklahoma* vast private incomes are being given immunity from state and federal taxation. I agree with MR. JUSTICE STONE that that case was wrongly decided and should now be frankly overruled. Merely to construe strictly its doctrine will not adequately protect the public revenues. Compare *Jaybird Mining Co.* v. *Weir,* 271 U. S. 609.

Stare decisis is not, like the rule of *res judicata,* a universal, inexorable command. "The rule of *stare decisis,* though one tending to consistency and uniformity

of decision, is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the court, which is again called upon to consider a question once decided." *Hertz* v. *Woodman*, 218 U. S. 205, 212. *Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. Compare *National Bank* v. *Whitney*, 103 U. S. 99, 102. This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation.[1] But in cases involving the Fed-

[1] This Court has, in matters deemed important, occasionally overruled its earlier decisions although correction might have been secured by legislation. See *Chicago & Eastern Illinois R. Co.* v. *Industrial Commission*, 284 U. S. 296, overruling *Erie R. Co.* v. *Collins*, 253 U. S. 77, and *Erie R. Co.* v. *Szary*, 253 U. S. 86; *Gleason* v. *Seaboard Air Line Ry. Co.*, 278 U. S. 349, 357, in part overruling *Friedlander* v. *Texas & Pacific Ry. Co.*, 130 U. S. 416; *Lee* v. *Chesapeake & Ohio Ry. Co.*, 260 U. S. 653, 659, overruling *Ex parte Wisner*, 203 U. S. 449, and qualifying *In re Moore*, 209 U. S. 490; *Boston Store* v. *American Graphophone Co.*, 246 U. S. 8, 25, and *Motion Picture Co.* v. *Universal Film Co.*, 243 U. S. 502, 518, overruling *Henry* v. *A. B. Dick Co.*, 224 U. S. 1; *Rosen* v. *United States*, 245 U. S. 467, 470, overruling *United States* v. *Reid*, 12 How. 361 (compare *Greer* v. *United States*, 245 U. S. 559, 561; *Jin Fuey Moy* v. *United States*, 254 U. S. 189, 195; *Olmstead* v. *United States*, 277 U. S. 438, 466); *Roberts* v. *Lewis*, 153 U. S. 367, 377, overruling *Giles* v. *Little*, 104 U. S. 291; *Kountze* v. *Omaha Hotel Co.*, 107 U. S. 378, 387, overruling *Stafford* v. *Union Bank of Louisiana*, 16 How. 135; *United States* v. *Phelps*, 107 U. S. 320, 323, overruling *Shelton* v. *The Collector*, 5 Wall. 113, 118; *Hornbuckle* v. *Toombs*, 18 Wall. 648, 652, 653, overruling *Orchard* v. *Hughes*, 1 Wall. 77, *Noonan* v. *Lee*, 2 Black 499, and *Dunphy* v. *Kleinsmith*, 11 Wall. 610; *Mason* v. *Eldred*, 6 Wall. 231, 238, in effect overruling *Sheehy* v. *Mandeville*, 6 Cranch 253; *Gazzam* v. *Phillips' Lessee*, 20 How. 372, 377, 378, overruling *Brown's Lessee* v. *Clements*, 3 How. 650; *Vidal* v. *Girard's Executors*, 2 How. 127, qualifying *Baptist Assn.* v. *Hart's Executor*, 4 Wheat. 1; *Gordon* v. *Ogden*, 3 Pet. 33, 34, overruling *Wilson* v. *Daniel*, 3 Dall. 401; compare *Brenham* v. *German American Bank*, 144 U. S. 173,

eral Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions.[2] The Court bows to the les-

187, overruling *Rogers* v. *Burlington,* 3 Wall. 654 and *Mitchell* v. *Burlingham,* 4 Wall. 270; *Hudson* v. *Guestier,* 6 Cranch 281, 285, overruling *Himely* v. *Rose,* 4 Cranch 241, 284. See also *Fairfield* v. *County of Gallatin,* 100 U. S. 47, 54, 55, and cases cited.

[2] Besides cases in note 4, see *East Ohio Gas Co.* v. *Tax Commission,* 283 U. S. 465, 472, overruling *Pennsylvania Gas Co.* v. *Public Service Commission,* 252 U. S. 23; *Terral* v. *Burke Construction Co.,* 257 U. S. 529, 533, overruling *Doyle* v. *Continental Insurance Co.,* 94 U. S. 535, and *Security Mutual Life Insurance Co.* v. *Prewitt,* 202 U. S. 246; *Pennsylvania R. Co.* v. *Towers,* 245 U. S. 6, 17, in part overruling *Lake Shore & Michigan Southern Ry. Co.* v. *Smith,* 173 U. S. 684; *United States* v. *Nice,* 241 U. S. 591, 601, overruling *Matter of Heff,* 197 U. S. 488; *Garland* v. *Washington,* 232 U. S. 642, 646, 647, overruling *Crain* v. *United States,* 162 U. S. 625; *Pollock* v. *Farmers' Loan & Trust Co.,* 158 U. S. 601, in effect overruling *Hylton* v. *United States,* 3 Dall. 171; *Leisy* v. *Hardin,* 135 U. S. 100, 118, overruling *Peirce* v. *New Hampshire,* 5 How. 504; *Leloup* v. *Port of Mobile,* 127 U. S. 640, 647, overruling *Osborne* v. *Mobile,* 16 Wall. 479; *Morgan* v. *United States,* 113 U. S. 476, 496, overruling *Texas* v. *White,* 7 Wall. 700; *Legal Tender Cases,* 12 Wall. 457, 553, overruling *Hepburn* v. *Griswold,* 8 Wall. 603; *The Belfast,* 7 Wall. 624, 641, overruling in part *Allen* v. *Newberry,* 21 How. 544; *The Genesee Chief,* 12 How. 443, 456, overruling *The Thomas Jefferson,* 10 Wheat. 428, and *The Orleans* v. *Phoebus,* 11 Pet. 175; *Louisville, Cincinnati & Charleston R. Co.* v. *Letson,* 2 How. 497, 554–556, overruling *Commercial & Rail Road Bank* v. *Slocomb,* 14 Pet. 60, and other cases, and qualifying *Bank of the United States* v. *Deveaux,* 5 Cranch 61; compare *Marshall* v. *Baltimore & Ohio R. Co.,* 16 How. 314, 325, 326, in turn qualifying the *Letson* case, *supra.* Compare *Helson* v. *Kentucky,* 279 U. S. 245, 251, qualifying *Crandall* v. *Nevada,* 6 Wall. 35; *Sonneborn Bros.* v. *Cureton,* 262 U. S. 506, qualifying *Texas Co.* v. *Brown,* 258 U. S. 466; *Bowman* v. *Continental Oil Co.,* 256 U. S. 642, and *Standard Oil Co.* v. *Graves,* 249 U. S. 389; *Union Tank Line Co.* v. *Wright,* 249 U. S. 275, 283, 284, qualifying *Pullman Palace Car Co.* v. *Pennsylvania,* 141 U. S. 18; *Wheeler* v. *Sohmer,* 233 U. S. 434, 440, qualifying *Buck* v. *Beach,* 206 U. S. 392 (compare *Baldwin* v. *Missouri,* 281 U. S. 586); *Home Telephone & Telegraph Co.* v. *Los An-*

sons of experience and the force of better reasoning,[3] recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function. Compare *Brinkerhoff-Faris Trust & Savings*

---

geles, 227 U. S. 278, 294, qualifying *Barney* v. *New York,* 193 U. S. 430; *Galveston, H. & S. A. Ry. Co.* v. *Texas,* 210 U. S. 217, 226, qualifying *Maine* v. *Grand Trunk Ry. Co.,* 142 U. S. 217; *In re Chapman,* 166 U. S. 661, 670, qualifying *Runkle* v. *United States,* 122 U. S. 543, 555; *New Orleans City & Lake R. Co.* v. *New Orleans,* 143 U. S. 192, 195, qualifying *Gordon* v. *Tax Appeal Court,* 3 How. 133; *Philadelphia S. S. Co.* v. *Pennsylvania,* 122 U. S. 326, 342, qualifying *State Tax on Railway Gross Receipts,* 15 Wall. 284; *Wabash, St. Louis & Pacific Ry. Co.* v. *Illinois,* 118 U. S. 557, 568, 569, qualifying *Peik* v. *Chicago & Northwestern Ry. Co.,* 94 U. S. 164; *Kilbourn* v. *Thompson,* 103 U. S. 168, 196–200, qualifying *Anderson* v. *Dunn,* 6 Wheat. 204. See also discussion of *New York* v. *Miln,* 11 Pet. 102, in *Passenger Cases,* 7 How. 283; that of *Ficklen* v. *Shelby County Taxing District,* 145 U. S. 1, in *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292, 296, and in *Texas Transport & Terminal Co.* v. *New Orleans,* 264 U. S. 150, 153, 154; that of *Gulf, Colorado & Santa Fe Ry. Co.* v. *Texas,* 204 U. S. 403, in *Baltimore & Ohio Southwestern R. Co.* v. *Settle,* 260 U. S. 166, 173.

Movement in constitutional interpretation and application—often involving no less striking departures from doctrines previously established—takes place also without specific overruling or qualification of the earlier cases. Compare, for example, *Allgeyer* v. *Louisiana,* 165 U. S. 578, with *The Slaughter House Cases,* 16 Wall. 36; *Tyson* v. *Banton,* 273 U. S. 418, with *Munn* v. *Illinois,* 94 U. S. 113; *Muller* v. *Oregon,* 208 U. S. 412, and *Bunting* v. *Oregon,* 243 U. S. 426, with *Lochner* v. *New York,* 178 U. S. 45.

[3] Compare Taney, C. J., in *The Passenger Cases,* 7 How. 283, 470: "After such opinions, judicially delivered, I had supposed that question to be settled, so far as any question upon the construction of the Constitution ought to be regarded as closed by the decision of this court. I do not, however, object to the revision of it, and am quite willing that it be regarded hereafter as the law of this court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported."

Co. v. *Hill,* 281 U. S. 673, 681. Recently, it overruled several leading cases, when it concluded that the States should not have been permitted to exercise powers of taxation which it had theretofore repeatedly sanctioned.[4] In cases involving the Federal Constitution[5] the position

---

See also Miller, J., dissenting, in *Washington University* v. *Rouse,* 8 Wall. 439, 444: "With as full respect for the authority of former decisions, as belongs, from teaching and habit, to judges trained in the common-law system of jurisprudence, we think that there may be questions touching the powers of legislative bodies, which can never be finally closed by the decisions of a court. . . ."

Compare Field, J., in *Barden* v. *Northern Pacific R. Co.,* 154 U. S. 288, 322: "It is more important that the court should be right upon later and more elaborate consideration of the cases than consistent with previous declarations. Those doctrines only will eventually stand which bear the strictest examination and the test of experience."

[4] See *Alpha Cement Co.* v. *Massachusetts,* 268 U. S. 203, 218, overruling *Baltic Mining Co.* v. *Massachusetts,* 231 U. S. 68; *Farmers Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204, 209, overruling *Blackstone* v. *Miller,* 188 U. S. 189. See also *Baldwin* v. *Missouri,* 281 U. S. 586, 591; *Beidler* v. *South Carolina Tax Commission,* 282 U. S. 1, 8; *First National Bank* v. *Maine,* 284 U. S. 312. During the twenty-seven years preceding the decision of *Farmers Loan & Trust Co.* v. *Minnesota, Blackstone* v. *Miller* had been cited with approval in this Court fifteen times. Compare *Educational Films Corp.* v. *Ward,* 282 U. S. 379, 392–394, and *Pacific Co.* v. *Johnson,* decided today, *post,* p. 480, qualifying *Macallen Co.* v. *Massachusetts,* 279 U. S. 620.

[5] The policy of *stare decisis* may be more appropriately applied to constitutional questions arising under the fundamental laws of those States whose constitutions may be easily amended. The action following the decision in *Ives* v. *South Buffalo Ry. Co.,* 201 N. Y. 271, shows how promptly a state constitution may be amended to correct an important decision deemed wrong. See Frankfurter and Landis, "The Business of the Supreme Court," pp. 193–198. In only two instances—the Eleventh and the Sixteenth Amendments—has the process of constitutional amendment been successfully resorted to, to nullify decisions of this Court. See *Chisholm* v. *Georgia,* 2 Dall. 419; *Pollock* v. *Farmers' Loan & Trust Co.,* 158 U. S. 601. It required eighteen years of agitation after the decision in the *Pollock* case to secure the Sixteenth Amendment.

of this Court is unlike that of the highest court of England, where the policy of *stare decisis* was formulated and is strictly applied to all classes of cases.[6] Parliament is free to correct any judicial error; and the remedy may be promptly invoked.

The reasons why this Court should refuse to follow an earlier constitutional decision which it deems erroneous are particularly strong where the question presented is one of applying, as distinguished from what may accurately be called interpreting, the Constitution. In the cases which now come before us there is seldom any dispute as to the interpretation of any provision. The controversy is usually over the application to existing conditions of some well-recognized constitutional limitation.[7] This is strikingly true of cases under the due process clause when the question is whether a statute is unreasonable, arbitrary or capricious; of cases under the equal protection clause when the question is whether there is any reasonable basis for the classification made by a statute; and of cases under the commerce clause when the question is whether an admitted burden laid by a statute upon interstate commerce is so substantial as to be deemed direct. These issues resemble, fundamentally, that of reasonable care in negligence cases, the determination of which is ordinarily left to the verdict of the jury. In every such case the decision, in the first instance, is dependent upon the determination of what in legal parlance is called a fact, as distinguished from the

[6] Compare *London Street Tramways Co.* v. *London County Council*, (1898) A. C. 375; *Stuart* v. *Bank of Montreal*, 41 Sup. Ct. Can. 516. See Arthur L. Goodhart, "Case Law in England and America," 15 Cornell Law Quarterly, 173, 188, 193; E. K. Williams, "Stare Decisis," 4 Canadian Bar Review 289.

[7] See Frankfurter and Landis, "The Business of the Supreme Court," pp. 307–318.

declaration of a rule of law.[8] When the underlying fact has been found, the legal result follows inevitably. The circumstance that the decision of that fact is made by a court, instead of by a jury, should not be allowed to obscure its real character.

The issue presented by the case at bar is of the character of those discussed above. Here, also, the applicable provision of law is beyond dispute. Confessedly, the United States may not, by a tax, interfere substantially with the functions of a State. The question at issue is, whether, as a practical matter, it does so interfere by a statute which includes among the items on which its general income tax is laid, the profits derived by the taxpayer from operating some of the State's school lands under a lease. The question resembles closely that presented and decided in *Willcuts* v. *Bunn,* 282 U. S. 216, 230, 231. There, this Court examined the surrounding facts to determine whether "a federal tax on the profits of sales of such securities should be deemed, as a practical matter, to lay such a burden on the exercise of the State's borrowing power as to make it necessary to deny to the Federal Government the constitutional authority to impose the tax." The validity of the tax, it held, depends upon "whether the prospect on the part of the ordinary investor of obtaining profit on the resale of such obligations is so important an element in inducing their acquisition that a federal tax on such profits, in common with profits derived from the sales of other property, constitutes any substantial interference with the functions of state governments." Obviously the matter for determination in *Willcuts* v. *Bunn,* although made by the highest court of the land, was, in

[8] Arthur W. Machen, Jr., "The Elasticity of the Constitution," 14 Harv. L. Rev. 273; Henry Wolf Biklé, "Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action," 38 Harv. L. Rev. 6.

essence, a matter of fact. Similarly, here, the question whether it would interfere substantially with the functions of the state government to permit the general income tax of the United States to include profits derived from the lease involves primarily the determination of a fact, not the decision of a proposition of law.

The doctrine of *res judicata* demands that a decision made by the highest court, whether it be a determination of a fact or a declaration of a rule of law, shall be accepted as a final disposition of the particular controversy, even if confessedly wrong. But the decision of the Court, if, in essence, merely the determination of a fact, is not entitled, in later controversies between other parties, to that sanction which, under the policy of *stare decisis,* is accorded to the decision of a proposition purely of law. For not only may the decision of the fact have been rendered upon an inadequate presentation of then existing conditions, but the conditions may have changed meanwhile. Compare *Abie State Bank* v. *Bryan,* 282 U. S. 765, 772. Moreover, the judgment of the Court in the earlier decision may have been influenced by prevailing views as to economic or social policy which have since been abandoned.[9] In cases involving constitutional issues of the character discussed, this Court must, in order to reach sound conclusions, feel free to bring its opinions into agreement with experience and with facts newly ascertained, so that its

[9] Roscoe Pound, "The Theory of Judicial Decision," 36 Harv. Law Rev. (1923), 641, 651; Ray A. Brown, "Due Process of Law, Police Power, and the Supreme Court," 40 Harv. L. Rev. (1927), 943, 961, 967; "Police Power—Legislation for Health and Personal Safety," 42 Harv. L. Rev. (1929), 866, 867, 872; Percy H. Winfield, "Public Policy in the English Common Law," 42 Harv. L. Rev. (1928), 76, 101, 102. See Charles Warren, "The Supreme Court in United States History," Vol. III, pp. 470, 471.

judicial authority may, as Mr. Chief Justice Taney said, "depend altogether on the force of the reasoning by which it is supported."

MR. JUSTICE STONE and MR. JUSTICE ROBERTS join in this opinion.

CANADA MALTING CO., LTD. *v.* PATERSON STEAMSHIPS, LTD.*

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

No. 487. Argued February 25, 1932.—Decided April 11, 1932.

1. In a suit in admiralty between foreigners it is ordinarily within the discretion of the District Court to refuse to retain jurisdiction; and the exercise of its discretion will not be disturbed unless abused. P. 418.
2. This rule applies even though the cause of action arose in this country. Pp. 418, 419.
3. Two ships of Canadian registry and ownership, each carrying cargo shipped from one Canadian port to another, collided on Lake Superior while unintentionally in United States waters, and one ship sank. While suit was pending in a Canadian court of admiralty to determine liability as between the ships, libels *in personam* against the owner of one of them were filed by cargo owners in a federal district court in New York. All the parties were citizens of Canada, and the officers and crew of each vessel—the material witnesses—were citizens and residents of that country. Opposing affidavits alleged that the motive of the cargo owners in coming to a court of the United States lay in the opportunity in our law to recover full damages from the non-carrying vessel, whereas, in Canada, the liability would be divided equally between the two vessels if both were at fault. The district court dismissed the libels, but ordered that the respondent should appear and file security in any action which might be instituted by the libelants in the admi-

---

* Together with No. 488, *British Empire Grain Co., Ltd.* v. *Paterson Steamships, Ltd.*, and No. 489, *Starnes* v. *Same.*

ralty courts of Canada, so that they would not by dismissal of the libels lose the security gained by foreign attachment.

Held that the refusal to retain jurisdiction was not an abuse of discretion. P. 423.

51 F. (2d) 1007, affirmed.

CERTIORARI, 284 U. S. 612, to review the affirmance of decrees dismissing three libels in admiralty. 49 F. (2d) 802, 804.

Mr. D. Roger Englar, with whom *Messrs. Oscar R. Huston, Leonard J. Matteson, Henry J. Bigham,* and *James W. Ryan* were on the brief, for petitioners.

The Treaty of January 11, 1909, clearly provides that both of the parties shall have the right to navigate freely throughout the waters of the Great Lakes, on either side of the international boundary line; and provides with equal clearness that vessels of one nation entering the territorial waters of another, are subject to the local laws, which, in this case, undoubtedly include the rule that all vessels must navigate with caution and at moderate speed in fog. The only limitation on the sovereignty of the United States, so far as concerns Canadian vessels, is that it shall not pass any law inconsistent with the free navigation of the waters in question by such vessels; and that it shall not pass any law which does not apply equally to the ships and citizens of both countries. There is not the slightest support in the treaty for the suggestion that the maritime law of the United States is not effective on the Great Lakes up to the international boundary line. These waters remain a part of the United States and subject to its laws, just as much as New York harbor or the Mississippi River.

It follows that any liability for a tort committed in these waters is determined, both as to its existence and its extent, by the maritime law of the United States. *The Lottawanna,* 21 Wall. 558; *Slater* v. *Mexican National*

R. Co., 194 U. S. 120; *Smith* v. *Condry,* 1 How. 28, 32; *New York Cent. R. Co.* v. *Chisholm,* 268 U. S. 29, 32; *American Banana Co.* v. *United Fruit Co.,* 213 U. S. 347; *Western Union* v. *Brown,* 234 U. S. 542.

The Scotland, 105 U. S. 24, 29, dealt with a collision on the high seas. The Great Lakes are wholly territorial. Moore, Dig. of Int. L., vol. 1, pp. 672–3; Hyde, Int. L., vol. 1, p. 268; Hunt, vol. 4, Am. Jour. Int. L., p. 285.

In cases of collision occurring within the territorial limits of the United States, the admiralty jurisdiction conferred upon the District Courts is positive and mandatory, and there is no discretion to decline jurisdiction even though the parties are not citizens of the United States. Const., U. S., Art. III, § 2, cl. 1; Jud. Code, § 24 as amended (28 U. S. C., § 41); *Second Employers' Liability Cases,* 223 U. S. 1, 58–9; *Cohens* v. *Virginia,* 6 Wheat. 264, 403; *Raich* v. *Truax,* 219 Fed. 273, 285; *Gregonis* v. *P. & R. Coal & I. Co.,* 235 N. Y. 152; *Chicot County* v. *Sherwood,* 148 U. S. 529, 534; *McClellan* v. *Carland,* 217 U. S. 268, 282; *Kline* v. *Burke Construction Co.,* 260 U. S. 226, 234; *Hyde* v. *Stone,* 20 How. 170, 175; *Ex parte United States,* 242 U. S. 27.

Charter Shipping Co. v. *Bowring, Jones & Tidy,* 281 U. S. 515, 517, and *Langnes* v. *Green,* 282 U. S. 531, 544, merely restate the rule laid down in *The Belgenland,* 114 U. S. 355, which is expressly limited to controversies between foreigners in cases not arising in the country of the forum or cases arising beyond the territorial jurisdiction of the country to which the courts belong.

The remarks of this Court in *The Maggie Hammond,* 9 Wall. 435, 457, to the effect that the jurisdiction was not obligatory, clearly related to a case, like the one before it, where the cause of action arose outside the territorial limits of the United States.

There is in fact no basis for suggesting that jurisdiction should be discretionary with respect to a collision occur-

ring within the territorial limits of this country. The act is wrongful and gives rise to a cause of action only because of the laws of this country. The cause of action arises out of the law of this country and as a result of a breach of its laws. Our courts have criminal as well as civil jurisdiction of offenses at the point at which the collision occurred. The violations of law which contributed to this collision are a breach of our peace and of the security which our laws guarantee to the strangers within our gates, as well as to our own citizens. Brown on Juris., 2d ed., p. 22; Story, Confl. L., § 541; *id.*, 8th ed., p. 754; Elihu Root, 4 Am. J. Int. L., p. 521.

Within the territorial limits of the United States there can be no law other than that of the United States. *The Western Maid,* 257 U. S. 419, 432; *United States* v. *Bevans,* 3 Wheat. 336, 388; *The Apurimac,* 7 F. (2d) 741; *Heredia* v. *Davies,* 12 F. (2d) 500; *Uravic* v. *Jarka Co.,* 282 U. S. 234, 240.

In matters relating to the internal discipline of the ship, American law, both civil and criminal, is sometimes applied to acts done on board American vessels in foreign waters. *United States* v. *Rodgers,* 150 U. S. 249; *Thompson Towing & Wrecking Assn.* v. *McGregor,* 207 Fed. 209; Webster, Secretary of State, to Lord Ashford, in *United States* v. *Rodgers, supra,* pp. 264, 265; *Cunard S. S. Co.* v. *Mellon,* 262 U. S. 100, 123–4.

We think it is clear that the discretion mentioned in the cases last cited is to be exercised by Congress or by the treaty-making power, and not by the courts. The situation is quite different where our courts are asked to enforce the laws of a foreign country. They do so only as a matter of comity; and they may, in their discretion decline to do so. The presumption is that in any suit by these petitioners against the respondent in the Canadian courts, those courts would apply the substantive law

of the United States. *The Eagle Point,* 142 Fed. 453, certiorari denied, 201 U. S. 644.

By the Fourteenth Amendment and by § 1977 of the Revised Statutes, all persons, whether citizens or aliens, are entitled to the equal protection of the laws in respect of matters arising within the territory of the United States. *Yick Wo* v. *Hopkins,* 118 U. S. 356, 369.

Mr. Ray M. Stanley, with whom *Mr. Ellis H. Gidley* was on the brief, for respondent.

Mr. Justice Brandeis delivered the opinion of the Court.

These three libels in admiralty *in personam* were brought in the federal court for western New York, by owners of cargo laden on the steamer "Yorkton" to recover for loss resulting from the sinking of that vessel in a collision with respondent's steamer "Mantadoc," in Lake Superior, on the American side of the international boundary line. The respondent moved, in each case, that the District Court exercise its discretion to decline jurisdiction and dismiss the libels on the ground that all the parties were citizens of Canada and that the controversy concerned "matters . . . properly the subjects of hearing and determination" by the Canadian courts. The motions were granted, 49 F. (2d) 802, 804; and the decrees of the District Court were affirmed by the Circuit Court of Appeals for the Second Circuit, 51 F. (2d) 1007. This Court granted certiorari.

Shortly after the collision, the Wreck Commissioner of Canada held a formal investigation, as required by law, respecting the circumstances of the collision, and determined that the masters of both vessels were at fault. The respondent then instituted in the admiralty court of Canada a proceeding for the judicial determination of the liability as between the colliding vessels and their owners.

The libellants' motive for invoking the jurisdiction of a court of the United States, instead of that of the Canadian court in which that proceeding was pending, appears in affidavits filed with the exceptions to the libel. Under the Canadian law, it is stated, if both colliding vessels were at fault each vessel would be liable for not more than half of the loss; and the salvaged value of the Yorkton might not suffice to pay its share. See *The Milan,* Lush. Adm. 401. Under our law the innocent cargo-owner can recover full damages from the non-carrying vessel. *The New York,* 175 U. S. 187, 209, 210.

The libellants concede, as they must, that in a suit in admiralty between foreigners it is ordinarily within the discretion of the District Court to refuse to retain jurisdiction; and that the exercise of its discretion will not be disturbed unless abused. *Charter Shipping Co.* v. *Bowring, Jones & Tidy, Ltd.,* 281 U. S. 515, 517. Compare *Watts, Watts & Co.* v. *Unione Austriaca di Navigazione,* 248 U. S. 9; *Langnes* v. *Green,* 282 U. S. 531, 544. They claim, however, that the rule is not applicable here since the cause of action arose within the territorial limits of the United States; and, moreover, that if the District Court had discretion, the decrees should be reversed because, on the undisputed facts, it was an abuse of discretion to decline jurisdiction. We are of opinion that neither claim is well founded.

First. The contention that the jurisdiction was obligatory rests upon the fact that the collision occurred within the territorial waters of the United States. The argument is that a cause of action arising from a collision occurring on territorial waters of the United States arises out of its laws, since within its territory there can be no other law, *Smith* v. *Condry,* 1 How. 28, 33; *Slater* v. *Mexican National R. Co.,* 194 U. S. 120, 126; *New York Central R. Co.* v. *Chisholm,* 268 U. S. 29, 32; that the Constitution, Art. III, § 2, cl. 1, extends the judicial

power to "all cases of admiralty and maritime jurisdiction;" that § 24 of the Judicial Code confers upon the District Court jurisdiction "of all civil causes of admiralty and maritime jurisdiction;" and that by vesting jurisdiction in that Court, Congress imposed a duty upon it to exercise the jurisdiction, *Cohens* v. *Virginia,* 6 Wheat. 264, 404; *McClellan* v. *Carland,* 217 U. S. 268, 281; *Second Employers' Liability Cases,* 223 U. S. 1, 58, 59. In support of the argument that there is no power to decline jurisdiction in cases where the cause of action arose within the United States, the libellants urge the statement in *The Belgenland,* 114 U. S. 355, 365, that "the courts will use a discretion about assuming jurisdiction of controversies between foreigners in cases arising beyond the territorial jurisdiction of the country to which the courts belong."

The respondent insists that the doctrine of *lex loci delicti* has no application to cases of collision on the Great Lakes; that the Great Lakes and their connecting channels constitute public navigable waters, irrespective of the location of the international boundary, and possess all the characteristics of the high seas, *The Eagle,* 8 Wall. 15, 22; *United States* v. *Rodgers,* 150 U. S. 249, 256; *Panama R. Co.* v. *Napier Shipping Co.,* 166 U. S. 280, 285; *The New York,* 175 U. S. 187; *The Robert W. Parsons,* 191 U. S. 17, 27; that in a case of collision on the high seas between two vessels of the same nationality, liability is governed by the law of the flag, *The Scotland,* 105 U. S. 24, 29, 30; *The Eagle Point,* 142 Fed. 452, 454; that the Canadian law would apply in the cases at bar; and that hence, the asserted ground for the District Court's retaining jurisdiction fails.

We have no occasion to enquire by what law the rights of the parties are governed, as we are of the opinion that, under any view of that question, it lay within the discretion of the District Court to decline to assume jurisdiction

over the controversy. The suggestion drawn from the language in *The Belgenland, supra*, that such discretion exists only "in cases arising beyond the territorial jurisdiction of the country to which the courts belong," is without support in either the earlier or the later decisions of this Court. Nor is it justified by the language relied on, when that language is read in its context. The case of *The Belgenland* arose out of a collision on the high seas between foreign vessels of different nationalities; and the objection was raised that the courts of the United States were wholly without jurisdiction. Mr. Justice Bradley, speaking for the Court, replied that jurisdiction in admiralty did exist over controversies between foreigners arising without the territorial waters of this country, but that the court in such a case would use its discretion in determining whether to exercise it. That the Court had no intention of denying the existence of similar discretion, where the cause of action arose within the territorial waters of this country, is shown by its reference to the cases of *The Maggie Hammond,* 9 Wall. 435, 457, and *Taylor* v. *Carryl,* 20 How. 583, 611, in which no such limitation was expressed, and which the Court described as "accurately stating" the law. The doctrine of these earlier cases was recently reiterated by this Court, in similar terms, in *Langnes* v. *Green,* 282 U. S. 531, 544, where it was said: "Admiralty courts . . . have complete jurisdiction over suits of a maritime nature between foreigners. Nevertheless, 'the question is one of discretion in every case, and the court will not take cognizance of the case if justice would be as well done by remitting the parties to their home forum.'" See also *Charter Shipping Co.* v. *Bowring, Jones & Tidy, Ltd.,* 281 U. S. 515, 517.[1]

[1] Compare *Mason* v. *The Blaireau,* 2 Cranch 240, 264; *Ex parte Newman,* 14 Wall. 152, 168, 169; *Panama R. Co.* v. *Napier Shipping Co.,* 166 U. S. 280, 285.

The rule recognizing an unqualified discretion to decline jurisdiction in suits in admiralty between foreigners appears to be supported by an unbroken line of decisions in the lower federal courts.[2] The question has most frequently been presented in suits by foreign seamen against masters or owners of foreign vessels, relating to claims for wages and like differences,[3] or to claims of personal injury.[4] Although such cases are ordinarily decided ac-

[2] See note 5, *infra*. See also *One Hundred and Ninety-four Shawls*, 1 Abb. Adm. 317, 321; Fed. Cas. No. 10,521; *The Sailor's Bride*, 1 Brown's Adm., 68, 70; Fed. Cas. No. 12,220; *The Bee*, 1 Ware 336, 339; Fed. Cas. No. 1,219; *Muir* v. *The Brig Brisk*, 4 Ben. 252, 254; Fed. Cas. No. 9,901; *Thomassen* v. *Whitwell*, 9 Ben. 113; Fed. Cas. No. 13,928; *Boult* v. *Ship Naval Reserve*, 5 Fed. 209; *The City of Carlisle*, 39 Fed. 807, 815; *Goldman* v. *Furness, Withy & Co.*, 101 Fed. 467, 469; *The Kaiser Wilhelm der Grosse*, 175 Fed. 215, 216, 217; *The Iquitos*, 286 Fed. 383, 384; *Danielson* v. *Entre Rios Rys. Co.*, 22 F. (2d) 326, 327; *The Canadian Commander*, 43 F. (2d) 857, 858.

[3] Jurisdiction was declined in *Willendson* v. *The Försöket*, 1 Pet. Adm. 197; Fed. Cas. No. 17,682; *The Infanta*, 1 Abb. Adm. 263, 268, 269; Fed. Cas. No. 7,030; *The Ada*, 2 Ware 408; Fed. Cas. No. 38; *The Becherdass Ambaidass*, 1 Lowell 569; Fed. Cas. No. 1,203; *The Montapedia*, 14 Fed. 427; *The Ucayali*, 164 Fed. 897, 900; *The Albani*, 169 Fed. 220, 222.

In the following cases jurisdiction was taken, but the existence of discretion recognized: *Thompson* v. *The Ship Catharina*, 1 Pet. Adm. 104; Fed. Cas. No. 13,949; *Weiberg* v. *The Brig St. Oloff*, 2 Pet. Adm. 428; Fed. Cas. No. 17,357; *Davis* v. *Leslie*, 1 Abb. Adm. 123, 131; Fed. Cas. No. 3,639; *Bucker* v. *Klorkgetter*, 1 Abb. Adm. 402, 405, 406; Fed. Cas. No. 2,083; *The Pawashick*, 2 Lowell 142, 151; Fed. Cas. No. 10,851; *The Brig Napoleon*, Olcott, 208, 215; Fed. Cas. No. 10,015; *The Bark Lilian M. Vigus*, 10 Ben. 385; Fed. Cas. No. 8,346; *The Amalia*, 3 Fed. 652, 653; *The Salomoni*, 29 Fed. 534, 537; *The Topsy*, 44 Fed. 631, 633, 635; *The Sirius*, 47 Fed. 825, 827; *The Karoo*, 49 Fed. 651; *The Lady Furness*, 84 Fed. 679, 680; *The Alnwick*, 132 Fed. 117, 120; *The August Belmont*, 153 Fed. 639; *The Sonderberg*, 47 F. (2d) 723, 725.

[4] Jurisdiction was declined in *The Carolina*, 14 Fed. 424; *Camille* v. *Couch*, 40 Fed. 176; *The Walter D. Wallet*, 66 Fed. 1011, 1013;

cording to the foreign law, they often concern causes of action arising within the territorial jurisdiction of the United States, compare *Patterson* v. *The Eudora,* 190 U. S. 169; *The Kestor,* 110 Fed. 432, 450. Neither in these, nor in other cases, has the bare circumstance of where the cause of action arose been treated as determinative of the power of the court to exercise discretion whether to take jurisdiction.[5]

Obviously, the proposition that a court having jurisdiction must exercise it, is not universally true; else the admiralty court could never decline jurisdiction on the ground that the litigation is beween foreigners. Nor is it true of courts administering other systems of our law.

The Lamington, 87 Fed. 752, 757; *The Knappingsborg,* 26 F. (2d) 935, 937. See also *Bolden* v. *Jensen,* 70 Fed. 505, 509. Compare *Bernhard* v. *Creene,* 3 Sawy. 230, 234; Fed. Cas. No. 1,349; *The Noddleburn,* 30 Fed. 142, 143; *The Troop,* 118 Fed. 769, 772.

[5] The only case supporting the position of the petitioners which has been called to our attention is *The Apurimac,* 7 F. (2d) 741, 742, involving an action by a foreign seaman for injuries sustained on a foreign vessel lying in American waters. The expressions of the District Court in this case, however, were disapproved by the Circuit Court of Appeals for the Fourth Circuit, which affirmed the judgment on the ground that jurisdiction, although discretionary, had been properly taken. *Heredia* v. *Davies,* 12 F. (2d) 500, 501.

In *The Steamship Russia,* 3 Ben. 471, 476–479, Fed. Cas. No. 12,168, the district court for the southern district of New York, took jurisdiction of a libel arising out of the collision of foreign vessels of different nationalities in New York harbor, but expressly treated the question as one within its discretion. In *The Bifrost,* 8 F. (2d) 361, 362, jurisdiction was declined in an action by foreign seamen for breach of contract in shipping articles, although it was urged that the articles were signed in this country and governed by its law. See also *Fairgrieve* v. *Marine Ins. Co.,* 94 Fed. 686, 687; *The Ester,* 190 Fed. 216, 221; *Cunard S. S. Co.* v. *Smith,* 255 Fed. 846, 848, 849; *The Eemdyjk,* 286 Fed. 385; *The Seirstad,* 12 F. (2d) 133, 134; *The Fredensbro,* 18 F. (2d) 983, 984; *The Sneland I,* 19 F. (2d) 528, 529; *The Falco,* 20 F. (2d) 362, 364. Compare *Neptune Steam Nav. Co.* v. *Sullivan Timber Co.,* 37 Fed. 159.

Courts of equity and of law also ocassionally decline, in the interest of justice, to exercise jurisdiction, where the suit is between aliens or non-residents or where for kindred reasons the litigation can more appropriately be conducted in a foreign tribunal.[6] The decisions relied upon by libellants are inapposite for several reasons. They were not in admiralty causes; nor did they involve alien or non-resident parties. Compare *Second Employers' Liability Cases,* 223 U. S. 1, 58, 59, with *Douglas* v. *New York, New Haven & Hartford R. Co.,* 279 U. S. 377. The cases of *Cohens* v. *Virginia,* 6 Wheat. 264, 404, and *McClellan* v. *Carland,* 217 U. S. 268, 281, denied the right to abdicate to state courts jurisdiction which the Constitution in positive terms entrusts to the federal judiciary.

Second. There is no basis for the contention that the District Court abused its discretion. All the parties were not only foreigners, but were citizens of Canada. Both the colliding vessels were registered under the laws of Canada; and each was owned by a Canadian corporation. The officers and the crew of each vessel—the material witnesses—were citizens and residents of that country; and so would not be available for compulsory attendance in the District Court. The cargo, in each case, was shipped under a Canadian bill of lading from one Canadian port to another. The collision occurred at a point where the inland waters narrowed to a neck and the District Court concluded that the colliding vessels proceeded

[6] Compare *Davis* v. *Farmers' Co-operative Equity Co.,* 262 U. S. 312; *Logan* v. *Bank of Scotland,* (1906) 1 K. B. 141; *Société du Gaz de Paris* v. *Armateurs Francais,* (1926) Sess. Cas. (H. L.) 13. See, for collections of authorities, Paxton Blair, "The Doctrine of Forum Non Conveniens in Anglo-American Law," 29 Col. L. Rev. 1; Roger S. Foster, "Place of Trial in Civil Actions," 43 Harv. L. Rev. 1217, "Place of Trial—Interstate Application of Intrastate Methods of Adjustment," 44 *id.* 41; Note, 32 A. L. R. 6.

in United States waters unintentionally. If the libellants are entitled to have applied the law of the United States in respect to the liability, the Canadian courts will, it must be assumed, give effect to it. The District Court embodied in the decrees an order that the respondent should appear and file security in any action which might be instituted by the petitioners in the admiralty courts of Canada, so that petitioners would not by dismissal of the libels lose the security gained by the foreign attachment. It is difficult to conceive of a state of facts more clearly justifying the refusal of a District Court to retain jurisdiction in a cause between foreigners.

Affirmed.

MR. JUSTICE CARDOZO took no part in the consideration or decision of these cases.

UNITED STATES *v.* LIMEHOUSE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA.

No. 513. Argued February 25, 26, 1932.—Decided April 11, 1932.

1. In § 211 of the Criminal Code, which declares unmailable "every obscene, lewd, or lascivious, and every filthy" book, letter, etc., "or other publication of an indecent character," and punishes the mailing of such things, the words "and every filthy" add a new class to the matter included when this Court construed the prohibition (R. S. 3893) as confined to matter "calculated to corrupt and debauch the minds and morals of those into whose hands it might fall" and to induce sex immorality. *Swearingen* v. *United States*, 161 U. S. 446. P. 426.
2. The section is *held* applicable to letters that contained much foul language and that charged the addressees, or persons associated with them, with sex immorality. *Id.*

58 F. (2d) 395, reversed.

APPEAL under the amended Criminal Appeals Act from an order quashing an indictment on demurrer.

Mr. Claude R. Branch, with whom *Solicitor General Thacher, Assistant Attorney General Dodds,* and *Mr. W. Marvin Smith* were on the brief, for the United States.

Messrs. William C. Wolfe and *John P. Grace* for appellee.

MR. JUSTICE BRANDEIS delivered the opinion of the Court.

Section 211 of the Criminal Code declares unmailable, " every obscene, lewd, or lascivious, and every filthy, book, pamphlet, picture, paper, letter, print, or other publication of an indecent character "; and provides that " whoever shall knowingly deposit, or cause to be deposited for mailing and delivery " any such unmailable matter " shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both."

Under this statute Limehouse was indicted in the federal court for eastern South Carolina. The indictment contained thirty counts, each charging the unlawful deposit of " a certain filthy letter and writing in a certain post office." Each set forth *verbatim* a separate letter. The letters contained much foul language; charged the addressees or persons associated with them with sexual immorality, and in some cases charged miscegenation and similar practices. They were coarse, vulgar, disgusting, indecent; and unquestionably filthy within the popular meaning of that term. On the ground that no letter was obscene, lewd or lascivious within the meaning given to those terms in *Swearingen* v. *United States,* 161 U. S. 446, the District Court sustained a demurrer and quashed the indictment. The case is here by direct appeal under the Criminal Appeals Act as amended.[1] We are of opinion that the judgment should be reversed.

[1] See Acts of March 2, 1907, c. 2564, 34 Stat. 1246; February 13, 1925, c. 229, 43 Stat. 936, 938; January 31, 1928, c. 14, 45 Stat. 54; and April 26, 1928, c. 440, 45 Stat. 466.

In *Swearingen* v. *United States,* decided in 1896, the indictment was under Revised Statutes § 3893, which made unmailable only "obscene, lewd, or lascivious" matter. This Court, being of opinion that those words should be given the meaning attributed to them at common law in prosecutions for criminal libel, directed that the judgment of conviction be reversed, because the language used was not "calculated to corrupt and debauch the mind and morals of those into whose hands it might fall" and induce sexual immorality. 161 U. S. at 451. The indictment here under review contains no reference to "obscene, lewd, or lascivious." The charge is of depositing "a certain filthy letter." It is brought under the amendment to § 3893 of the Revised Statutes made by § 211 of the Criminal Code, Act of March 4, 1909, c. 321, 35 Stat. 1088, 1129, which inserted the words, "and every filthy." Now the clause reads "every obscene, lewd, or lascivious, and every filthy, book, . . . letter."

The lower court failed to recognize that the amendment introduced, not merely a word, but a phrase. Disregarding the collocation of the words, it treated the amended clause as if it had read "obscene, lewd, lascivious, or filthy;" and then, applying the doctrine of *noscitur a sociis,* gave to "filthy" the meaning attributed in the *Swearingen* case to the words "obscene, lewd, or lascivious." Thus, the court emptied the amendment of all meaning. We think that it is a more natural reading of the clause to hold that by the amendment Congress added a new class of unmailable matter,—the filthy.[2] The let-

[2] For the legislative history of the amendment see Senate Doc. No. 68, Pt. 2, p. XVI, Cong. Docs. 4227, 4228, 57 Cong. 1st Sess., Senate Docs. Vols. 9, 10; House Report No. 2, Pt. 1, p. 2, 60th Cong., 1st Sess., Cong. Doc. 5225; Final Report, 1906, U. S. Commission to Revise the Laws, Vol. 1, p. 107 under § 8845, Vol. 2 (proposed bill), p. 1813; Senate Report No. 10, Pt. 1, p. 22, Pt. 2, p. 230, "Sec. 212," 60th Cong., 1st Sess., Cong. Doc. 5220; House Report No. 2, Pt. 1, p. 22, 60th Cong., 1st Sess., Cong. Doc. 5225; 42 Cong. Rec., Pt. 1, pp. 539–542, 564, 995–999; *id.,* Pt. 3, pp. 2391–2392; Vol. 43, Pt. 1, pp. 283–284, 2649; *id.,* Part 4, pp. 3217–18.

ters here in question plainly relate to sexual matters. We have no occasion to consider whether filthy letters of a different character fall within the prohibition of the Act.

Reversed.

MR. JUSTICE MCREYNOLDS thinks the judgment should be affirmed.

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

HAGNER ET AL. *v.* UNITED STATES.

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

No. 590. Argued March 14, 1932.—Decided April 11, 1932.

1. Defendants were convicted in the District of Columbia upon an indictment under § 215 of the Criminal Code, charging that, having devised there a scheme to defraud a named corporation in manner and form set forth, they did, for the purpose of executing the scheme, place in a designated post office in Pennsylvania, to be sent and delivered by the post office establishment to the addressee thereof, certain accounts enclosed in an envelope addressed to the company at a stated address in the District of Columbia. The indictment did not allege specifically that they caused the letter to be delivered by mail according to the direction thereon. *Held* that against objection first made by motion in arrest, and upon a record not containing the evidence or instructions, the indictment should be sustained as charging an offense committed within that District, because of the presumption that the letter was delivered there. Pp. 429–431.
2. Proof that a letter properly directed was placed in a post office, creates a presumption that it reached its destination in usual time and was actually received by the person to whom it was addressed. And the fact that receipt of the letter subjects the person sending it to a penalty does not alter the rule. P. 430.

3. The rigor of old common law rules of criminal pleading has yielded, in modern practice, to the general principle that formal defects, not prejudicial, will be disregarded. P. 431.
4. Rev. Stats., § 1025 does not dispense with the rule which requires that the essential elements of an offense must be alleged; but it authorizes the courts to disregard merely loose or inartificial forms of averment. Upon a proceeding after verdict at least, no prejudice being shown, it is enough that necessary facts appear in any form, or by fair construction can be found within the terms of the indictment. P. 433.

60 App. D. C. 335; 54 F. (2d) 446, affirmed.

CERTIORARI, 284 U. S. 614, to review the affirmance of a conviction for use of the post office in pursuance of a scheme to defraud.

Mr. Wm. E. Leahy, with whom *Messrs. Lucien H. Vandoren* and *Wm. J. Hughes, Jr.,* were on the brief, for petitioners.

The indictment charges no offense in the District of Columbia, but an offense in Pennsylvania. *Salinger* v. *Loisel,* 265 U. S. 264; *United States* v. *Sauer,* 88 Fed. 249; *Stewart* v. *United States,* 119 Fed. 89; *United States* v. *Conrad,* 59 Fed. 458.

Section 44, Title 18, of the Code of the District of Columbia limits the criminal jurisdiction of the Supreme Court of the District to crimes committed within the District.

It seems extremely doubtful that the provisions of Art. III, § 2 of the Constitution and the Sixth Amendment, relative to trial by jury of the State and district wherein the offense was committed, can be waived. Petitioners did not waive them in the present case.

The decision below is contrary to *Patton* v. *United States,* 281 U. S. 276.

Solicitor General Thacher, with whom *Messrs. Whitney North Seymour, Erwin N. Griswold,* and *Wm. H. Riley, Jr.,* were on the brief, for the United States.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

Petitioners were indicted in the Supreme Court of the District of Columbia under § 215 of the Criminal Code, U. S. C., Title 18, § 338, which provides:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, . . . shall, for the purpose of executing such scheme or artifice or attempting so to do, place or cause to be placed, any letter, . . . in any post-office, . . . to be sent or delivered by the post-office establishment of the United States, . . . *or shall knowingly cause to be delivered by mail according to the direction thereon,* . . . any such letter, . . . shall be fined not more than $1,000, or imprisoned not more than five years, or both."

The indictment charges that petitioners devised and intended to devise a scheme and artifice to defraud the Merchants' Transfer and Storage Company out of its money and property in manner and form set forth; and that "for the purpose of executing said scheme and artifice, on, to wit, April 19, 1927, did place and cause to be placed in the Post Office at the City of Scranton, in the State of Pennsylvania, to be sent and delivered by the Post Office establishment of the United States of America, to the addressee thereof, three certain accounts enclosed in a certain envelope addressed to Merchants' Transfer and Storage Company, 920 E Street, N. W., Washington, D. C."

Petitioners were arraigned, entered pleas of not guilty, and went to trial without challenging the sufficiency of the indictment or the jurisdiction of the court to hear and determine the case. They were found guilty by a jury, and thereupon moved in arrest of judgment upon the ground that the indictment failed to charge any offense within the jurisdiction of the court. The motion was overruled, and petitioners sentenced to pay a fine and

undergo a term of imprisonment. Upon appeal the judgment was affirmed by the court below. 60 App. D. C. 335; 54 F. (2d) 446.

The contention is that the indictment charges no offense committed in the District of Columbia, but only an offense committed in Pennsylvania; and, assuming this to be true, that the Supreme Court of the District of Columbia was without jurisdiction. Undoubtedly, the indictment is adequate to charge an offense committed in Pennsylvania; but the question first to be considered is whether upon this record and upon a motion in arrest of judgment, the indictment may be sustained as also sufficient to charge an offense committed within the District of Columbia. The record brought here does not contain the evidence or any of the trial proceedings. We have before us only the indictment, the fact that petitioners were arraigned, entered pleas, were convicted and sentenced, the motion in arrest of judgment and the order of the court overruling it, together with the formal docket entries relating thereto.

The defect said to exist is that the indictment fails to allege specifically that petitioners did " cause [the letter] to be delivered by mail according to the direction thereon." Obviously, in this particular, the indictment does not precisely follow the terms of the statute, but it does allege that the letter was deposited in a post office so addressed as to constitute a direction for its delivery to the addressee at a particular place in the District of Columbia. The rule is well settled that proof that a letter properly directed was placed in a post office, creates a presumption that it reached its destination in usual time and was actually received by the person to whom it was addressed. *Rosenthal* v. *Walker,* 111 U. S. 185, 193. And the fact that receipt of the letter subjects the person sending it to a penalty does not alter the rule. *Id.,* p. 194. If the indictment had alleged actual delivery of the letter in

question, the case for the government in this particular would have been made out by proof that the letter thus directed had been placed in the post office for transmission. The burden then would have been cast upon petitioners to show the contrary.

While, therefore, the indictment does not in set terms allege delivery of the letter, a presumption to that effect results from the facts which are alleged. In *Ball* v. *United States,* 140 U. S. 118, 133, 136, it was held that an indictment for murder which fails to allege the time of the death is fatally defective, since to constitute murder it is necessary that death shall occur within a year and a day from the time of the fatal stroke. But it appearing that the indictment then under consideration had been returned less than a year from the day of the assault, the court did not consider the objection fatal to the indictment in this particular, notwithstanding the absence of an allegation of the time of death.

The rigor of old common law rules of criminal pleading has yielded, in modern practice, to the general principle that formal defects, not prejudicial, will be disregarded. The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, "and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offence, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction." *Cochran and Sayre* v. *United States,* 157 U. S. 286, 290; *Rosen* v. *United States,* 161 U. S. 29, 34.

Section 1025 Revised Statutes (U. S. C. Title 18, § 556) provides:

"No indictment found and presented by a grand jury in any district or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or

other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant."

This section was enacted to the end that, while the accused must be afforded full protection, the guilty shall not escape through mere imperfections of pleading. We refer to a few of the many cases where the provision has been applied.

In *Grandi* v. *United States,* 262 Fed. 123, 124, the indictment charged the defendant with the receipt and possession of goods knowing they had been stolen from part of a shipment in interstate commerce, but failed to charge that the goods were in fact so stolen. A motion to quash had been denied, on the ground that the defendant could not have been misled to his prejudice. The court said— "The charge that defendant knew the goods to have been stolen naturally implies that the goods had been in fact stolen. The verdict should not be reversed on account of a defect so obviously technical and unsubstantial." An indictment under the Espionage Act, which denounces certain acts when the United States is at war, has been upheld notwithstanding a failure to allege that when the acts were committed the United States was at war, on the ground that the courts would take judicial notice of that fact. *Stephens* v. *United States,* 261 Fed. 590; *Bouldin* v. *United States,* 261 Fed. 674. An indictment for seditious conspiracy under Section 6 of the Criminal Code must charge that the conspiracy involved an intent to use force; but where the overt act was alleged, with the intent of engaging in armed hostility against the United States by attacking with force and arms, the original intent was necessarily implied and the indictment was sustained notwithstanding the lack of the specific allegation, since otherwise effect, fatal to the indictment, would be given to a mere imperfection in matter of form, not tending to the prejudice of the defendant. *Phipps* v. *United States,* 251

Fed. 879, 880. Omission from an indictment, drawn under the section of the Criminal Code now under consideration, of a specific allegation that the letter was "to be sent or delivered by the post office establishment" was not considered prejudicial where the indictment sufficiently alleged that the letter was placed in the post office properly addressed. *Olsen* v. *United States,* 287 Fed. 85, 90. See also *Cohen* v. *United States,* 294 Fed. 488, 490; *Gay* v. *United States,* 12 F. (2d) 433, 434; *Musey* v. *United States,* 37 F. (2d) 673, 674.

It, of course, is not the intent of § 1025 to dispense with the rule which requires that the essential elements of an offense must be alleged; but it authorizes the courts to disregard merely loose or inartificial forms of averment. Upon a proceeding after verdict at least, no prejudice being shown, it is enough that the necessary facts appear in any form, or by fair construction can be found within the terms of the indictment.

In the absence of the evidence and the charge of the court, we are free to assume that every essential element of the offense was sufficiently proved and that the question as to the delivery of the letter was submitted under appropriate instructions to the jury. The contrary of neither of these propositions is asserted. The indictment in the particular complained of is loosely and inartificially drawn and is not to be commended, but upon the record before us, and without deciding that the indictment would not have been open to some form of challenge at an earlier stage of the case, we are of opinion that after verdict it is not vulnerable to the attack here made upon it. *Dunbar* v. *United States,* 156 U. S. 185, 191 *et seq.* Compare *Pierce* v. *Creecy,* 210 U. S. 387, 401-2; *Ex parte Pierce,* 155 Fed. 663, 665; *United States* v. *Barber,* 157 Fed. 889, 891.

In view of this conclusion, it becomes unnecessary to consider the further question whether the trial court had

jurisdiction to try the indictment, if construed as charging the commission of an offense only in Pennsylvania.

Judgment affirmed.

COOMBES *v.* GETZ.

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 528. Argued March 21, 1932.—Decided April 11, 1932.

1. Where the contract clause of the Federal Constitution is involved, this Court will determine for itself whether there be a contract the obligation of which is within the protection of that clause, and whether that obligation has been impaired, and, likewise, will determine for itself the meaning and application of state constitutional or statutory provisions said to create the contract or by which it is asserted an impairment has been effected. P. 441.
2. One section of the California constitution provided that directors of corporations should be liable to the creditors for all moneys embezzled or misappropriated by corporate officers. Another section reserved power to alter or repeal all existing or future laws concerning corporations. While creditors who contracted with a corporation, with these provisions in force, were suing to enforce their rights against a director for money misappropriated by the corporation's officers, the section making the director liable was repealed. *Held:*

   (1) The right to enforce the liability was part of the creditors' contracts, perfected and fully vested before the repeal, and was protected by the contract clause of the Constitution and by the due process clause of the Fourteenth Amendment. Pp. 442, 448.

   (2) When the contracts were made, the Supreme Court of California had not decided that the repeal of a law creating such a contractual liability extinguishes the cause of action. P. 445.

   (3) The so-called reserved power of a State over corporations and their shareholders can not be used to destroy the vested rights of third persons or to impair the obligations of their contracts. P. 441.

213 Cal. 164; 1 P. (2d) 992; 4 P. (2d) 157, reversed.

CERTIORARI, 284 U. S. 613, to review a decision dismissing an appeal in a suit to enforce a director's liability to creditors of a corporation.

Mr. Joseph L. Lewinson, with whom *Messrs. W. H. Douglass, Nat Schmulowitz,* and *Bronte M. Aikins* were on the brief, for petitioner.

Cases involving stockholders' liability demonstrate that retroactive effect given to repeal of § 3 of Art. XII of the California constitution impairs the obligations of contracts. *Hawthorne* v. *Calef,* 2 Wall. 10; *Ochiltree* v. *Iowa Co.,* 21 Wall. 249; *Pittsburgh Steel Co.* v. *Equitable Society,* 226 U. S. 455; *Harrison* v. *Paper Co.,* 140 Fed. 385; *Blackburn* v. *Irvine,* 205 Fed. 217; *Woodbine Savings Bank* v. *Shriver,* 226 N. W. 374; *Pate* v. *Bank of Newton,* 116 Miss. 666; *Bank of Old Dominion* v. *McVeigh,* 20 Grat. (Va.) 457; *Smathers* v. *Bank,* 135 N. C. 411; *Barnes* v. *Arnold,* 23 Misc. (N. Y.) 197, affirmed, 45 App. Div. 314, 169 N. Y. 611; *St. Louis Ry. Supplies Co.* v. *Harbine,* 2 Mo. App. 134; *Barton Nat. Bank* v. *Atkins,* 72 Vt. 33; *Huntington* v. *Attrill,* 146 U. S. 657.

The liability of directors under § 3 of Art. XII of the California constitution uniformly has been held to be contractual and not penal. *Dean* v. *Shingle,* 198 Cal. 652; *Major* v. *Walker,* 23 Cal. App. 465; *O'Connell* v. *Walker,* 12 Cal. App. 694; *Hercules Oil Co.* v. *Hocknell,* 5 Cal. App. 702; *Brown* v. *Major,* 164 Fed. 673; *Winchester* v. *Howard,* 136 Cal. 432.

In character this liability is indistinguishable from stockholders' liability for corporate debts imposed by statute, creating an obligation contractual in its nature. *Bernheimer* v. *Converse,* 206 U. S. 516, 529.

Reserved power to alter or repeal corporation laws does not empower the State to destroy or impair the contract rights of creditors. See *Morris* v. *American Public Utilities,* 122 Atl. 696; *Yoakam* v. *Providence Biltmore Hotel Co.,* 34 F. (2d) 533; *Lord* v. *Equitable Society,* 194 N. Y. 221; *Re Mt. Sinai Hospital,* 250 N. Y. 103; *Bingham* v. *Savings Investment,* 101 N. J. Eq. 413; 77 Am. L. Reg. 256; 43 Harv. L. Rev. 656; 14 Minn. L. Rev.

413; Morawitz, Private Corporations, 2d ed., vol. 2, §§ 1093–1113; Beveridge, Life of Marshall, vol. 4, c. 5, pp. 220–281; *Stearns* v. *Minnesota,* 179 U. S. 223; *Douglas* v. *Kentucky,* 168 U. S. 488; *Sinking Fund Cases,* 99 U. S. 700; *Greenwood* v. *Union Freight R. Co.,* 105 U. S. 13.

Apart from corporation law, rights of a contractual or quasi contractual nature that have arisen out of transactions authorized by statute may not be destroyed or impaired by subsequent repealing statutes. *Pacific Mail S. S. Co.* v. *Joliffe,* 2 Wall. 450; *Wasser* v. *Congregation Agudath Sholom,* 262 Mass. 235.

The legislature may restrict or revoke, at its pleasure, any of the powers of a municipal corporation, but in doing so it may not impair the obligation of contracts. *Van Hoffman* v. *Quincy,* 4 Wall. 535; *Wolff* v. *New Orleans,* 103 U. S. 358.

It may not impose unconstitutional conditions upon corporations or persons dealing with them. *Liggett* v. *Baldridge,* 278 U. S. 104; *Terral* v. *Burke Construction Co.,* 257 U. S. 529; *San Mateo* v. *Southern Pacific Ry. Co.,* 13 Fed. 722; *Frost* v. *R. R. Commission,* 271 U. S. 583.

The position in the majority opinion below that the reservation of power contained in § 1 of Art. XII of the state constitution justified retroactive repeal, is untenable, because that section is *in pari materia* with § 16 of Art. I of the state constitution prohibiting the impairment of the obligation of contracts. Cf. *Omaha Water Co.* v. *Omaha,* 147 Fed. 1; *Western Union* v. *Hopkins,* 160 Cal. 106.

If the reserved power clause is an implied term of corporate contracts, it is also an implied term that the clause be read prospectively. *Smathers* v. *Bank,* 135 N. C. 411; *Barnes* v. *Arnold,* 23 Misc. 197, 45 App. Div. 314, 169 N. Y. 611; *Barton Nat. Bank* v. *Atkins,* 72 Vt. 33; *Schramm* v. *Done,* 135 Ore. 16.

Mr. Alfred Sutro, with whom *Messrs. Oscar Lawler, Frank D. Madison,* and *Eugene M. Prince* were on the brief, for respondent.

The power expressly reserved by the constitution of California to repeal all laws concerning corporations, was a part of the implied contractual arrangement relied upon by petitioner. *Covington* v. *Kentucky,* 173 U. S. 231; *Stanislaus County* v. *San Joaquin Co.,* 192 U. S. 201, 212–213; *Market Street Ry. Co.* v. *Hellman,* 109 Cal. 571.

The State has power to withdraw contractual rights or privileges granted by it, such as the privilege of suit here claimed by petitioner, and may even destroy an express contract, provided only the power to do so was clearly reserved. A repealable contract obviously can not be impaired by exercise of the power of repeal. *Missouri Pacific R. Co.* v. *Kansas,* 216 U. S. 262, 274–275; *Hammond Packing Co.* v. *Arkansas,* 212 U. S. 322, 346; *Citizens Savings Bank* v. *Owensboro,* 173 U. S. 636, 644; *Owensboro* v. *Cumberland Telephone Co.,* 230 U. S. 58.

The contingency of repeal, with a consequent extinction of petitioner's cause of action, was contemplated and provided for in the contract relied on by petitioner. Long before the extension of credit by his assignor, the Supreme Court of California had decided that pending causes of action upon a director's liability, unknown at common law, are, unless expressly saved, extinguished by the repeal of the law creating the liability, regardless of whether the liability is penal or contractual. Under the settled rule of this Court these decisions were a part of the contract relied upon by petitioner. *Warburton* v. *White,* 176 U. S. 484; *Moss* v. *Smith,* 171 Cal. 777; *Freeman* v. *Telephone Co.,* 184 Cal. 508; *Willcox* v. *Edwards,* 162 Cal. 455; *People* v. *Bank,* 159 Cal. 65, 67; *Wheeler* v. *Plumas County,* 149 Cal. 782, 785–786; *Flanigan* v. *Sierra County,* 196 U. S. 553; *Napa State Hospital* v. *Flaherty,* 134 Cal.

315, 317–318; *First Nat. Bank* v. *Henderson,* 101 Cal. 307, 309–310; *Lamb* v. *Schottler,* 54 Cal. 319, 322–326; *McMinn* v. *Bliss,* 31 Cal. 122, 126.

The California court had in many other cases invoked the reserved power in support of changes in the corporation laws which affected contract rights.

The reserved power provisions were adopted by the States, pursuant to the suggestions in the concurring opinion of Justice Story in the *Dartmouth College Case,* for the specific purpose of preserving the power to control private rights created by the corporation laws against the claim that the Contract Clause placed such rights beyond state control. *Looker* v. *Maynard,* 179 U. S. 46, 51–52.

Cases involving rights of the corporation or stockholders: *Miller* v. *State,* 15 Wall. 478; *Looker* v. *Maynard,* 179 U. S. 46; *Covington* v. *Kentucky,* 173 U. S. 231, 238; *Keokuk R. Co.* v. *Missouri,* 152 U. S. 301, 306; *Louisville Water Co.* v. *Clark,* 143 U. S. 1, 12; *Chesapeake & O. R. Co.* v. *Miller,* 114 U. S. 176, 188–189; *Citizens Bank* v. *Owensboro,* 173 U. S. 636; *Sherman* v. *Smith,* 1 Black 587; *McGowan* v. *McDonald,* 111 Cal. 57; *Shields* v. *Ohio,* 95 U. S. 319, 324; *Stanislaus County* v. *San Joaquin Co.,* 192 U. S. 201, 212, 213; *Peik* v. *Chicago & N. W. R. Co.,* 94 U. S. 164; *Spring Valley Water Works* v. *Schottler,* 110 U. S. 347; *Spring Valley Water Works* v. *Bartlett,* 16 Fed. 615; *Spring Valley Water Works* v. *San Francisco,* 61 Cal. 3; *United States* v. *Union Pac. R. Co.,* 160 U. S. 1, 36.

Cases involving contractual rights of third persons: *United States* v. *Union Pac. R. Co.,* 160 U. S. 1; *Looker* v. *Maynard,* 179 U. S. 46; *Schurz* v. *Cook,* 148 U. S. 397, 411.

Such authorities as the foregoing establish the principle that the State can pass any amendatory or repealing law which it otherwise could have passed under the reserved power, nothwithstanding that third persons, under the

prior law, have entered into contractual relations which indirectly or incidentally will be affected by the amendatory or repealing law. The State may exercise a right which it has expressly reserved, regardless of what the incidental result may be upon the ability of creditors to collect their claims.

While the reserved power is not without limit, and "sheer oppression and wrong can not be inflicted" under the guise of amendment or repeal (*Shields* v. *Ohio,* 95 U. S. 319, 324–325), it is not oppression or wrong for the State to retain, through the reserved power, control of that which the State granted—in this case the privilege of suit claimed by petitioner. *Sinking Fund Cases,* 99 U. S. 700, 720–721.

The reserved power necessarily gives something more than the mere right to change the law for the future, because such right as to the future would exist without any express reservation, and the court can not assume that the express reservation was made without any object.

If the extent of the reserved power is in doubt, every intendment is in favor of the decision of the Supreme Court of California, because the reserved power must be construed in favor of the State, and because all presumptions favor the constitutionality of laws.

Mr. Justice Sutherland delivered the opinion of the Court.

This is a suit brought in a California superior court by petitioner, on behalf of himself and other creditors, to recover from respondent, a director in Getz Bros. & Company, a California corporation, the amount of an indebtedness upon an open account for goods sold to the corporation by petitioner's assignor. The basis of the liability sought to be enforced is found in the following provision of § 3, Art. XII, of the California Constitution of 1879:

"The directors or trustees of corporations and joint-stock associations shall be jointly and severally liable to

the creditors and stockholders for all moneys embezzled or misappropriated by the officers of such corporation or joint-stock association, during the term of office of such director or trustee."

The bill alleges misappropriation and embezzlement of moneys of the corporation by its officers, with appropriate details to bring the respondent within the terms of the foregoing provision. The superior court sustained a demurrer to the complaint, for reasons not material here, and rendered final judgment accordingly. An appeal was taken to the state supreme court; and, while that appeal was pending, the provision of the state constitution above quoted was repealed. Thereupon, respondent moved to dismiss the appeal, on the ground that the cause of action had abated by reason of the repeal of the provision of law upon which it was based. The court sustained the motion and dismissed the appeal [*Coombes* v. *Franklin*] 1 P. (2d) 992; and subsequently denied a petition for rehearing, 4 P. (2d) 157.

In substance, it was held that the right accorded to corporate creditors was created by, and dependent alone upon, the constitutional provision, said to have the force of a statute; and that when that was repealed, the right fell with it, being still inchoate, not reduced to possession nor perfected by final judgment. It was conceded that the liability created by the constitution was in its nature contractual and, as a matter of law, entered into and became a part of every contract between the corporation and its creditors. But this contractual liability, it was said, was conditioned by the power reserved over corporate laws by § 1, Art. XII, of the constitution, as follows:

"All laws now in force in this state concerning corporations, and all laws that may be hereafter passed pursuant to this section, may be altered from time to time or repealed."

In virtue of this reservation of power, the state court held that the repeal of the liability provision was a known contingency constituting a part of the contract as much as the provision which imposed the liability.

The decision of the supreme court of a state construing and applying its own constitution and laws generally is binding upon this court; but that is not so where the contract clause of the Federal Constitution is involved. In that case this court will give careful and respectful consideration and all due weight to the adjudication of the state court, but will determine independently thereof whether there be a contract, the obligation of which is within the protection of the contract clause, and whether that obligation has been impaired; and, likewise, will determine for itself the meaning and application of state constitutional or statutory provisions said to create the contract or by which it is asserted an impairment has been effected. *Scott* v. *McNeal,* 154 U. S. 34, 45; *Mobile & Ohio R. Co.* v. *Tennessee,* 153 U. S. 486, 492 *et seq.; Stearns* v. *Minnesota,* 179 U. S. 223, 232–233; *Louisiana Ry. & Nav. Co.* v. *New Orleans,* 235 U. S. 164, 170; *Huntington* v. *Attrill,* 146 U. S. 657, 684; *New Orleans Waterworks* v. *La. Sugar Rfg. Co.,* 125 U. S. 18, 38; *Bridge Proprietors* v. *Hoboken Co.,* 1 Wall. 116, 144; *Jefferson Branch Bank* v. *Skelly,* 1 Black 436, 443.

In substance, the contention of respondent here is that the reserved power provision, read into the contract as one of its terms, authorizes an extinction by repeal of the creditor's cause of action, unless previously reduced to final judgment.

The authority of a state under the so-called reserved power is wide; but it is not unlimited. The corporate charter may be repealed or amended, and, within limits not now necessary to define, the interrelations of state, corporation and stockholders may be changed; but

neither vested property rights nor the obligation of contracts of third persons may be destroyed or impaired. *Tomlinson* v. *Jessup,* 15 Wall. 454, 459; *Lake Shore & M. S. Ry. Co.* v. *Smith,* 173 U. S. 684, 690. Compare *Greenwood* v. *Freight Co.,* 105 U. S. 13, 17, 19; *Shields* v. *Ohio,* 95 U. S. 319, 324. The right of this petitioner to enforce respondent's liability had become fully perfected and vested prior to the repeal of the liability provision. His cause of action was not *purely* statutory. It did not arise upon the constitutional rule of law, but upon the contractual liability created in pursuance of the rule. Although the latter derived its being from the former, it immediately acquired an independent existence competent to survive the destruction of the provision which gave it birth. The repeal put an end to the rule for the future, but it did not and could not destroy or impair the previously vested right of the creditor (which in every sense was a property right, *Ettor* v. *Tacoma,* 228 U. S. 148, 156; *Pritchard* v. *Norton,* 106 U. S. 124, 132) to enforce his cause of action upon the contract. *Ettor* v. *Tacoma, supra; Hawthorne* v. *Calef,* 2 Wall. 10; *Steamship Co.* v. *Joliffe,* 2 Wall. 450; *Ochiltree* v. *Railroad Co.,* 21 Wall. 249, 252-253; *Harrison* v. *Remington Paper Co.,* 140 Fed. 385, 390 *et seq.; Knickerbocker Trust Co.* v. *Myers,* 133 Fed. 764, 767.

The *Ettor* case, *supra,* involved a statute of the State of Washington which required municipalities to compensate for consequential damages. While that statute was in force actions were brought to recover for damages inflicted upon abutting property in consequence of street grading done by the authority and direction of the City of Tacoma. While these actions were being heard, the statute in respect of this liability was repealed; and the trial court directed a verdict for the city, on the theory that the right of action was statutory and fell with the

statute, there being no saving clause. Judgment was affirmed by the state supreme court and the case came here on writ of error. This court reversed the judgment and in the course of its opinion (pp. 155-156) said:

"The court below gave a retrospective effect to the amendatory and repealing act by holding that the effect of the repeal was to destroy the right to compensation which had accrued while the act was in force. The obligation of the city was fixed. The plaintiffs in error had a claim which the city was as much under obligation to pay as for the labor employed to do the grading. It was a claim assignable and enforceable by a common-law action for a breach of the statutory obligation.

"The necessary effect of the repealing act, as construed and applied by the court below, was to deprive the plaintiffs in error of any remedy to enforce the fixed liability of the city to make compensation. This was to deprive the plaintiffs in error of a right which had vested before the repealing act, a right which was in every sense a property right. Nothing remained to be done to complete the plaintiffs' right to compensation except the ascertainment of the amount of damage to their property. The right of the plaintiffs in error was fixed by the law in force when their property was damaged for public purposes, and the right so vested cannot be defeated by subsequent legislation."

In the *Hawthorne* case, *supra,* it was held that a state statute, incorporating a railroad company, which provided that the shares of the stockholders should be liable for the debts of the corporation, in effect pledged the liability or guarantee of the stockholders to the extent of their stock to the creditors of the company. "They thereby virtually agree to become security to the creditors for the payment of the debts of the company, which have been contracted upon the faith of this liability." Haw-

thorne supplied the corporation with materials to build its road and obtained judgment against it. Being unable to satisfy the judgment, he brought suit against Calef, a stockholder. The state supreme court rendered judgment against Hawthorne on the ground that the individual liability provision had been repealed by subsequent legislation, passed two months after the debt was contracted, and that such repeal had taken away the right to enforce the stockholders' liability. This court reversed on the ground that when the debt was contracted with the company the creditor held the stockholders' liability as security for its payment and the repealing act, by abolishing it, impaired the obligation of that contract.

In the *Joliffe* case, *supra,* this court had before it for determination substantially the same question that is involved here. There a California statute had created a Board of Pilot Commissioners, and authorized the board to license pilots, prescribe their qualifications, etc. The statute provided, with an exception, that when a vessel was spoken by a pilot and his service was declined he should be entitled to one-half pilotage fees. Joliffe, a pilot licensed under this statute, spoke a vessel of the Steamship Company and offered his service to pilot her out of the port of San Francisco. This was declined, and the pilot brought suit to recover for one-half the pilotage. Judgment was rendered against the company. Pending review in this court, a new statute was passed and the old act, in terms, repealed. The point was made that the claim to half pilotage fees having been given by statute, the right to recover fell with its repeal, and accordingly that the writ of error should be dismissed. This court held the point not well taken and declined to dismiss the writ. The transaction between the pilot and the ship, it was held (pp. 457–458), gave rise to a *quasi* contract.

"The claim of the plaintiff below for half-pilotage fees, resting upon a transaction regarded by the law as *quasi* contract, there is no just ground for the position that it fell with the repeal of the statute under which the trans-

action was had. When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute. And such is the position of the claim of the plaintiff below in the present action: the pilotage services had been tendered by him; his claim to the compensation prescribed by the statute was then perfect, and the liability of the master or owner of the vessel had become fixed."

Respondent, however, insists that long prior to the extension of credit to the corporation by petitioner's assignor, the decisions of the Supreme Court of California had established that the repeal of a law creating such a liability as that here involved extinguishes the cause of action; and that this amounted to a construction of the constitutional provision which entered into the contract and will be followed and applied by this court. *Warburton* v. *White,* 176 U. S. 484, 495; *Ennis Water Works* v. *Ennis,* 233 U. S. 652, 657. But upon a careful consideration of the California cases referred to, we are of opinion that they fail to establish the premises upon which the conclusion is based.

The decisions chiefly relied upon are *Moss* v. *Smith,* 171 Cal. 777; 155 Pac. 90, and *Willcox* v. *Edwards,* 162 Cal. 455; 123 Pac. 276. *Moss* v. *Smith* involved § 309 of the Civil Code of California, which created a liability against directors who had participated in the creation of debts in excess of the subscribed capital stock. Suit was brought to enforce this liability against directors of a public utility company, but it appearing that during the pendency of the suit § 309 had been repealed as to public utility companies without a saving clause, the court held that all pending causes of action were thereby extinguished. The basis of the decision was that the statute was of a penal character; the court, however, saying that

it was not of vital consequence whether it be viewed as penal or remedial. In any event, the liability was not held to be contractual. On the contrary, the court said (p. 787), "The right of action against these directors conferred by section 309 was a statutory right pure and simple, having no foundation in contract, nor any existence at common law." And it is significant that the court perceived a determinative distinction between § 309 of the Civil Code, and the provision of the constitution here under consideration. "Nothing in *Winchester* v. *Howard,* 136 Cal. 441," the court said (p. 785), "is in conflict with this; in the first place, because the directors, under section 3, article XII, of the constitution, which section was the foundation of the action, are liable solely for loss sustained by embezzlement and misappropriation—a liability involving loss and thus entirely different in character from that which appellants contend is imposed by section 309." "And that this statute," the court already had said (p. 783), "becomes highly penal in character the moment there is eliminated from it the consideration of compensation for loss, is at once apparent."

As already suggested, *Winchester* v. *Howard,* 136 Cal. 432; 64 Pac. 692; 69 Pac. 77, arose under § 3, Art. XII, of the state constitution, and the court there, in pointing out the purpose and effect of that provision, said (p. 444):

"The constitution merely makes the directors sureties for their fellow-directors and for the officers of the corporation for moneys, when so misappropriated as to make the officer misappropriating liable, and authorizing the creditors and stockholders to sue. . . . It is not penal in the technical sense, as it allows no recovery as a punishment, but only to compensate for a loss."

And again at p. 448:

"There is no difference between this case and the ordinary contract of a surety, unless it can be said that this liability is placed upon the director against his will.

Argument is hardly required to show that such is not the case. The state could refuse to grant corporate franchises altogether, or may grant on such terms as it pleases. The right to do business as a corporation, or to be a director, if I may speak of it as a right, is not a natural right. These directors took office knowing the responsibilities they assumed in so doing, and in the eye of the law did so as freely and voluntarily as they would have done had they signed a bond agreeing to be responsible for the corporate officers."

The distinction between the section of the code and the constitutional provision, therefore, is clear. In the former the liability is wholly statutory; in the latter it is contractual.

In *Willcox* v. *Edwards, supra,* the court had under consideration a constitutional provision repealing a former provision of the constitution making valid certain contracts for the sale of stocks on margin. The right to sue for the recovery of money paid under such a contract, the court held, was not a vested right depending upon a *quasi* contract arising by operation of law from the terms of the original constitutional provision, but a right dependent upon that provision standing alone; and that upon its repeal, without a saving clause, pending litigation fell for want of authority to maintain it. But it plainly appears that the decision would have been otherwise if the court had deemed the right to be contractual.

Another case relied upon is *Napa State Hospital* v. *Flaherty,* 134 Cal. 315; 66 Pac. 322, 323. There a state statute made certain kindred of indigent insane persons liable for their board at the insane asylum to which such insane persons were committed. The right to maintain an action for nonpayment was conferred upon the board of trustees or directors. Such an action was brought; but the court held that the remedy had been repealed and the cause of action fell with it, putting its decision upon

the ground that "where a right is created solely by a statute, and is dependent upon the statute alone, and such right is still inchoate, and not reduced to possession, or perfected by final judgment, the repeal of the statute destroys the remedy, unless the repealing statute contains a saving clause."

The case here is entirely different. There the obligation which was imposed upon the relatives was purely statutory. No act was contemplated on their part by way of assumption of an obligation in order to fix the liability. No element of a contract was present. Here both parties acted. The creditor extended credit to the corporation; and his action in so doing, under the state constitutional provision, brought into force for his benefit the constitutional obligation of the director, which, by becoming a director, the latter had voluntarily assumed and, thereby, in the eye of the law, created against himself a contractual liability in the nature of a suretyship. *Harrison* v. *Remington Paper Co., supra,* p. 388. Doubts which otherwise might have existed in respect of the character and effect of the transaction are no longer open. It is settled by decisions of this and other federal courts (*Ettor* v. *Tacoma,* and cases cited in connection therewith, *supra*) that, upon the facts here disclosed, a contractual obligation arose; and the right to enforce it, having become vested, comes within the protection of both the contract impairment clause in Art. 1, § 10, and the due process of law clause in the Fourteenth Amendment, of the Federal Constitution.

Decree reversed.

MR. JUSTICE CARDOZO, dissenting.

I am unable to concur in the reversal of this judgment.

"The directors or trustees of corporations and joint-stock associations shall be jointly and severally liable to the creditors and stockholders for all moneys embezzled

or misappropriated by the officers of such corporation or joint stock association during the term of office of such director or trustee" (Constitution of California, Art. XII, section 3, repealed Nov. 4, 1930).

The Supreme Court of California has said that the liability thus created is contractual (*Dean* v. *Shingle,* 198 Cal. 652; 246 Pac. 1049); but only in a qualified sense, as the expression of a legal fiction, is the statement true, nor did the court that made it intend otherwise. The liability would not be destroyed though the directors when assuming office and repeatedly thereafter were to repudiate the obligation utterly. They would be held for all their protestations upon a liability imposed by law. Indeed, they would have to answer to the creditors though they had ceased to be directors before the debts were in existence. If we put aside deceptive labels, borrowed from the law of quasi-contracts, the tangle is unraveled. The petitioner had a contract with the corporation and not with any one else (*Crane* v. *Hahlo,* 258 U. S. 142, 146), but annexed by law to the obligation of that contract was a liability purely statutory imposed on the directors (compare *Christopher* v. *Norvell,* 201 U. S. 216, 225; *Bernheimer* v. *Converse,* 206 U. S. 516, 529). The decisions in California, when analyzed, will be found to hold nothing to the contrary. They amount merely to this, that the liability created by the statute, which is enforcible also by the shareholders, is not penal but remedial, and is limited to the damage resulting to the corporation from the loss of the embezzled moneys as if the director were a surety to the corporation for the acts of its defaulting officer (*Dean* v. *Shingle, supra;* compare, *Winchester* v. *Howard,* 136 Cal. 432; 64 Pac. 692; 69 Pac. 77). In any event, this Court is not controlled by the label which the state court may affix to a liability growing out of a given state of facts. It determines for itself whether within the meaning of the Constitution the product is a contract to be pro-

tected by the power of the nation (*Appleby* v. *New York,* 271 U. S. 364, 380; *Coolidge* v. *Long,* 282 U. S. 582, 597). As to this, its judgment is guided by realities and not by words. The section of the Constitution whereby contracts are secured against impairment is aimed at true agreements, and not at quasi-contracts as distinguished from agreements implied in fact (*Crane* v. *Hahlo,* 258 U. S. 142, 146; *Louisiana* v. *New Orleans,* 109 U. S. 285, 288). Here whatever duty was assumed by a director through the acceptance of his office, was one that he owed in the first instance to the corporation itself, though the creditors and shareholders were privileged to enforce it (*Dean* v. *Shingle, supra*). Payment to the corporation before action brought would establish a defense, and even after action brought, any surplus remaining would go into the treasury. A distinction may exist between a liability cast upon directors and one cast upon the shareholders, who are quasi-partners in the venture (*Corning* v. *McCullough,* 1 N. Y. 47). To develop the implications of the distinction is unnecessary now.

I start then with the assumption that the petitioner had a contract with a corporation secured in certain contingencies by a statutory liability. I add the assumption that the State of California was not at liberty, after the contract had been made and a cause of action had accrued thereunder, to make the security defeasible if it was indefeasible in its origin. Either the article of the Constitution prohibiting the impairment of contracts (U. S. Constitution, Art. I, sec. 10) or the Fourteenth Amendment (which, however, is not invoked) might then stand in the way (*Hawthorne* v. *Calef,* 2 Wall. 10; *Steamship Co.* v. *Joliffe,* 2 Wall. 450; *Ettor* v. *Tacoma,* 228 U. S. 148; *Forbes Pioneer Boat Line* v. *Board of Commissioners,* 258 U. S. 338). The difficulty with the petitioner's case is this, that his security in its origin was not vested, but contingent. The meaning of the California constitution

is whatever the courts of California declare it to be. The obligation of the petitioner's contract is whatever the law of California attached to the contract at the hour of its making. Long before that time, the Supreme Court of that State had held that under the law of California a statutory cause of action, whether penal or remedial, may be canceled or modified by repeal or amendment until it has ripened into a judgment (*Moss* v. *Smith,* 171 Cal. 777, 788; 155 Pac. 90; *Napa State Hospital* v. *Flaherty,* 134 Cal. 315; 66 Pac. 322; *Willcox* v. *Edwards,* 162 Cal. 455, 466; 123 Pac. 276; compare *Coombes* v. *Franklin,* 1 P. (2d) 992; 4 P. (2d) 157, the decision under review). Consistent with these decisions is a provision of the Political Code: "Any statute may be repealed at any time, except when it is otherwise provided therein. Persons acting under any statute are deemed to have acted in contemplation of this power of repeal" (California Political Code, § 327, quoted in *Moss* v. *Smith, supra,* at p. 787). I assume for present purposes that the rule thus announced would be held of no effect if the statute and decisions declaring it had been made after Coombes became a creditor. Made as they were before that time, they were reservations or conditions limiting the statutory liability, and to be read into the statute, and hence into any contract to which the statute was an incident, as if written there in words (*Citizens' Savings Bank* v. *Owensboro,* 173 U. S. 636, 644; *Farmers Bank* v. *Fed. Reserve Bank,* 262 U. S. 649, 660). "The claim of an irrepealable contract cannot be predicated upon a contract which is repealable" (*Hammond Packing Co.* v. *Arkansas,* 212 U. S. 322, 346). Either the petitioner took his cause of action subject to such infirmities or contingencies as were attached to it by the law of the State of its creation, or he did not take anything.

This view of the case puts aside as irrelevant the provision of the California constitution permitting the

amendment of corporate charters, and sustains the repeal upon the ground that the liability by the law of its creation was defeasible in its origin.

MR. JUSTICE BRANDEIS and MR. JUSTICE STONE join in this dissent.

UNITED STATES *v.* LEFKOWITZ ET AL.

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

No. 466. Argued February 19, 23, 1932.—Decided April 11, 1932.

1. A complaint charged that the defendants conspired to sell, possess, transport, furnish, deliver and take orders for intoxicating liquors, contrary to the National Prohibition Act; and that as part of the conspiracy, they were to use a designated room in soliciting orders for the liquor, having it delivered by express companies or other carriers, collecting for it and sharing in the proceeds. Under a warrant of arrest issued upon the complaint, the defendants were arrested in the room designated, which was used as an office and was not alleged to be a place where liquor was, or ever had been, manufactured, sold, kept or bartered, or which contained fixtures or other things essential or intended to be used for the sale of liquors to be consumed on the premises or otherwise. Upon making the arrests, the officers explored all desks, cabinets, waste baskets, etc., for evidence of guilt and found various books, papers and other things intended to be used in soliciting orders for liquor, which they took away. *Held:*

   (1) The mere soliciting of orders from the room, in connection with the other uses alleged in the complaint, was not sufficient to constitute maintenance of a nuisance therein. P. 462.

   (2) There was no ground for saying that the accused were arrested while committing the crime of conspiracy or nuisance. P. 463.

   (3) The search was not justifiable as an incident of the arrests. P. 463.

2. The Fourth Amendment forbids every search that is unreasonable and is construed liberally to safeguard the right of privacy. P. 464.

3. A search for and seizure of an individual's papers, solely that they may be used as evidence to convict him of crime, is unconstitutional, even when done under a search warrant issued upon ample evidence and precisely describing the things to be taken and their whereabouts. P. 464.
4. The decisions of this Court distinguish searches of one's house, office, papers or effects merely to get evidence to convict him of crime, from searches such as those made to find stolen goods for return to the owner, to take property that has been forfeited to the Government, to discover property concealed to avoid payment of duties for which it is liable, and from searches such as those made for the seizure of counterfeit coins, burglars' tools, gambling paraphernalia and illicit liquor in order to prevent the commission of crime. P. 465.
5. The Constitution is to be construed with regard to the principles upon which it was established. The direct operation or literal meaning of the words used do not measure the purpose or scope of its provisions. P. 467.

52 F. (2d) 52, affirmed.

CERTIORARI, 284 U. S. 612, to review a reversal of an order of the District Court, 47 F. (2d) 921, which denied a motion for the suppression, as evidence, of papers, etc., seized at the time of serving a warrant of arrest.

Solicitor General Thacher, with whom *Assistant Attorney General Youngquist,* and *Messrs. John J. Byrne* and *Wilbur H. Friedman* were on the brief, for the United States.

Since the arrests were lawful, search of the premises where they were made was lawful; and the search made was not unreasonable.

Until *Boyd* v. *United States,* 116 U. S. 616, it was settled that the admissibility of evidence was not affected by the illegality of the means by which it was obtained. *State* v. *Reynolds,* 101 Conn. 224, 237; *Adams* v. *New York,* 192 U. S. 585; Wigmore, Ev., 2d. ed., § 2183. Hence the question of the extent of the right of arresting officers to make search arose, typically, in actions against them

for damages. *Banks* v. *Farwell,* 21 Pick. 156; *Spalding* v. *Preston,* 21 Vt. 9; *Houghton* v. *Bachman,* 47 Barb. 388; *Closson* v. *Morrison,* 47 N. H. 482; *O'Connor* v. *Bucklin,* 59 N. H. 589; *Dillon* v. *O'Brien,* 16 Cox C. C. 245 (Ex. Div. Ire. 1887); *Thatcher* v. *Weeks,* 79 Me. 547; *Carmichael* v. *McCowen,* (1897–1903) Newfoundland 597; *Getchell* v. *Page,* 103 Me. 387; cf. *Kneeland* v. *Connally,* 70 Ga. 424; *State* v. *Robbins,* 124 Ind. 308; *North* v. *People,* 139 Ill. 81; *Newman* v. *People,* 23 Colo. 300. The case of *Entick* v. *Carrington,* 19 How. St. Tr. 1029, was an action of trespass against officers who had, under a general warrant, entered the plaintiff's premises, arrested him, and searched for and seized his books and papers.

The general rule was early stated to be that upon making a valid arrest the arresting officer was privileged to search for and seize articles connected with the crime either as its fruits, or as the means by which it was committed, or as evidence which would aid in securing a conviction. Such articles might be taken if on the person of the prisoner or otherwise in his possession. Bishop, Crim. Pro., (1st ed. 1866), § 668; cases cited *supra.*

While the doctrine of the *Boyd* case is too firmly established in federal law to be questioned now, its historically questionable basis (see *Hale* v. *Henkel,* 201 U. S. 43, 71–73; *Adams* v. *New York,* 192 U. S. 585, 597–598; Wigmore, Ev. (2d ed.), §§ 2184, 2250, 2264; cf. *Wilson* v. *United States,* 221 U. S. 361), and its rejection by the great majority of the state courts (see *People* v. *Defore,* 242 N. Y. 13, 21; *State* v. *Reynolds,* 101 Conn. 224), should not be forgotten when the attempt is made, as it is in the present case, to extend the effect of the Fourth Amendment far beyond its express language and original intent.

Early approach to the present problem is illustrated by the leading case of *Dillon* v. *O'Brien,* 16 Cox C. C. (Ex. Div. Ire.) 245, approved in *Weeks* v. *United States,* 232

U. S. 383, 392; *Carroll* v. *United States,* 267 U. S. 132, 158. See also *Carmichael* v. *McCowen,* (1897–1903) Newfoundland 597; *Agnello* v. *United States,* 269 U. S. 20; *United States* v. *Lee,* 274 U. S. 559, 563; *Marron* v. *United States,* 275 U. S. 192.

Thus there is a substantial body of authority in this Court upholding the privilege of an arresting officer to search for and seize evidence of the crime for which the arrest is made, as indicated in the *Weeks* and *Carroll* cases, *supra,* and the means or instrumentalities used in its commission, as held in the *Agnello* and *Marron* cases, *supra;* and the privilege extends "to all parts of the premises used for the unlawful purpose." In the *Marron* case the premises searched consisted of an entire second floor of six or seven rooms; in the present case, a business office room, about ten by twenty feet, divided by a partition, which "constituted but single premises." The books and papers, here seized as an incident of a lawful arrest, were properly taken, in so far as they were means used in furthering the conspiracy for which the arrest was made.

The case is lacking in those factors, the sum of which was regarded by this Court in the *Go-Bart* case, 282 U. S. 344, as rendering the search there involved unreasonable.

The court in *Entick* v. *Carrington* was not dealing with a search incidental to a lawful arrest. Such a search is totally different from the type of search aimed at by the Fourth Amendment. Cf. *Banks* v. *Farwell,* 21 Pick. 156, 159; *North* v. *People,* 139 Ill. 81, 107.

It was the duty of the officers to make a thorough search of the premises under the control of the accused for the instrumentalities of the crime. See *Getchell* v. *Page,* 103 Me. 387; *Smith* v. *Jerome,* 47 Misc. (N. Y.) 22; *Commonwealth* v. *Stubler,* 84 Pa. Super. Ct. 32; *State* v. *Magnano,* 97 Conn. 543; *Banks* v. *Farwell,* 21 Pick. 156; *State* v. *Robbins,* 124 Ind. 308.

As held by this Court in the *Marron* case, *supra,* nothing can be searched for and seized under a search warrant except that which is specifically described in it; whereas, upon a lawful arrest, the arresting officers have the right to search for and seize any articles used in the commission of the offense for which the arrest is made. A search of the latter sort is necessarily general in the sense that it is for things the existence of which can not be known until they are found.

Searches "general" in this sense as well as in their scope have been upheld by the state courts as incidents of lawful arrests. *Argetakis* v. *State,* 24 Ariz. 599; *Pickett* v. *Marcucci's Liquors,* 112 Conn. 169; *Commonwealth* v. *Phillips,* 224 Ky. 117; *Smith* v. *Jerome,* 47 Misc. (N. Y.) 22; *Commonwealth* v. *Stubler,* 84 Pa. Super. Ct. 32. See also *Dillon* v. *O'Brien,* 16 Cox C. C. 245; *Carmichael* v. *McCowen,* (1897–1903) Newfoundland 587.

Mr. David P. Siegel, with whom *Mr. Milton B. Seasonwein* was on the brief, for respondents.

The arrests, though lawful, did not justify a ransacking and exploratory search of the premises. *Weeks* v. *United States,* 232 U. S. 383; *Silverthorne* v. *United States,* 251 U. S. 385; *Boyd* v. *United States,* 116 U. S. 616; *Gouled* v. *United States,* 255 U. S. 295; *Marron* v. *United States,* 275 U. S. 192; *Go-Bart Importing Co.* v. *United States,* 282 U. S. 344; *Federal Trade Comm.* v. *American Tobacco Co.,* 264 U. S. 298; *Agnello* v. *United States,* 269 U. S. 20.

These principles have been vigorously enforced in the Circuit Courts of Appeals and in the District Courts. *Flagg* v. *United States,* 233 Fed. 481; *In re 191 Front Street,* 5 F. (2d) 282; *United States* v. *Kirschenblatt,* 16 F. (2d) 202; *United States* v. *1013 Crates,* 52 F. (2d) 49; *United States* v. *Mills,* 185 Fed. 318; *United States* v. *Mounday,* 208 Fed. 186; *United States* v. *Epstein,* 33 F. (2d) 982; *United States* v. *Kraus,* 270 Fed. 578; *United States* v. *Rembert,* 284 Fed. 996; *Haywood* v. *United States,* 268 Fed. 795.

Two separate and distinct prohibitions are contained in the Fourth Amendment. It prohibits unreasonable searches and seizures of any kind, however made. It interdicts, secondly, the issuance of search warrants except where probable cause exists and where the warrant is upon oath or affirmation and contains a particular description of the place to be searched and the persons or things to be seized. To limit the constitutional protection against unreasonable searches and seizures to those made under the guise of a search warrant, as is contended for by the Solicitor General, is to emasculate the Amendment. So interpreted it would be reduced to a form of words and it could be evaded as the occasion arose.

Wherever possible, a search warrant and a warrant of arrest should be employed by the arresting officers. See *Carroll* v. *United States,* 267 U. S. 132. This was not done here because the officers knew that they could not obtain a search warrant for the evidentiary material which they sought. See *Kirvin* v. *United States,* 5 F. (2d) 282; and *United States* v. *Kirschenblatt,* 16 F. (2d) 202.

General exploratory searches for evidence are within the proscription of the Fourth Amendment even where there is not an actual physical rummaging of the premises.

Section 33 of Title 27, U. S. Code, is limited to cases where intoxicating liquor is sold or stored on the premises.

At the time when the respondents were arrested the alleged conspiracy had been consummated; the agents did not, nor could they, see conspiracy being committed.

In *Dillon* v. *O'Brien,* 16 Cox C. C. (Ex. Div. Ire.) 245, the papers seized were actually being used when the arrest was made. This Court cited that decision in the *Weeks* case only for the proposition that the person of the accused might be searched upon his arrest.

Mr. Justice Butler delivered the opinion of the Court.

The question is whether searches and seizures claimed by the Government to have been made as lawfully inci-

dent to the arrest of respondents on a warrant for conspiracy to violate the National Prohibition Act transgressed their rights under the Fourth and Fifth Amendments.

January 12, 1931, a prohibition agent complained to a United States commissioner in the southern district of New York that commencing June 21, 1930, and continuing to the time of making the complaint Henry Miller (meaning respondent Lefkowitz), Jane Doe (meaning respondent Paris), and another person called Richard Doe did conspire to sell, possess, transport, furnish, deliver and take orders for intoxicating liquor contrary to the National Prohibition Act. The complaint alleged it was a part of the conspiracy that from room 604 at 1547 Broadway defendants should solicit orders for liquor, have it delivered by express companies or other carriers, collect for it and share the proceeds. It alleged certain overt acts but they have no significance upon the question under consideration. The allegations of the complaint show that the complaining witness had knowledge and information of facts amply sufficient to justify the accusation.

The commissioner issued his warrant, to which was attached a copy of the complaint, commanding the marshal and his deputies to arrest defendants. It was given to a deputy marshal for execution and he, the complaining witness and three other prohibition agents, went to room 604. The room was about ten feet wide and twenty feet long and was divided by a partition. In its outer portion, there were a stenographer's desk used by respondent Paris, a towel cabinet and a waste basket; and in the inner part another desk and basket. When the deputy marshal and agents entered, Lefkowitz was in the room. The deputy marshal arrested him, and thereupon one of the prohibition agents searched and took from his person various papers and other things all of which were given to the deputy marshal and later turned over to the assistant United States attorney. The agents opened all the

drawers of both desks, examined their contents, took therefrom and carried away books, papers and other articles.[1] They also searched the towel cabinet and took

---

[1] From the outer desk were taken:

1. Black leather covered loose-leaf note book, containing alphabetical list of names and addresses.

2. An envelope marked room 604, 1547 Broadway, New York City, containing a 1929 New York State motor vehicle registration certificate 5 Y–2555, issued to Milton Hordish, 635 Kelly Street, Bronx, N. Y., for a 1929 Nash sedan.

3. A bill or statement amounting to $25 addressed to Herman Bernstein, c/o Bernstein & Lefkowitz, 1547 Broadway, New York City, apparently sent by doctors whose names appear on the statement.

4. Business card bearing the name of Dave Scherl, giving his address and telephone number and residence telephone number.

5. A number of business cards reading as follows:

Dan Lefkowitz Herman Bernstein
LEFKOWITZ & BERNSTEIN
1547 Broadway
New York City
Chickering 4–8928 Room 604

6. About 25 sheets of typewriter paper with the heading thereon of "William Salmon, 1547 Broadway, room 604."

7. About 75 envelopes addressed to various persons throughout the United States, some of which contained undated letters bearing the typewritten signature "William Salmon" to the effect that he had made his yearly change of name from "Henry Miller" to "William Salmon" and that he had received a new stock of merchandise that was for sale.

8. A cardboard covered loose-leaf binder, containing an alphabetical typewritten list of names and addresses.

9. A stenographer's note book and text book.

10. Three raffle books.

From the inner desk were taken:

1. Bottle partly full of alcohol (not shown to be intended or fit for beverage).

2. Telephone address book containing names of persons and telephone numbers.

3. Business card.

4. Blank order book with some of the slips torn out.

5. Several business cards of Bernstein & Lefkowitz.

papers from it.[2] There was no breaking, as the desks and cabinet were not locked. They also took the contents of the baskets and later pasted together pieces of papers found therein.[3] Respondent Paris came in while the room was being searched, and the deputy marshal arrested her. All the searches and seizures were made without a search warrant. The prohibition agents delivered to the special agent in charge all the things taken from the desks, cabinet and baskets. And, until delivered to the assistant United States attorney after Lefkowitz applied to the court for their suppression and return, they were held by the agent in charge for use in making further investigations concerning the conspiracy referred to in the complaint.

January 21, 1931, the district court on the application of Lefkowitz issued an order to show cause, why the court

[2] Several typewritten loose leaf sheets unbound bearing names and addresses of numerous people throughout the United States.

[3] The writings made by pasting together pieces of paper taken from the baskets were:

Edison Company electric light bill from October 31 to December 3, 1930, for room 604 at 1547 Broadway, reading No. 6223, bill addressed to Herman Bernstein at 1547 Broadway.

Edison Company electric light bill from December 3, 1930, to January 5, 1931, for room 604 at 1547 Broadway, reading No. 6248, bill addressed to Herman Bernstein at 1547 Broadway.

Unsigned letter from Lefkowitz & Bernstein, 1547 Broadway, to L. Lieberman, 34 E. 12th Street, New York City, for merchandise delivered, $80.

Some 32-odd salesmen's order slips for intoxicating liquor with customers' names and addresses.

N. Y. Telephone Co. receipt No. 6225 dated January 8, 1931, acknowledging having received from Daniel Lefkowitz sum of $14.26 for telephone service, Chic. 4–8928.

A pencil memorandum containing names with amounts set after the respective names, some of these names being Myers, Gordon, French, and K.

A pencil memorandum containing names with amounts set after the names, one of them being Dan, $537, the total amount of the memorandum being $1,497.95.

should not make an order for the suppression of evidence obtained by reason of the search of the room and for the return of all the books, papers and other things belonging to Lefkowitz. With the exception of some things that the prosecuting attorney did not wish to retain as evidence and which he had returned to Lefkowitz before the hearing, all the papers and articles seized were produced and submitted to the court. The Government submitted, in opposition to respondents' motions, affidavits of its attorney, the deputy marshal and three of the four prohibition agents.

The district court denied respondents' motions. It construed the complaint to charge felony under § 37 of the Criminal Code defining conspiracy and § 21 of the National Prohibition Act defining nuisance; held that each of the papers seized was within the meaning of §§ 21 and 22, kept and used to maintain a nuisance; said that "it is enough if the conspiracy was there or the petitioners or their associates had any of them gathered in the room to conduct the conspiracy or do any act to effect its object"; that "it might well follow that, in the sense of the word as used in the *Carroll* case, [267 U. S. 132] the seized papers were contraband"; and that "it is not necessary, however, to determine that, for the reason that, at least within the *Marron* case [275 U. S. 192] all the papers were but usual and ordinary means of carrying on a business of the character presented here." 47 F. (2d) 921.

The Circuit Court of Appeals reversed. 52 F. (2d) 52. It found that the search of the person of Lefkowitz was lawful and that the things taken might be used as evidence against him; held that the things seized when the office and furniture were explored did not belong to the same class; referred to "the firmly rooted proposition that what are called general exploratory searches throughout premises and personal property are forbidden," and said that it did not matter "whether the articles of personal property

opened and the contents examined are numerous or few, the right of personal security, liberty, and private property is violated if the search is general, for nothing specific, but for whatever the containers may hide from view, and is based only on the eagerness of officers to get hold of whatever evidence they may be able to bring to light. . . . Such a search and seizure as these officers indulged themselves in is not like that in *Marron* v. *United States* . . . where things openly displayed to view were picked up by the officers and taken away at the time an arrest was made. The decision that does control is *Go-Bart Co.* v. *United States,* 282 U. S. 344. Indeed, this case differs in its essential facts from that one so slightly that what is said in that opinion in characterizing the search made will apply with equal force to this one, which must accordingly be held unreasonable."

The Government maintains that the facts and circumstances set forth in the affidavits submitted by it constitute a sufficient showing not only that the arrests were lawfully made on a valid warrant for the offense charged in the complaint but also that, without regard to the warrant, the arrests were justified as having been made for a felony by officers believing upon probable cause that respondents committed it and that when arrested they were actually engaged in the commission of crime. And it argues that, since the arrests were lawful, the search of the place where they were made was lawful, and that, having the right to search the premises, the officers were bound to do it thoroughly.

It is clear that respondents were arrested in the proper execution of the warrant, and not by officers acting without a warrant merely upon probable cause to believe that respondents were guilty of a felonious conspiracy. The offense charged involved the use of the room only to solicit orders for liquor, to cause it to be delivered, to collect for it and divide proceeds. There is nothing in

the record to support the claim that, at the time of the arrest, the offense for which the warrant issued or any other crime was being committed in the presence of the officers. It cannot be claimed that they saw conspiracy being committed or that any understanding, agreement or combination was being had, made or formed in their presence. *Go-Bart Co.* v. *United States, supra,* 357. The maintenance of a nuisance or conspiracy to maintain one is not involved. The complaint did not attempt or purport to charge either. It did not allege that the room was a place where liquor was or ever had been manufactured, sold, kept or bartered or that it contained fixtures or other things essential or intended to be used for the sale of liquor to be consumed on the premises or otherwise. The mere soliciting of orders from the room in connection with the other uses alleged in the complaint is not sufficient to constitute the maintenance of nuisance therein. See §§ 18, 21 and 22, National Prohibition Act, 27 U. S. C., §§ 30, 33 and 34. *Miller* v. *United States,* 300 Fed. 529, 535. *Schechter* v. *United States,* 7 F. (2d) 881. Cf. *Todd* v. *United States,* 48 F. (2d) 530, 532. The facts and circumstances stated in the affidavits of the prohibition agents do not support but are inconsistent with and negative the assertions therein contained to the effect that respondents were arrested while committing the crime of conspiracy or nuisance.

The only question presented is whether the searches of the desks, cabinet and baskets and the seizures of the things taken from them were reasonable as an incident of the arrests. And that must be decided on the basis of valid arrests under the warrant. Save as given by that warrant and as lawfully incident to its execution, the officers had no authority over respondents or anything in the room. The disclosed circumstances clearly show that the prohibition agents assumed the right contemporaneously with the arrest to search out and scru-

tinize everything in the room in order to ascertain whether the books, papers or other things contained or constituted evidence of respondents' guilt of crime, whether that specified in the warrant or some other offense against the Act. Their conduct was unrestrained. The lists printed in the margin show how numerous and varied were the things found and taken.

The Fourth Amendment forbids every search that is unreasonable and is construed liberally to safeguard the right of privacy. *Byars* v. *United States,* 273 U. S. 28, 32. Its protection extends to offenders as well as to the law abiding. *Weeks* v. *United States,* 232 U. S. 383. *Agnello* v. *United States,* 269 U. S. 20, 32. The authority of officers to search one's house or place of business contemporaneously with his lawful arrest therein upon a valid warrant of arrest certainly is not greater than that conferred by a search warrant issued upon adequate proof and sufficiently describing the premises and the things sought to be obtained. Indeed, the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime. *United States* v. *Kirschenblatt,* 16 F. (2d) 202, 203. *Go-Bart Co.* v. *United States, supra,* 358.

Respondents' papers were wanted by the officers solely for use as evidence of crime of which respondents were accused or suspected. They could not lawfully be searched for and taken even under a search warrant issued upon ample evidence and precisely describing such things

and disclosing exactly where they were. *Gouled* v. *United States,* 255 U. S. 298, 310.

These searches and seizures are to be distinguished from the seizure of a ledger and some bills that was sustained in the *Marron* case. There, prohibition officers lawfully on the premises searching for liquor described in a search warrant, arrested the bartender for crime openly being committed in their presence. He was maintaining a nuisance in violation of the Act. The offense involved the element of continuity, the purchase of liquor from time to time, its sale as a regular thing for consumption upon the premises and other transactions including the keeping of accounts. The ledger and bills being in plain view were picked up by the officers as an incident of the arrest. No search for them was made. The ledger was held to be part of the outfit actually used to commit the offense. The bills were deemed so closely related to the business that it was not unreasonable to consider them as employed to carry it on. While no use was being made of the book or papers at the moment of the arrest, they—like containers, chairs and tables for customers, the cash register, glasses and supplies—were kept to be utilized when needed. The facts disclosed in the opinion were held to justify the inference that when the arrest was made the ledger and bills were in use to carry on the criminal enterprise.

Here, the searches were exploratory and general and made solely to find evidence of respondents' guilt of the alleged conspiracy or some other crime. Though intended to be used to solicit orders for liquor in violation of the Act, the papers and other articles found and taken were in themselves unoffending. The decisions of this court distinguish searches of one's house, office, papers or effects merely to get evidence to convict him of crime, from searches such as those made to find stolen goods for return

to the owner, to take property that has been forfeited to the Government, to discover property concealed to avoid payment of duties for which it is liable, and from searches such as those made for the seizure of counterfeit coins, burglars' tools, gambling paraphernalia and illicit liquor in order to prevent the commission of crime. *Boyd* v. *United States,* 116 U. S. 616, *et seq. Weeks* v. *United States,* 232 U. S. 383, 395. *Gouled* v. *United States, supra,* 306. *Carroll* v. *United States, supra.*

In *Entick* v. *Carrington,* 19 How. St. Tr. 1029, Lord Camden declared that one's papers are his dearest property, showed that the law of England did not authorize a search of private papers to help forward conviction even in cases of most atrocious crime, and said (p. 1073): "Whether this proceedeth from the gentleness of the law towards criminals, or from a consideration that such a power would be more pernicious to the innocent than useful to the public, I will not say. It is very certain, that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it should seem, that search for evidence is disallowed upon the same principle. There too the innocent would be confounded with the guilty."

The teachings of that great case were cherished by our statesmen when the Constitution was adopted. In *Boyd* v. *United States, supra,* 630, this Court said: "The principles laid down in this opinion [*Entick* v. *Carrington*] affect the very essence of constitutional liberty and security. . . . They apply to all invasions on the part of the Government and its employees of the sanctity of a man's home and the privacies of life. . . . A forcible and compulsory extraction of a man's own testimony or of his private papers to be used as evidence to convict him of 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." And this Court has always construed provisions of the Constitution having regard to the principles upon which it was established. The direct operation or literal meaning of the words used do not measure the purpose or scope of its provisions. *M'Culloch* v. *Maryland,* 4 Wheat. 316, 406, 407, 421. *Boyd* v. *United States, supra. Byars* v. *United States, ubi supra.*

This case does not differ materially from the *Go-Bart* case and is ruled by it. An arrest may not be used as a pretext to search for evidence. The searches and seizures here challenged must be held violative of respondents' rights under the Fourth and Fifth Amendments.

Affirmed.

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

SHRIVER *v.* WOODBINE SAVINGS BANK.

APPEAL FROM THE SUPREME COURT OF IOWA.

No. 158. Submitted December 3, 1931.—Argued March 14, 15, 1932.—Decided April 11, 1932.

1. An objection to a state statute upon the ground that it places on a stockholder an obligation to pay assessments not imposed by the statutes in force when he acquired his stock invokes the due process clause of the Fourteenth Amendment rather than the contract clause of the Constitution. P. 474.
2. A party making this objection based on the Fourteenth Amendment must show that the statutes existing when his contract was made did not impose the obligation laid by the later statute; and if this is doubtful upon the face of the statutes and for want of an authoritative construction by the state court, the objection will not be entertained. P. 475.
3. When the statutes in force when a stockholder of a bank acquired his stock make him liable to pay assessments to restore impairments of the bank's capital, the obligation may be enforced, in the absence of an exclusive statutory remedy, by a common-law action of debt, or its modern equivalent. P. 476.

4. The mere fact that the statutes defining the stockholder's liability to pay create a special remedy for collecting the assessments by sale of his shares does not imply that this is to be exclusive (the statutes not so declaring) and that the more plenary remedy by common-law action is withheld. P. 477.
5. The enactment of a statute specifically authorizing suit against stockholders for deficiencies after sale of their stock to pay assessments can not be taken as a legislative determination that under the earlier statutes no common-law remedy for the collection of assessments existed. P. 479.
6. Mere variations of the remedy, or the creation of new ones, even though more onerous, for the enforcement of a pre-existing obligation to pay assessments in full, are unobjectionable. *Id.*

212 Iowa 196; 236 N. W. 10, affirmed.

APPEAL from a judgment affirming a recovery by the bank in its suit against stockholders to collect assessments.

Messrs. H. B. Claypool and *W. E. Wallace*, with whom *Mr. James M. Parsons* was on the brief, for appellant.

Where a statute creates a right, and provides a special remedy, that remedy is exclusive. This is the general rule of construction. *Carondelet* v. *Picot*, 38 Mo. 125; *Pollard* v. *Bailey*, 20 Wall. 520, 527; *Andover & Medford Corp.* v. *Gould*, 6 Mass. 40; *Dollar Savings Bank* v. *United States*, 19 Wall. 227, 238; *Jefferson County Farm Bureau* v. *Sherman*, 208 Iowa 614, 618; *Cole* v. *Muscatine*, 14 Iowa 296; *Lease* v. *Vance*, 28 Iowa 509; *Conrad* v. *Starr*, 50 Iowa 470; *Hullitt* v. *Bell*, 85 Fed. 98–102; *Chester Glass Co.* v. *Dewey*, 16 Mass. 94–101; *Mechanics Foundry & Machine Co.* v. *Hall*, 121 Mass. 272; *Camden* v. *Allen*, 26 N. J. L. 398; *Globe Newspaper Co.* v. *Walker*, 210 U. S. 356.

The rule is founded upon the thought that where the legislature designates the remedy it impliedly prohibits any other and thus limits the liability. *United States* v. *Stevenson*, 215 U. S. 190; *Dollar Savings Bank* v. *United States*, 19 Wall. 227, 238. Cf. *Davis* v. *Mills*, 194 U. S. 451, 454; *Slater* v. *Mexican Nat. R. Co.*, 194 U. S. 120.

The Iowa Act in its original form and as codified did not in terms impose a personal liability on shareholders to pay the assessment. It was optional with the shareholder. He had the right to pay the assessment and protect his stock, otherwise he lost sufficient of his stock to pay the assessment. The Iowa legislature in this Act did not use any language appropriate to create a personal liability.

Surely where the legislature is creating a liability, its language is not to be extended by construction. *Brunswick Terminal Co.* v. *National Bank*, 192 U. S. 386, 390; *Alexander* v. *Crosby,* 143 Iowa 50, 54; *Highway Trailer Co.* v. *Janesville Electric Co.,* 187 Wis. 161.

If it had been the intent of the legislature to create a personal liability against the shareholder for the assessment, it would have used language such as "it shall be the duty of the stockholder to pay," "the shareholder shall pay," "the shareholder shall be liable," or similar language. *Chester Glass Co.* v. *Dewey,* 16 Mass. 94, 101; *Mechanics Machine Co.* v. *Hall,* 121 Mass. 272, 275; *Land Co.* v. *Hernegan,* 126 Mass. 155; *Carondelet* v. *Picot*, 28 Mo. 125.

It will be noticed that in § 3 of this Act (25 G. A., c. 29) the legislature used the term "individually liable" when providing the liability of bank directors who failed to proceed and make the assessment.

It is not reasonable to say that a shareholder was personally liable for the assessment to restore impaired capital after his stock had been sold. The sale of the stock terminated his relationship with the corporation. The statute, passed in 1925, does expressly provide for a personal liability after sale of the stock, and also provides a remedy by suit.

The Iowa court has held in other cases that there was no personal liability upon stockholders under the statutes prior to the enactment of § 9248–a1 Code, 1927. *Leach*

v. *Arthur Savings Bank,* 203 Iowa 1052; *Andrew* v. *Peoples State Bank,* 234 N. W. 542, 546.

Mr. J. A. Murray, with whom *Messrs. H. L. Robertson* and *C. A. Bolter* were on the brief, for appellee.

Mr. Earl F. Wisdom, Assistant Attorney General of Iowa, by leave of Court, for L. A. Andrew, Superintendent of Banking of Iowa, as *amicus curiae. Mr. John Fletcher,* Attorney General, was on the brief.

Mr. Justice Stone delivered the opinion of the Court.

Appellee, an Iowa banking corporation, brought suit in the courts of that State to enforce the personal liability of appellant, its stockholder, for an assessment made under the Iowa statutes, which provide for the restoration of any impairment of capital of a bank, by assessment pro rata of the stockholders. The case comes here on appeal, Jud. Code § 237, from a judgment of the Iowa Supreme Court sustaining the assessment and upholding the statute, which is assailed as infringing the contract and due process clauses of the Federal Constitution. 212 Ia. 196.

On different dates between 1891 and 1917, appellant acquired twenty-six shares of the capital stock of the appellee. Appellee, originally incorporated in 1891, was reincorporated in 1911, appellant acquiring a like number of shares in the new corporation. At that time the liability to assessment of the stockholders in the bank was controlled by §§ 1878, 1879, and 1880 of the 1897 Iowa Code, now appearing as §§ 9246–9250 of the 1927 Iowa Code. These sections authorize the superintendent of banks to require any impairment of capital of a state bank to be restored by an assessment upon its stockholders, as directed by an appropriate order of the superintendent, " fixing the amount of the assessment." Section 9247 imposes on the directors a duty to cause the deficiency in capital, thus determined, to be made good " by a ratable

assessment upon the stockholders, for the amount of stock held by them," and requires the proper officers of the bank to give written notice of the assessment, addressed to the several stockholders, which " shall state the entire sum to be raised and the amount due from the addressed stockholder." Section 9248 provides:

" Should any stockholder neglect or refuse to pay his assessment within ninety days from the date of mailing notice thereof, the board of directors shall cause a sufficient amount of the capital stock held by such stockholder to be sold at public auction to make good the deficiency, after giving ten days' notice thereof by personal service or by posting the same in the bank, and publishing it in some newspaper of the county in which the bank is located, which notice shall recite the assessment made, the amount due thereunder from the stockholder, and the time and place of sale; proof of all which may be made in the manner provided in the preceding section."

After appellant had acquired his stock, a new section was added by the Act of March 13, 1925, c. 181, Iowa Laws, 1925, now § 9248–a (1) of the 1927 Iowa Code, reading as follows:

" Should the proceeds of a sale under the preceding section of all of the stock of any stockholder be insufficient to satisfy his entire assessment liability, he shall be personally liable for the deficiency, which may be collected by suit brought in the name of the bank against such stockholder."

Following the adoption of this later section, the Superintendent of Banks determined that appellee's capital had been impaired 100% and directed an assessment accordingly. Acting under § 9248, appellee's directors sold appellant's stock for $1.00 a share, and the present suit was brought to recover the deficiency.

In answer to the objection that the Act of 1925 subjected appellant to an unconstitutional burden, appellee

relies on the statutes antedating appellant's acquisition of his stock, as imposing on him personal liability to pay the assessment, without the aid of the quoted provision of the later Act. It also argues that even if there was no such liability under the earlier statutes, the adoption of the Act of 1925 was but an exercise of the power reserved to the legislature by § 12, Art. 8 of the Iowa Constitution, and by § 1619 of the 1897 Iowa Code (§ 1090 Iowa Code of 1873), providing that "the articles of incorporation, by-laws, rules and regulations of corporations hereafter organized . . . shall at all times be subject to legislative control, and may be at any time altered, abridged or set aside by law. . . ." It is insisted that the power thus reserved embraces not only a legislative withdrawal of any grant of immunity to the stockholders of the bank, from liability for its debts, but extends to the imposition on them of a new and continuing liability to pay any assessment levied for the restoration of capital of the bank.

The Supreme Court of Iowa found it unnecessary to pass upon these contentions. Expressly disclaiming any purpose to decide either of them, it assumed, for purposes of decision, that under the earlier statutes the deficiency after sale of the stock could not be collected from the stockholder. It then proceeded to point out that from the beginning the authorized assessments were not upon the stock of the bank, but upon the stockholders personally, and said, 212 Iowa 196, 201, 202; 236 N. W. 10, 12:

"According to the original statute, the stockholder was personally and primarily liable for the assessment, and section 9248 and its predecessors had to do only with the remedy and nothing else. Then, assuming that the only remedy originally made for the collection of the assessment was to confiscate the stockholder's stock, nevertheless, so far as the remedy was sufficient, the stockholder was personally liable for the assessment. This burden

was cast upon the stockholder himself, even though the only remedy to enforce the obligation was by the sale of the stock. Consequently, appellant's obligation in the premises had not been increased. He was always obligated to pay the assessment. Of course, if he did not pay, the only remedy under the statute was to sell his stock; yet the obligation to pay was there just the same. Now, under the new legislation, the stockholder's liability has not been increased, but rather the remedy for enforcing that obligation has been changed. Were the remedy a part of appellant's contract, a change thereof would amount to an impairment. *Barnitz* v. *Beverly,* 163 U. S. 118; *Conley* v. *Barton,* 260 U. S. 677.

"Obviously in the case at bar, however, we are not confronted with a case where the remedy became a part of the contractual obligation. There is not a syllable in the statutory contract which in any way indicates that the remedy is a part of the agreement. It was not said by the legislature that there could be no other or different remedy. Hence it was perfectly proper for the law making body to adopt section 9248-a (1) of the 1927 Code, because such amendatory legislation pertained to the remedy only. The purpose of this legislative enactment was to afford a more appropriate remedy for an obligation already existing against appellant. Ever since becoming a stockholder of the appellee bank, he was obligated to pay any legal assessment made for the purpose of repairing the capital stock. This new legislation simply recognized that obligation and afforded a more complete remedy to enforce the same. No new obligation was created by the amendment, but rather the old was recognized and a better way to enforce it provided."

We find it unnecessary to answer the question implicit in this disposition of the case, whether an obligation can be said to exist apart from a remedy to enforce it—whether within the meaning of the contract clause any personal

obligation of a stockholder in the nature of a contract to restore his pro rata share of any impairment of the corporate capital, can be said to exist independently of some means or remedy for enforcing it in addition to the sale of his stock.

Nor are we called on to discuss here the suggestion that even though the sale of the stock was the only means of collecting assessments, the contract and due process clauses do not guarantee appellant against the selection and the application to him of any other remedy reasonably adapted to carrying out the policy and purpose plainly declared by the earlier statute, to require complete restoration of any impairment of corporate capital by assessment of the stockholders. See *Henley* v. *Myers,* 215 U. S. 373; *League* v. *Texas,* 184 U. S. 156, 158; *Graham & Foster* v. *Goodcell,* 282 U. S. 409, 426; *Milliken* v. *United States,* 283 U. S. 15, 20 *et seq.; People* v. *Adams State Bank,* 272 Ill. 277; 111 N. E. 989; *Irvine* v. *Elliott,* 203 Fed. 82, 96–97. For we conclude that appellant does not sustain the burden which rests on him of establishing that the later statute is unconstitutional because imposing a liability to which he was not subject under the earlier one.

In strictness, appellant presents no question of impairment of the obligation of contract, for it is not insisted that either party has been deprived by legislative action of any right or remedy secured by the statute in force when appellant acquired his stock. His objection is not directed to any such impairment of right or obligation. It is rather that the Act of 1925 imposed on him a personal obligation where none existed before, and that its imposition, by fiat of the law, after he had bought his stock, operates to deprive him of property without due process of law. See *League* v. *Texas, supra,* pp. 158, 161. This contention is, of course, without support if the liability to pay the full assessment declared by the earlier stat-

ute was then enforcible by any appropriate form of remedy. See *Pinney* v. *Nelson,* 183 U. S. 144, 147; *Whitman* v. *Oxford National Bank,* 176 U. S. 559; *Thomas* v. *Matthiessen,* 232 U. S. 221.

The Supreme Court of Iowa has given no authoritative answer to the question whether, before the Act of 1925, there was any remedy other than sale of the stock by which an assessment might be recovered from a stockholder. In the present case it did not decide the question, contenting itself with the observation that "the only remedy *under the statute* was to sell his stock." In two earlier cases, arising long after appellant acquired his stock, it had expressed the view that the only remedy for enforcing the payment of assessments was by sale of the shareholder's stock. See *Leach* v. *Arthur Savings Bank,* 203 Iowa 1052, 1057; 213 N. W. 772; *Andrew* v. *People's State Bank,* 211 Iowa 649; 234 N. W. 542, 546. But in neither was this statement necessary to the decision, nor did it have any bearing on the question actually decided. Both followed the passage of the Act of 1925. In no other cited case has the question been considered.

Where legislation is assailed as impairing the obligation of contract, this Court, in defining the scope of the constitutional immunity, will determine for itself what the contract is for whose protection the immunity is invoked. See *Appleby* v. *New York,* 271 U. S. 364, 379, 380. In the circumstances of this case, also, where the alleged infringement of the Fourteenth Amendment turns on the asserted non-existence of a contractual obligation to do that which the challenged statute exacts, appellant must satisfy this Court that he was not so bound. For, here, the nature and extent of his obligation depend upon the construction of a local statute which the highest court of the state has indicated by its latest decision is still open for determination. See *Brunswick Terminal Co.* v.

National Bank of Baltimore, 192 U. S. 386, 392 *et seq.*; cf. *Broad River Power Co.* v. *South Carolina,* 281 U. S. 537, 540.

The meaning of the sections now in question must be ascertained in the light of the legislative policy of the state. They are a part of its public laws, dealing with a subject of public concern, the stability and solvency of state banking institutions. See *Noble State Bank* v. *Haskell,* 219 U. S. 104, 111, 112; *Bank of Oxford* v. *Love,* 250 U. S. 603. Those laws confer on the Superintendent of Banks full authority to require a bank to restore impairments of its capital. § 9235 Iowa Code of 1927 (§1572 Iowa Code of 1873). He may cause its liquidation if it refuses to comply with his order or is in an insolvent or unsafe condition, or the interests of creditors require it to be closed. §§ 9238, 9239 Iowa Code of 1927 (§ 1572 Iowa Code of 1873). The stockholders are made individually liable to creditors, §§ 9251–9252 Iowa Code of 1927 (§ 1882 Iowa Code of 1897); and any bank, whether its charter has expired or not, may be dissolved by vote of three-fourths of the stockholders. § 9277 Iowa Code of 1927 (§ 1857 Iowa Code of 1897).

These sections exhibit an unmistakable purpose to maintain the banks of the state in a solvent condition with capital unimpaired, which is specifically given effect by §§ 9246–9248 of the 1927 Code. By these sections the appellant was made aware, when he acquired his stock, that in the event of any impairment of capital of the bank, the Superintendent of Banks was authorized to "require an assessment upon the stockholders" and to fix "the amount of the assessment required"; that the directors of the bank could be ordered by the Superintendent to "cause such a deficiency to be made good by a ratable assessment upon the stockholders"; that the officers of the corporation were required to give notice to each stockholder of "the entire sum to be raised and the

amount due from the addressed stockholder"; and that after 90 days, allowed for the payment of the assessment, his stock might be sold upon an advertisement required to "recite the assessment made and the amount due thereunder from the stockholder." These are phrases importing legal liability. They define an obligation imposed by the statute upon the stockholders to pay the assessments to the bank, see *Whitman* v. *Oxford National Bank,* 176 U. S. 559, 562, by which alone the complete restoration of impaired capital, which is the legislative purpose, could be secured with certainty.

If no specific remedy of any kind had been provided to compel payment of assessments, there could be little doubt that the effect of these provisions would have been to create an obligation or liability, quasi-contractual in nature, on the part of stockholders acquiring their stock after the enactment, to pay to the bank a sum certain, that is, the assessment when made, for which the common law affords a remedy in debt or *indebitatus assumpsit* or its modern equivalent. See *Mills* v. *Scott,* 99 U. S. 25; *Whitman* v. *Oxford National Bank,* 176 U. S. 559; *Flash* v. *Conn,* 109 U. S. 371; *Bernheimer* v. *Converse,* 206 U. S. 516, 529; *Price* v. *United States,* 269 U. S. 492, 500; *United States* v. *Chamberlin,* 219 U. S. 250; *Meredith* v. *United States,* 13 Pet. 486, 493; *Steamship Co.* v. *Joliffe,* 2 Wall. 450, 457; *Converse* v. *Hamilton,* 224 U. S. 243, 253; *Farmers Loan & Trust Co.* v. *Funk,* 49 Neb. 353; 68 N. W. 520. See James B. Ames, Lectures on Legal History, Implied Assumpsit, 149, 161.

In the face of the sweeping language of the statute, the mere fact that it gave a remedy by sale of the stock cannot be taken as necessarily precluding resort to the common law remedy, which would otherwise be available and by which alone the liability declared could in many cases be successfully enforced. The summary remedy by a sale would often be a speedy and convenient alternative

method of enforcing the statutory liability to pay assessments. But it is not stated to be exclusive and its adoption involves no necessary inconsistency with the continued existence of a common law remedy for the recovery of the sum certain fixed by the assessment and declared to be due by the statute. In those instances where the impairment is more than 50% of the capital, the remedy by sale would be insufficient to enforce the liability declared. No reason is suggested why such a remedy should, by mere implication, be deemed exclusive or why the statute should be so construed by inference as to defeat its obvious purpose, or limit or destroy the liability which, in plain terms, it has created.

It is true that where a statute creates a liability and provides a remedy by suit specially adapted to its enforcement, other less appropriate common law remedies are impliedly excluded. See *Evans* v. *Nellis,* 187 U. S. 271; *Pollard* v. *Bailey,* 20 Wall. 520, 527; *Williamson* v. *American Bank,* 115 Fed. 793; cf. *Middletown Bank v. Railway Co.,* 197 U. S. 394. And in every case conditions precedent to the statutory liability must be satisfied before any form of remedy can be resorted to. *Fourth National Bank* v. *Francklyn,* 120 U. S. 747; *Middletown Bank* v. *Railway Co., supra; State National Bank* v. *Sayward,* 91 Fed. 443. But here the conditions of liability, the order of the Superintendent of Banks, the assessment by the directors, and the notice fixing the amount of appellant's obligation, have all been performed. Here, the remedy provided is a summary and only partially effective supplement or alternative to that which the common law affords for enforcing the obligation to pay a sum certain, which, when fixed by the prescribed assessment, is declared to be due and owing. The very fact that the remedy is on its face inadequate to compel full performance of the obligation declared, is persuasive that it was

not intended to be exclusive of applicable common law remedies, by which complete performance might be secured.

Administrative remedies for the collection of taxes, if not made exclusive by statute, do not preclude the recovery of the tax by a common law action of debt. *Price* v. *United States,* 269 U. S. 492, 500; *United States* v. *Chamberlin,* 219 U. S. 250, 262; *Dollar Savings Bank* v. *United States,* 19 Wall. 227, 238–239; *Meredith* v. *United States,* 13 Pet. 486, 493; see *Stockwell* v. *United States,* 13 Wall. 531, 542. And in general the liability of stockholders to assessment under local statutes is deemed transitory in nature, enforcible by common law remedies in states other than that of the corporation, although special statutory forms of remedy given by the local statute could not be resorted to elsewhere. See *Whitman* v. *Oxford National Bank,* 176 U. S. 559; *Hancock National Bank* v. *Farnum,* 176 U. S. 640; *Hale* v. *Hardon,* 95 Fed. 747; *Rhodes* v. *United States National Bank,* 66 Fed. 512; *Dexter* v. *Edmands,* 89 Fed. 467.

The enactment of the statute of 1925, specifically authorizing a suit for the deficiency after the sale of the stock, served to remove any possible doubts and rendered certain what may previously have been thought by some to be uncertain. But it can hardly be taken to be a legislative determination that under the earlier statutes no common law remedy could be availed of for the collection of assessments. If not, mere variations of the remedy or the creation of new ones, even though more onerous, for the enforcement of a pre-existing obligation to pay assessments in full, are unobjectionable. See *Hill* v. *Merchants' Mutual Ins. Co.,* 134 U. S. 515; *League* v. *Texas,* 184 U. S. 156, 158; *Henley* v. *Myers,* 215 U. S. 373; *Conley* v. *Barton,* 260 U. S. 677.

In the absence of an authoritative construction by the state court of the statutes in force when appellant acquired

his stock, we cannot say that he was not personally liable for his pro rata share of any impairment of the bank's capital assessed against him while he remained a stockholder, whether his stock was sold under § 9248-a (1), or not, or that the later statute, which provided a remedy for enforcing such liability, infringed his constitutional rights.

Affirmed.

PACIFIC CO., LTD. *v.* JOHNSON, STATE TREASURER.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 270. Argued January 8, 1932. Reargued March 17, 1932.—Decided April 11, 1932.

A California corporation acquired municipal bonds at a time when, by the state constitution, they were declared to be "free and exempt from taxation." Subsequently, pursuant to a change in the constitution, a statute subjected the corporation to a tax on the privilege of doing business in the State, measured by a specified percentage of its net income, in the computation of which the statute directed the inclusion of "all interest received from federal, state, municipal or other bonds." *Held* (assuming that the exemption was contractual and extended to the income derived from the bonds exempted):

1. That the tax immunity granted was not broad enough to secure freedom from taxation of the corporate franchise measured by the tax-exempt income, and therefore the obligation of the bond contracts was not impaired by the tax. Pp. 489–491.

2. In the absence of applicable state decisions antedating the alleged impairment of contract, the extent of the tax exemption is to be decided by the aid of generally accepted principles of construction. P. 489.

3. Until the adoption of the constitutional amendment in 1928 (§ 16, Art. XIII), and of the Bank and Corporation Franchise Tax Act (Cal. Stats., 1929, c. 13, p. 19), there was no provision in California for taxing corporate franchises by the method here in question; and, until this case, no decision of any court of the

State had determined whether the granted immunity extends to a tax on corporate franchises because tax-free income or property is included in its measure. P. 489.

4. On the other hand, long before adoption of the constitutional tax exemption, the distinction was well-recognized between a tax on the privilege of exercising the corporate franchise and a tax on corporate property or income, even though the former was measured by the latter; and tax immunity of the property or income was not deemed to extend to the franchise. P. 489.

5. Grants of immunity from taxation are strictly construed. P. 491.

6. In as much as the tax exemption, as granted, did not extend to immunity from inclusion of the interest in the measure of a corporate franchise tax, and in as much as the State had power to use that measure in taxing the franchise, the fact that the legislature saw fit to include the interest on such bonds by express mention when its inclusion would otherwise have been implied in the general term net income, does not invalidate the tax, no discrimination being involved. Pp. 491–495.

212 Cal. 148; 298 Pac. 489, affirmed.

APPEAL from a judgment affirming the dismissal of the complaint in a suit by the appellant corporation to recover from the State Treasurer the part of a franchise tax which resulted from including its income from tax-free municipal bonds in the measure of its franchise tax.

Mr. Stuart Chevalier, with whom *Messrs. Melvin D. Wilson, Joseph D. Peeler, Donald O. Hunter,* and *Robert N. Miller* were on the brief, for appellant.

When the State of California induced citizens to purchase the bonds of its political subdivisions by constitutionally exempting such bonds from taxation, and then, after the bonds were sold, changed its constitution and its tax system for the purpose of subjecting to tax the very property which it had held out as non-taxable, it did the very thing which the contract clause of the Federal Constitution was intended to stop. For a clear view of the history of the legislation and statement of the principles

involved see diss. op. of Langdon, J., in court below. In *Macallen Co.* v. *Massachusetts*, 279 U. S. 620, the facts were in all material respects identical with those in this case. It appears to be the only decision of this Court involving squarely the validity of a state tax "measured by" the income from the State's own tax-exempt bonds, where from the legislative history of the Act and from the language of the Act itself it is clear that "the avowed purpose and self-evident operation of the statute is to reach such income," and that the legislature is deliberately "aiming" thereat.

Can it be fairly said that the inclusion of such income was merely fortuitous and incidental to the main purpose of the law? Cf. remarks of Cardozo, J., in *People* v. *Knapp,* 230 N. Y. 48, 57.

The fact that the State was seeking to comply with the federal statute furnishes no defense.

Section 5219, R. S., attempts to give authority to the State to tax only national banks, according to or measured by their "net income received from all sources." Even if Congress has succeeded by this Act in authorizing the States to tax such banks on income from United States bonds, a question still left open (see 279 U. S. at p. 633), certainly Congress has not attempted to nor can authorize the States to tax otherwise exempt state bonds.

While there are, strictly speaking, certain differences between the Massachusetts and California situations, the differences are of a nature either too trivial to warrant grounding a distinction, or of such a nature that they make out a still stronger case here for the application of the rule recognized in the *Macallen* case than did the Massachusetts statute. Thus, in California, the inclusion of interest from tax-exempt securities is permitted by an entirely new scheme of taxation, instead of inferentially through amendment of an existing statutory plan by re-

moving a specific exemption. Again, the California statute includes interest from tax-exempt securities in a manner different from that employed by Massachusetts, but one which makes the intent to reach such income more obvious from the face of the statute than was true of the *Macallen* tax.

Under the *Macallen* case, the Court is not restricted to the face of the statute in finding the legislative motive, but may consider the history of the legislation and its environment.

We are dealing with an explicit constitutional prohibition against the impairment of the obligation of contracts, and not with an implied constitutional inhibition as to relative sovereignties, and not, therefore, with a mere burden on impliedly exempt subjects where the validity of the tax may, to some extent, depend upon the degree or the weight of the burden. Certainly, the contract is either impaired or it is not. Cf. *Gillespie* v. *Oklahoma,* 257 U. S. 501, making a distinction as between burdens on interstate commerce where the degree of the burden may be considered, and on federal instrumentalities. As said in *People* v. *Bond,* 10 Cal. 563, 571, "The question is not whether by legislative alteration of a contract a party is to be injured seriously or slightly; he has a right to the substance of the contract as he has made it." "The objection to a law, on the ground of its impairing the obligation of a contract, can never depend upon the extent of the change which the law effects in it. Any deviation from its terms . . . impairs its obligation." *Green* v. *Biddle,* 8 Wheat. 1, 84.

But the burden is not in fact slight in this case. It is very substantial. More than one-half of appellant's tax is based upon the income from these exempt securities and the Report of the California Tax Commission shows that it was expected that "substantial revenue" would be raised from this very source.

The State has attempted to tax bonds which, by its constitution, it had declared to be non-taxable and which it had sold to the public under a solemn assurance that no taxes would be imposed thereon. It was to prevent just such an act by a State that the prohibition was embodied in our Federal Constitution.

We can not believe that a State may be permitted thus to repudiate or impair its contracts by the device of a so-called "franchise" tax and thereby to reduce the value of its obligations in the hands of innocent holders. *Bronson* v. *Kinzie,* 1 How. 311, 318; *Green* v. *Biddle,* 8 Wheat. 1, 17.

Other leading decisions of this Court plainly show that appellant is entitled to prevail in this suit. *Educational Films Corp.* v. *Ward,* 282 U. S. 379, 393; *Miller* v. *Milwaukee,* 272 U. S. 713; *Northwestern Mut. Life Ins. Co.* v. *Wisconsin,* 275 U. S. 136; *Gillespie* v. *Oklahoma,* 257 U. S. 501; *Weston* v. *Charleston,* 2 Pet. 449; *Home Savings Bank* v. *Des Moines,* 205 U. S. 503; *Choctaw & Gulf R. Co.* v. *Harrison,* 235 U. S. 292; *Galveston, H. & S. A. Ry. Co.* v. *Texas,* 210 U. S. 217; *Cook* v. *Pennsylvania,* 97 U. S. 566; *Almy* v. *California,* 24 How. 169; *Indian Oil Co.* v. *Oklahoma,* 240 U. S. 522; *Federal Land Bank* v. *Croslan,* 261 U. S. 374; *Fairbank* v. *United States,* 181 U. S. 283; *Alpha Portland Cement Co.* v. *Massachusetts,* 268 U. S. 203; *Frick* v. *Pennsylvania,* 268 U. S. 473; *National Life Ins. Co.* v. *United States,* 277 U. S. 508; *Western Union* v. *Kansas,* 216 U. S. 1; *Owensboro Nat. Bank* v. *Owensboro,* 173 U. S. 664.

Messrs. H. H. Linney, Deputy Attorney General of California, and *U. S. Webb,* Attorney General, with whom *Mr. Frank L. Guerena* was on the brief, for appellee.

Income from bonds immune from property taxes is but incidentally related to the amount of the franchise tax, which is not levied necessarily upon every dollar of

interest that a taxpayer receives from such bonds. It is conceivable that conditions might exist whereby the amount of the franchise tax would not be increased by the receipt of income from such bonds. The amount of the tax, manifestly, does not vary in exact proportion to the gross income from the bonds included in the aggregate.

A corporation franchise tax measured by a percentage of net income is not a property tax. *Flint* v. *Stone-Tracy Co.,* 220 U. S. 107; *Maine* v. *Grand Trunk R. Co.,* 142 U. S. 217; *Galveston, H. & S. A. Ry. Co.* v. *Texas,* 210 U. S. 217, 226; *Bass Co.* v. *Tax Commission,* 266 U. S. 271; *New York* v. *Jersawit,* 263 U. S. 493, 496; *Educational Films Corp.* v. *Ward,* 282 U. S. 379; *McCoach* v. *Minneville Ry. Co.,* 228 U. S. 295, 387; *Stratton's Independence* v. *Howbert,* 231 U. S. 399, 416; *Interboro Transit Co.* v. *Sohmer,* 237 U. S. 276, 284; *Equitable Life Society* v. *Pennsylvania,* 238 U. S. 143, 147; *Anderson* v. *42 Broadway Co.,* 239 U. S. 69, 72; *Fidelity & Colonial Tr. Co.* v. *Louisville,* 245 U. S. 54, 59; *Doyle* v. *Mitchell Co.,* 247 U. S. 179, 182; *Ray Copper Co.* v. *United States,* 268 U. S. 373, 376; *Macallen Co.* v. *Massachusetts,* 279 U. S. 620.

A corporation franchise tax measured by dividends or bank deposits, or corporate excess, is not a property tax. *Society for Savings* v. *Coite,* 6 Wall. 594; *Provident Institution* v. *Massachusetts,* 6 Wall. 611; *Hamilton Co.* v. *Massachusetts,* 6 Wall. 632; *Home Insurance Co.* v. *New York,* 134 U. S. 594.

State inheritance taxes are valid excises although measured by the value of nontaxables. *Plummer* v. *Coler,* 178 U. S. 115; *Greiner* v. *Llewelyn,* 258 U. S. 384; *Blodgett* v. *Silberman,* 277 U. S. 1, 12.

A corporation franchise tax measured by capital stock reflecting the value of nontaxables is not a property tax. *Hump Hair Pin Co.* v. *Emmerson,* 258 U. S. 290; *People* v. *Latrobe,* 279 U. S. 421; *International Shoe Co.* v.

Shartel, 279 U. S. 429; *Roberts & Schaefer Co.* v. *Emmerson,* 271 U. S. 50; *Kansas City* v. *Botkin,* 240 U. S. 227; *Western Cartridge Co.* v. *Emmerson,* 281 U. S. 511.

A corporation franchise tax measured in part by net income from interstate commerce is not a property tax. *Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S. 113; *Bass Co.* v. *Tax Commission,* 266 U. S. 271; *Alpha Cement Co.* v. *Massachusetts,* 268 U. S. 203, 216; *National Leather Co.* v. *Massachusetts,* 277 U. S. 413.

A state tax on the operative property of public utilities fixed at a percentage of gross income from all sources, including nontaxables, is a valid property tax. *San Diego Ry. Co.* v. *State Board,* 165 Cal. 516; *Lake Tahoe Ry. Co.* v. *Roberts,* 168 Cal. 551; *San Bernardino County* v. *State Board,* 172 Cal. 76; *Southern Pacific Co.* v. *Richardson,* 181 Cal. 280; *Southern Pacific Co.* v. *Levee District,* 172 Cal. 354; *Pullman Co.* v. *Richardson,* 185 Cal. 484; *San Francisco* v. *Pacific Tel. & Tel. Co.,* 166 Cal. 244; *Pacific Gas & Elec. Co.* v. *Roberts,* 168 Cal. 420; s. c., 176 *id.* 183; *Pullman Co.* v. *Richardson,* 261 U. S. 330; *U. S. Express Co.* v. *Minnesota,* 223 U. S. 335; *Cudahy Co.* v. *Minnesota,* 246 U. S. 450; *Great Northern Ry. Co.* v. *Minnesota,* 278 U. S. 503; *Atchison, T. & S. F. Ry. Co.* v. *Collins,* 294 Fed. 742; *Western Union* v. *Massachusetts,* 125 U. S. 530; 141 *id.* 40; *Alward* v. *Johnson,* 282 U. S. 509.

A state property tax on corporate excess, partly located outside the taxing state and employed in interstate commerce, is valid. *Miller & Lux* v. *Richardson,* 182 Cal. 115; *People* v. *Alaska Pacific S. S. Co.,* 182 Cal. 202; *Pacific Coast S. S. Co.* v. *Richardson,* 186 Cal. 70; *Utah Construction Co.* v. *Richardson,* 187 Cal. 649; *People* v. *Ford Motor Co.,* 188 Cal. 8; *Schwab* v. *Richardson,* 188 Cal. 27.

State *ad valorem* taxes on national bank shares are legal though the value of tax-exempts is included in the assessment. *Van Allen* v. *The Assessors,* 3 Wall. 573 (cited ap-

provingly in *Educational Films Corp.* v. *Ward*, 282 U. S. 379); *Home Savings Bank* v. *Des Moines*, 205 U. S. 503; *Des Moines Bank* v. *Fairweather*, 263 U. S. 103, 114.

A state tax on income may properly include in the computation the net income derived from transactions in interstate commerce. *U. S. Glue Co.* v. *Oak Creek*, 247 U. S. 321, 328; *Peck* v. *Lowe*, 247 U. S. 165.

A state property tax on insurance companies fixed at a percentage of their gross premiums, with no deductions, is valid. *Hartford* v. *Jordan*, 168 Cal. 270; *Hughes* v. *Los Angeles*, 168 Cal. 764; *Northwestern Mutual Co.* v. *Roberts*, 177 Cal. 540; *Bankers Life Co.* v. *Richardson*, 192 Cal. 113.

Section 1¾, Art. XIII, Calif. Const. is an exemption from property taxes only.

Exemptions from taxation are construed strictly. The exact and express requirements of the language used, construed *strictissimi juris*, must be the limit of construction; no presumption in favor of grants of exclusive franchise or immunity from government control is indulged; the presumption is against the intent to grant; privilege can not arise from mere implication or inference; and doubts are resolved against claims of privilege.

Assuming an exemption, it was withdrawn by subsequent changes in the California Constitution.

A state has the right to change its tax and other policies. *Thornton* v. *Duffy*, 254 U. S. 361, 369; *Ochiltree* v. *Iowa Ry. Co.*, 21 Wall. 249, 253.

Macallen Co. v. *Massachusetts*, 280 U. S. 513, is not controlling. Cf. *Educational Films Corp.* v. *Ward*, 282 U. S. 379. The relation of interest from tax-exempts to the franchise tax is indeed "fortuitous and incidental" in the history and in the structure of that enactment.

Mr. Justice Stone delivered the opinion of the Court.

This case is here on appeal, Jud. Code § 237, from a judgment of the Supreme Court of California, denying

recovery of a tax paid by appellant, a California corporation, for the privilege of doing business within the state, and exacted under a statute [1] alleged to be in contravention of the contract clause, Art. I, § 10, of the Federal Constitution. 212 Cal. 148. The annual tax is, for domestic corporations, a specified percentage of the net income of the corporation for the next preceding fiscal or calendar year. By § 7 of the statute, net income is defined as "gross income" less certain allowed deductions, and § 6 provides that "gross income . . . includes . . . all interest received from federal, state, municipal or other bonds . . ." Section 1¾ of Art. XIII of the Constitution of California, adopted in 1902, provides that bonds issued by political subdivisions of the State and its municipalities "shall be free and exempt from taxation."

The State Franchise Tax Commissioner, in assessing appellant's franchise tax for the year 1928, included in its gross income interest derived from improvement district bonds, issued after the adoption of the quoted exemption provision of the Constitution, but before the constitutional amendment and the statute authorizing the tax. The present suit was brought to recover so much of the tax as results from the inclusion in the computation, of the interest received from the tax-exempt bonds. Appellant insists that, under the exemption clause of the State Constitution, it acquired a contractual immunity from state taxation of the bonds or their income, and that the later statute, by authorizing the inclusion of the bond interest in the measure of the tax, in effect taxed the income and thus impaired the obligation of the contract.

[1] The California Bank and Corporation Franchise Tax Act, Cal. Stat. 1929, c. 13, p. 19, enacted pursuant to an amendment of the California Constitution, § 16, Art. XIII, adopted November 6, 1928, which authorized a tax on corporate franchises.

If, as appellant argues, the exemption from taxation of the bonds is contractual and extends to the income derived from them, the question still remains whether the immunity is broad enough to secure freedom from taxation of a corporate franchise, to the extent that it is measured by tax-exempt income. This Court, in answering that question, will, in the absence of applicable state decisions antedating the alleged impairment, be guided by generally accepted principles of construction which have been recognized and acted upon by this Court.

Until the article of the Constitution adopted in 1928, and the statute of 1929, there were no provisions in the Constitution and laws of California for taxing corporate franchises by the present method, and until this case no decision by any court of the state had determined whether the granted immunity extends to a tax upon corporate franchises because tax-free property or income is included in its measure. Long before the adoption of the constitutional exemption, there was a well-recognized distinction between a tax on the privilege of exercising the corporate franchise and a tax on corporate property or income, even though the former was measured by the latter, and tax immunity of the property or income was not deemed to extend to the franchise.

The power of a state to levy a franchise tax measured by net property or income including tax-exempt bonds of the United States or their income was upheld by this Court in *Society for Savings* v. *Coite* (1868), 6 Wall. 594; *Provident Institution* v. *Massachusetts* (1868), 6 Wall. 611; *Home Insurance Co.* v. *New York* (1890), 134 U. S. 594. State laws taxing shareholders of national banks on the full net value of their shares, although the banks own tax-exempt federal securities, have also been consistently upheld. *Van Allen* v. *Assessors,* 3 Wall. 573; *Peoples National Bank* v. *Board of Equalization,* 260 U. S. 702; *Des Moines National Bank* v. *Fairweather,* 263 U. S. 103.

Similarly Congress may impose a tax on state banks measured by the average amount of their deposits, although deposits of state funds by state officers are included. *Manhattan Co.* v. *Blake,* 148 U. S. 412. The rule that a tax upon a franchise, measured by net income, including that from tax-immune property, is not an infringement of the immunity, was re-examined and affirmed in *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, which was accepted as authority in *Macallen Co.* v. *Massachusetts,* 279 U. S. 620, and followed in *Educational Films Corp.* v. *Ward,* 282 U. S. 379.

This distinction, so often and consistently reaffirmed, is but a recognition that the franchise, the privilege of doing business in corporate form, which is a legitimate subject of taxation, does not cease to be such because it is exercised in the acquisition and enjoyment of non-taxables. The distinction is one of substance, not of form, and has been so recently discussed in *Educational Films Corp.* v. *Ward* that it need not be elaborated here. It suffices to say that the tax immunity extended to property *qua* property does not embrace a special privilege, the corporate franchise, otherwise taxable, merely because the value of the corporate property or net income is included in an equable measure of the enjoyment of the privilege. The owner may enjoy his exempt property free of tax, but if he asks and receives from the state the benefit of a taxable privilege as the implement of that enjoyment, he must bear the burden of the tax which the state exacts as its price.

Appellant lays no foundation for the assertion that the state court erroneously construed the grant of immunity as limited to taxes imposed on the bonds and their interest, and as not embracing taxes on the franchise measured by the net income of the taxpayer without discrimination as to its source. We cannot say that this construction, with which no judicial decision of the

state conflicts, and which is supported by an unbroken line of decisions of this Court, some of them antedating the grant, is erroneous or that the later enactment of the challenged statute, in all respects consistent with it, impairs any contractual right which could be implied from the grant. Even if the construction were doubtful, the doubt, upon familiar principles, must be resolved in favor of the state. Grants of immunity from taxation, in derogation of a sovereign power of the state, are strictly construed. *Providence Bank* v. *Billings,* 4 Pet. 514, 561; *Delaware Railroad Tax Case,* 18 Wall. 206, 225–226; *Jefferson Branch Bank* v. *Skelly,* 1 Black 436, 447; *Charles River Bridge* v. *Warren Bridge,* 11 Pet. 420; *Yazoo & Mississippi Valley R. Co.* v. *Thomas,* 132 U. S. 174; *Vicksburg, S. & P. R. Co.* v. *Dennis,* 116 U. S. 665.

But appellant insists that even though the granted exemption is not broad enough to preclude, in every instance, the inclusion of tax-exempt income in the measure of the tax, its inclusion by the present statute is not a casual incident to a scheme of taxation of franchises measured by all net income, such as was upheld in *Flint* v. *Stone Tracy Co., supra,* but is the result of a fully disclosed legislative purpose to subject to taxation the income of non-taxables, such as was deemed to invalidate the tax in *Miller* v. *Milwaukee,* 272 U. S. 713, and in *Macallen Co.* v. *Massachusetts, supra.* In support of this contention, appellant points to the language of the taxing act, specifically including the income from tax-exempt bonds in the measure of the tax, and to its legislative history.

The California Constitution was amended and the legislation taxing corporate franchises was enacted shortly after the decisions of this Court in *First National Bank* v. *Hartford,* 273 U. S. 548, and *Minnesota* v. *First National Bank,* 273 U. S. 561, which held that the requirement of R. S. § 5219, of an approximate equality of state taxation

of national banks and of moneyed capital competing with them, comprehends the taxation not only of moneyed capital employed by state and private banks, but also that of other corporations in substantial competition with national banks. The State of California had previously imposed a tax on shareholders in banks, based on their proportionate share of the undivided profits, capital and surplus. Corporations other than banks, public utility, and insurance companies were taxed on the basis of their "corporate excess," in the computation of which non-taxable bonds were not included. In 1927 the California legislature created a commission to prepare a scheme of taxation which would secure the requisite equality. To attain this end the report of the Commission of August 10, 1928, (included in the final report of California Tax Commission of March 5, 1929, State Printing Office, Publication No. 63725, at p. 243, *et seq.*) recommended the adoption of the present corporate franchise tax as conforming to subdivision 4 of R. S. 5219, which permits the state taxation of national banks "according to or measured by their net income." In the course of the report, specific reference is made to the belief of the Commission that in the computation of such a tax the income of non-taxable federal bonds might be included in the measure of the tax, and it sufficiently appears from the report that the Commission was not unaware that income from bonds of the state would likewise be included by the proposed legislation and, indeed, that the desired equality of taxation of local corporations with that on national banks, measured by income, could not otherwise be secured. The adoption of the taxing act, as recommended by the Commission, may therefore be taken, as appellant contends, to evidence a definite and specific legislative purpose to levy a new type of franchise tax, measured by corporate net income, including the tax-exempt income from federal and state bonds.

The view that a tax, although levied on a taxable subject, may be deemed invalid because purposely devised to include a non-taxable subject in its measure, receives only a limited and qualified support from *Miller* v. *Milwaukee, supra.* There a state statute taxing corporate dividends was framed in such manner as to tax them only so far as they were derived from corporate income from tax-exempt bonds of the United States. The taxing act thus, on its face, did more than exhibit an intention of the one sovereignty to include in the dividends taxed, those derived from income from a non-taxable instrumentality of the other, together with income from all other sources. That admittedly would have been permissible; see *Des Moines National Bank* v. *Fairweather, supra; Flint* v. *Stone Tracy Co., supra; Educational Films Corp.* v. *Ward, supra.* But it was the exclusion from the measure of the tax of all income except from federal bonds which rendered the tax invalid.

Thus, in our dual system of government, action of the one government in the proper exercise of its sovereign powers, regarded as innocuous and permissible notwithstanding its incidental effects on the other, may become offensive and be deemed forbidden if it discriminates against the other. State taxes which, if non-discriminatory, would be upheld, even though they reach or affect those engaged in interstate commerce, are condemned if they discriminate against those so engaged, by placing on them heavier burdens than those imposed on others within the state. *Welton* v. *Missouri,* 91 U. S. 275, with which compare *Wagner* v. *Covington,* 251 U. S. 95; *Darnell & Son Co.* v. *Memphis,* 208 U. S. 113; *Bethlehem Motors Corp.* v. *Flynt,* 256 U. S. 421. Cf. *Reymann Brewing Co.* v. *Brister,* 179 U. S. 445. See *General American Tank Car Corp.* v. *Day,* 270 U. S. 367, 372.

But the present case is not one of discrimination. There is no attempt, as in *Miller* v. *Milwaukee, supra,* to meas-

ure the tax by exempt income while excluding from the measure all taxable income. The state seeks to do only what its contract permits it to do, to measure the franchise tax by all the net income of the taxpayer. If the words " net income " in the taxing statute may rightly be taken to include income from tax-exempt bonds, as they were in *Flint* v. *Stone Tracy Co., supra,* then there can be no tenable ground for saying that the addition of the words " income . . . includes . . . all interest received from federal, state, municipal or other bonds," discloses any different purpose on the part of the legislature, or can have any different effect, or can more definitely infringe the exemption than did the tax upheld in *Flint* v. *Stone Tracy Co., supra,* or that in *Educational Films Corp.* v. *Ward, supra.*

But it is said that the ruling of this Court in *Macallen Co.* v. *Massachusetts, supra,* requires the condemnation of the present tax. There the Commonwealth, which had long imposed a tax on corporate franchises measured by taxable income of the corporation, amended its statutes so as to add the income from tax-exempt bonds of the federal government to the measure of the tax. It was held that this change of taxation policy, embodied in the statute and " adopted as though it had been so declared in precise words for the very purpose of subjecting these securities *pro tanto* to the burden of the tax," was invalid. Thus the legislative abandonment of a policy which had previously discriminated in favor of tax-exempt securities was treated as a discrimination against them, and the tax, although in fact non-discriminatory, was condemned as analogous to the discriminatory tax held invalid in the *Miller* case. See *Macallen Co.* v. *Massachusetts, supra,* pp. 630, 631.

But the State of California, in its legislation, has indulged in no reversal of policy so far as the measure-

ment of the franchise tax is concerned and in no discrimination either in favor of or against tax-exempt income. The entire history of its legislation discloses only that it has sought, in good faith, to conform its scheme of taxation of corporations to a permitted method of taxing national banks, to avoid discrimination against the latter. It has effected its purpose by adopting, in a single legislative act, a new form of privilege tax on corporations measured by their net income, without any form of discrimination as to the sources of the income included in the measure, differing in this respect in no material way from the similar tax upheld in *Flint* v. *Stone Tracy Co.* and in *Educational Films Corp.* v. *Ward, supra.* We should hesitate to say that any action of the legislature or any purpose disclosed by a state commission could restrict the power of the state by constitutional amendment to authorize a tax which admittedly it could have authorized without them. In any case, the use of words in the statute and report, indicating what would otherwise have been implied, that "income" includes income from tax-exempt bonds, could neither enlarge the exemption nor diminish the constitutional power of the state.

But we do not rest our decision upon any narrow distinction as to the precise form of words which may be employed in taxing statutes or the particular order in which its provisions are incorporated in the statute, whether by a single legislative act or by amendment or the addition of new provisions in successive reenactments. A taxing statute, like others, must be read as a whole, as it stands on the statute books at its applicable date, and the legislative purpose in enacting it must be taken, regardless of forms of words, to envisage the obvious consequences which flow from its operation. Since the mere intent of the legislature to do that which the Constitution permits cannot deprive legislation of its constitutional

validity, and the purposeful choice by the state of a method of taxation which appellant's contract allows, cannot alter the terms of the contract, the present act must be judged by its operation rather than by the motives which inspired it. As it operates to measure the tax on the corporate franchise by the entire net income of the corporation, without any discrimination between income which is exempt and that which is not, there is no infringement of any constitutional immunity.

Affirmed.

MR. JUSTICE SUTHERLAND, dissenting:

MR. JUSTICE VAN DEVANTER, MR. JUSTICE BUTLER and I are unable to agree with the opinion and judgment just announced:

In *Miller* v. *Milwaukee*, 272 U. S. 713, speaking through Mr. Justice Holmes, this Court said [p. 715]:

"If the avowed purpose or self-evident operation of a statute is to follow the bonds of the United States and to make up for its inability to reach them directly by indirectly achieving the same result, the statute must fail even if but for its purpose or special operation it would be perfectly good. Under the laws of Wisconsin the income from the United States bonds may not be the only item exempted from the income tax on corporations, but it certainly is the most conspicuous instance of exemption at the present time. A result intelligently foreseen and offering the most obvious motive for an act that will bring it about, fairly may be taken to have been a purpose of the act. On that assumption the immunity of the national bonds is too important to allow any narrowing beyond what the Acts of Congress permit. We think it would be going too far to say that they allow an intentional interference that is only prevented from being direct by the artificial distinction between a corporation and its members. A tax very well may be upheld as against any

casual effect it may have upon the bonds of the United States when passed with a different intent and not aimed at them, but it becomes a more serious attack upon their immunity when they are its obvious aim. In such a case the Court must consider the public welfare rather than the artifices contrived for private convenience and must look at the facts."

In *Macallen Co.* v. *Massachusetts,* 279 U. S. 620, the principle thus announced was applied to an act imposing a corporate excise tax affecting the state's municipal securities in the same way as the California act affects the bonds here under consideration. These municipal securities were issued and acquired prior to the passage of the act, and when so issued and acquired were exempt from all forms of taxation by the express terms of a state statute. The situation in that respect is the same here, except that the exemption from taxation was made by the state Constitution instead of by statute. There, as here, the constitutionality of the act was challenged under the federal Constitution as impairing the obligation of contracts. We sustained the challenge, and pointed out that while a state was at liberty to impose a franchise tax upon a corporation with respect to the doing of its business, it could not tax the income of the corporation derived from nontaxable securities. We held that the effect of the taxing act was to repeal the prior statute and impose a burden upon the securities from which, by express provision of law, they had theretofore been free. In confirmation of this conclusion the report of a special commission appointed by the legislature to investigate the subject of taxation of banking institutions was cited and quoted. That report recommended the adoption of legislation which, by means of an excise upon the doing of business, would reach income from securities then exempt from taxation, either under federal or state law. The report received the con-

sideration of the legislature, and, we thought it fair to suppose, constituted the basis for adopting the challenged act. We said (p. 633):

"The effect of the report is that non-taxable bonds nevertheless should be subjected to the burden of the tax; and, since that could not be imposed directly, the clear intimation is that it be imposed indirectly through the medium of the so-called 'excise'."

We therefore concluded that the act manifested a change of policy adopted with the aim and for the purpose of subjecting the tax-exempt securities, *pro tanto,* to the burden of the tax, and, therefore, impaired "the obligation of the statutory contract of the state by which such bonds were made exempt from state taxation."

In the present case the aim and purpose of the California legislature to reach the same illegal result by indirection is no less clear. Here, as in Massachusetts, the State Tax Commission investigated the subject and made a special report to the Governor for submission to the legislature. In the course of the report the commission expressed the opinion that the only practicable method of securing a substantial revenue from the banks was to tax them "according to or measured by net income." This was designated its "fourth method." As distinguished from the "third method" suggested, the commission said that such a tax "is designed to include within the scope of its application certain types of income which may not legally be reached by a pure net income tax—such as interest on tax-exempt government bonds. . . . The third method may be discarded in favor of the fourth, because under the fourth everything can be accomplished which may be gained by proceeding under the third, and presumably more besides, viz., *the inclusion, if desired, of tax-exempt interest in the base.*"

Later in its report, under the heading "Importance of Including Tax-exempt Interest in Base," the commission,

after calling attention to the *Macallen* case, then pending but not decided, said:

"In the case of corporations other than banks, the point is not of vital importance. *But the banks hold such large quantities of these tax-exempt bonds that the effect of a decision holding that the state may not include them in the base would be very serious indeed.*"

There is more in the report to like effect.

In January, 1929, the two houses of the state legislature gave public hearings on the subject. Among others, Professor Haig of Columbia University, who had served as technical advisor to the commission, appeared and made a statement, in the course of which, in explanation of bills then pending, he said:

"Now, as to the definition of net income. You will find this material presented in section 6 and following. In the first place, the definition of income is broad, in one respect, in that it does attempt *to include within the scope of the base used as the measure of the tax income received from tax-exempt securities*—that is, government bonds and so on. . . . Interest from tax-exempt bonds is an exceedingly important item in a tax which is applied to banks. The definition is broad, in that it does include this tax-exempt interest in the base which is used as a measure of the value of the franchise."

The act here in question, which resulted from, and evidently was based upon, the report of the Commission and the statements of its advisor, provides in express terms:

"Sec. 6. The term 'gross income,' as herein used, includes . . . all interest received from federal, state, municipal or other bonds, . . .

"Sec. 7. The term 'net income,' as herein used, means the gross income less the deductions allowed." (No deduction, however, is allowed for interest received from federal, state, municipal or other tax-exempt bonds.)

The foregoing is so plain that comment or elucidation would seem unnecessary. The bare recital of the facts, in our opinion, shows how unreasonable it is to hold that the aim and purpose of the legislation was not, by indirection, to impose a tax upon income derived from tax-exempt securities which, constitutionally, could not be imposed directly. To say that the effect of the tax upon the tax-exempt bonds is "casual" and not its "obvious aim," (*Miller* v. *Milwaukee, supra*), is simply to presume upon our credulity. We think there is no escape from the conclusion that if the *Miller* and *Macallen* cases were followed the legislation here under review would be condemned. To base a distinction of these cases from the pending case upon differences so lacking in substance as to be in effect no differences at all, simply adds to the confusion already too great in this field of taxation.

The California franchise tax, in its application to the bonds here under consideration, is peculiarly indefensible. When these bonds were issued and acquired they were, by express constitutional provision, made "free and exempt from taxation." Upon the faith of that provision the bonds were bought. The fact that they were to be free from taxation must have resulted in the receipt of a larger price than otherwise would have been the case. The difference between the sum paid and what would have been paid but for the exemption was, in a very real sense, money taken from the purchaser in exchange for the tax immunity—as though future taxes had been anticipated by an immediate payment of the amount, computed on the basis of their present worth. By every principle of fair construction, the purchaser having paid for this immunity became entitled to hold the bonds and income therefrom free from any future taxation, the burden of which, however disguised, would fall, and was meant to fall, upon them. Otherwise the contractual ob-

ligation is a mere sham, signifying nothing. It is not denied, as we understand, that if the state had laid the tax directly upon the income derived from the bonds an unconstitutional impairment of the obligation would have resulted. And, in this respect, it is hard to see any substantial difference between a tax laid directly upon the income and one laid upon a privilege but measured by, and definitely intended to reach, such income. Undoubtedly, a state has the power to impose a franchise tax for the privilege of doing business as a corporation within the state and also to measure that tax by the amount of income received; but in every case where this court has sustained the validity of such a tax, when measured in part by non-taxable income, it has done so upon the view, implicit or express, that the latter in fact and reality was not the subject sought to be taxed, and that any burden thereby put upon it was casual and incidental.

A tax in form laid upon A but measured by B at once suggests that B was in reality the thing aimed at; and if inquiry discloses, as it does here, that such is the fact, the tax, assuming B to be non-taxable, should not be allowed to stand in the face of the settled principle that what cannot be done directly because of constitutional restriction cannot be done indirectly by legislation designed to reach the same end. *Fairbank* v. *United States,* 181 U. S. 283, 294, 300.

It is important for the states and their municipalities to obtain revenue; but, in doing so, it is also important that they shall not dishonor their promises. The moral duty of a state to keep its word, in spirit as well as in letter, is no less than that of an individual; and courts which condemn direct impairment by legislation of contractual obligations should not be over-ready to approve the adoption of circuitous and delusive means, which in form avoid but in fact accomplish the same unconstitutional result.

SPENCER KELLOGG & SONS, INC. *v.* HICKS, ADMINISTRATRIX, ET AL.*

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

No. 430. Argued February 16, 17, 1932.—Decided April 11, 1932.

1. A corporation operating a factory on the New Jersey side of the Hudson River owned a launch which it used for ferrying employees to and from their work there, a distance of somewhat more than a mile. The launch was not seaworthy when ice was in the river, and the company had therefore instructed the manager of the factory, who also controlled the use of the launch, not to allow it to be used when ice was, or was likely to be, present. Disobedience to these instructions, by the master of the launch, resulted in injuries and deaths of passengers. *Held:*

   (1) In view of weather conditions and observation of ice in the river some days before, the manager should not have rested upon a mere instruction to the master not to run through ice, but should have assured himself by inquiry or by personal investigation that the launch would not incur the hazard. P. 510.

   (2) The manager's agency was such that his "privity or knowledge" was that of the company. P. 511.

   (3) The company being thus chargeable with negligence in not taking measures for the safety of the passengers which the weather conditions required, could not, under R. S., § 4283, limit its liability to the value of the launch. P. 511.

   (4) The rule exculpating the ship-owner from "privity or knowledge" in cases of accident on the high seas due to the master's negligence in disobeying instructions, is inapplicable to this case. P. 511.

2. Where an employer of laborers owned a boat in which it transported them to and from their work, on navigable waters of the United States, and the boat while so employed was sunk by negligence,—*held* a maritime tort for which the survivors and the representatives of the dead were entitled to relief in a court of admiralty under the rules recognized by admiralty, including a

---

* Together with No. 444, *Alexander, Administratrix, et al.* v. *Spencer Kellogg & Sons, Inc.*

state statute allowing recovery for death by wrongful act; and that the remedies afforded by a state workmen's compensation law were inapplicable. P. 513.

52 F. (2d) 129, reversed.

CERTIORARI, 284 U. S. 610, 611, to review the affirmance of a decree in admiralty which held the above-named petitioner responsible for injuries and deaths resulting from the sinking of a vessel, and, because of its privity and knowledge, denied its application to limit its liability. Petitioners in the second case, No. 444, were denied relief by the decree, upon the ground that their claims should be prosecuted under a state workmen's compensation law.

Mr. D. Roger Englar, with whom *Messrs. Chauncey I. Clark*, *Leonard J. Matteson*, and *George S. Brengle* were on the brief, for Spencer Kellogg & Sons, Inc.

The petitioner had exercised the utmost care to prevent the running of the "Linseed King" when there was ice in the river. Definite instructions had been issued by the officers of the corporation to the manager of the plant that the boat should not be run in ice, and these instructions had been passed on to everyone who had anything to do with the boat, including the captain.

There was no ice in the Hudson River in the vicinity of petitioner's plant prior to the day of the accident, excepting a small quantity which appeared for a short time on the early morning of the previous day (Sunday); and neither the manager of petitioner's plant nor any of his subordinates in the management of the plant was chargeable with notice of any ice in the river prior to the accident.

The precautions taken by the petitioner were adequate.

The petitioner is entitled to a limitation of liability. The burden was on the claimants to prove that a wilful departure from its instructions was countenanced by petitioner. *La Bourgogne*, 210 U. S. 95, 126, 127; *Butler* v.

Steamship Co., 130 U. S. 527, 549; *Richardson* v. *Harmon*, 222 U. S. 96, 105; *The City of Norwich*, 118 U. S. 468; *The North Star*, 106 U. S. 17; *The Scotland*, 105 U. S. 24; *Craig* v. *Continental Ins. Co.*, 141 U. S. 638, 646; *American Hawaiian S. S. Co.* v. *Pacific S. S. Co.*, 41 F (2d) 718; *Kitsap County Transp. Co.* v. *Harvey*, 15 F. (2d) 166; *Warnken* v. *Moody*, 22 F. (2d) 960; *Standard Wholesale Works* v. *Chesapeake L. & T. Co.*, 16 F. (2d) 765; *Quinlan* v. *Pew*, 56 Fed. 111; *The North Star*, 3 F. (2d) 1010.

The limitation of liability acts apply to motor launches, yachts, and other vessels of this type. *In re Luvina*, 1927 A. M. C. 327; *Warnken* v. *Moody*, 22 F. (2d) 960; *In re Benedict*, 282 Fed. 238.

Mere negligence of servants or employees of the shipowner will not defeat the right of limitation, which is only denied on the ground of the knowledge or privity of the owner himself. *La Bourgogne*, 210 U. S. 95, 122; *The Oneida*, 282 Fed. 238, 241; *The 84–H*, 296 Fed. 427, 431; *The Colima*, 82 Fed. 665, 679, and cases *supra*.

The privity or knowledge must be that of the managing officers of a corporation and not merely negligence of servants and employees. *Craig* v. *Continental Ins. Co.*, 141 U. S. 638, 646.

The operation of the New Jersey Workmen's Compensation Act (Laws, 1911, c. 95), is not excluded or affected by the general maritime law or by the limitation of liability acts. *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U. S. 469; *State Industrial Board* v. *Terry & Tench Co.*, 273 U. S. 639; and *Millers Underwriters* v. *Braud*, 270 U. S. 59, are precisely in point. The "Linseed King" sank in navigable waters; but the petitioners were regular employees of Spencer Kellogg & Sons, Inc., who worked in the factory at Edgewater. There was nothing even remotely maritime about their employment. And, as in the *Rohde* case, they had contracted under and with reference to the exclusive provisions of the state compen-

sation act. See *Alaska Packers* v. *Industrial Accident Commission,* 276 U. S. 467; *London Co.* v. *Industrial Commission,* 279 U. S. 109, 121.

Workmen's compensation is consistent with limitation of liability. Cf. *Richardson* v. *Harmon,* 222 U. S. 96; *Millers Underwriters* v. *Braud,* 270 U. S. 59; *Baizley Iron Works* v. *Span,* 281 U. S. 232; *The Aquitania,* 20 F. (2d) 457; *Langnes* v. *Green,* 282 U. S. 531; *The Titanic,* 233 U. S. 718, 733.

In considering this general subject, it must be borne in mind that the admiralty law affords no remedy for wrongful death in such a case as this, and in awarding damages, the admiralty courts are merely enforcing a state statute. *The Harrisburg,* 119 U. S. 199; *The Hamilton,* 207 U. S. 398.

It is well settled, however, that if the limitation proceedings were dismissed, and the claimants attempted to prosecute the actions which a number of them now have pending in the New York state courts, they would find themselves barred by the New Jersey Workmen's Compensation Act, and would be remitted to their remedy before the New Jersey Compensation Bureau. See *Barnhart* v. *American Concrete Steel Co.,* 227 N. Y. 531.

The application of the New Jersey Workmen's Compensation Act was not affected by the filing of the petition for limitation of liability.

Miss Elizabeth Robinson, with whom *Messrs. Lucien V. Axtell* and *Vernon S. Jones* were on the brief, for Alexander et al.

Mr. Lester Hand Jayne for Roberts et al.

Messrs. Samuel B. Seidel and *Sidney Newborg* filed a brief for Ifill et al.

Messrs. Walter R. Kuhn and *George W. Riley* filed a brief for Hicks.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

These cross-writs were granted in a proceeding for limitation of liability under Sec. 3, Act of March 3, 1851, c. 43,[1] initiated by Spencer Kellogg & Sons, Inc., owner of the motor launch "Linseed King," which sank on December 20, 1926, causing personal injuries and loss of life.

Kellogg & Sons is a New York corporation engaged in the manufacture of linseed oil at a number of factories, among them one at Edgewater, New Jersey, on the west shore of the Hudson River, opposite 96th Street, New York. The home office of the corporation is in Buffalo, where the chief executive officers reside. The Edgewater plant employs many workmen who live in New York. In order to ferry these men to and from the factory the company owned and operated the "Linseed King," a gasoline launch of a length of forty-five feet and a beam of ten feet, having a small wheel house forward, and behind that an enclosed cabin which occupied practically the entire deck space. The company's practice was to send the boat from Edgewater, early in the morning, to the foot of 96th Street, where the men went on board and were transported to the factory in time for their work. Although the safe load was estimated at not over sixty passengers, she had eighty-six life preservers aboard and had frequently carried more than eighty persons. This number seriously crowded her cabin, the total superficial area of which was two hundred thirty-three square feet, two lengthwise seats occupying about one-third of the space.

[1] 9 Stat. 635; R. S. § 4283; U. S. C., Tit. 46, § 183, as amended by § 4 of the Act of June 19, 1886, c. 421; 24 Stat. 80; R. S. § 4289, U. S. C., Tit. 46, § 188.

On the morning in question the boat left the New Jersey pier before daybreak, in charge of one man. As the New York shore was approached drift ice was encountered which had come down the river during the night and been driven to the easterly side by a west wind. The launch passed safely through the ice and reached the foot of 96th Street. There another of the company's employees, who was detailed to give general assistance and may be considered a deckhand, came on board. The launch was immediately filled from a crowd of waiting men. It is difficult to ascertain exactly how many boarded her; but the courts below have found that there were at least seventy-eight. On the return trip the thicker part of the ice towards the New York shore was successfully traversed, and when the master considered himself clear of ice he proceeded at full speed,—about seven miles an hour. Shortly thereafter a cake or floe of ice stove a hole in the boat's port bow and caused her to fill and sink in about two minutes. The result was a panic in the cabin, a rush for the exits, which were small, and one of which opened inward, thus being difficult of operation on account of the crowded condition. Some of the passengers were thrown into the river, reached floating cakes of ice, and were rescued. Thirty-five bodies were found in the cabin, but the number lost was never definitely determined.

Actions were brought in the New York courts against Kellogg & Sons by certain of the survivors and by the administrators of some of those who had been drowned. One libel was filed in the District Court for Southern New York. Claims were made by others and suits threatened. The company filed a petition for limitation and sought an injunction against all proceedings upon any claim, including those for workmen's compensation under the New Jersey act, except that no injunction was asked against the mere filing of claims with the New Jersey State Work-

men's Compensation Bureau. The launch was surrendered, its value ascertained as $1,500, proper stipulation entered, and an order of reference made to a commissioner to receive claims. An injunction *pendente lite* was issued as prayed embracing not only the claimants, but the State Compensation Bureau, service being made upon the secretary of that body. Claims were filed, and the claimants in their answers to the petition denied the company's right to limitation.

Upon the issues so made the cause came on for hearing before the District Court, and at the conclusion of the evidence that court denied the owner's right to limit and referred all of the claims to a commissioner for report as to their validity and the amounts to be awarded. The latter recommended awards to sundry claimants. On exceptions the District Court confirmed some and altered others.

Those who were killed and injured in the disaster were of three classes: (1) Regular employees of Kellogg & Sons in the Edgewater plant; (2) Men who had applied on December 18 for work in discharging the cargo of a ship expected on that day. She did not then arrive, and they were given employment check stubs and told to return on the following day, which they did; but as she had not then docked they were advised to report again on the morning of the accident. The vessel had berthed the evening before, and if these men had succeeded in reaching the pier at Edgewater they would have been preferred in the allotment of work in discharging her cargo. (3) Men seeking employment in answer to an advertisement for laborers inserted in the New York newspapers, who had, however, not been interviewed by the company officials, and who would therefore have had to apply and be accepted upon arrival at the Edgewater pier.

The owner insisted that as the men in groups (1) and (2) were employees within the intent of the workmen's compensation law of New Jersey their remedy was exclusively under that act, and no damages could be granted to any of them or to the personal representatives of deceased members of these classes in this proceeding. No such objection was urged against awards to men in the third class. The commissioner overruled the owner's contention, held the workmen's compensation act was inapplicable, and all of the claimants should receive awards in the admiralty court. Upon exceptions the District Court reversed the commissioner's conclusions and held that those falling within the first class must be dismissed from the case, as any redress to which they were entitled was under the New Jersey act, but that the men in the second had never been actually employed, and were consequently outside the compensation law, and the commissioner's recommendations as to awards to them should be confirmed. The Circuit Court of Appeals affirmed the action of the District Court.

The petition for certiorari (No. 430) by the owner alleged error in refusing to limit liability and in not remitting the claimants in the second group to their remedy under the workmen's compensation act. Claimants of the first group also filed a petition (No. 444) asserting the court below improperly disposed of their claims, and that they were entitled to awards in the pending cause. The cases were heard together.

The first question for decision is whether Kellogg & Sons, as owner, was entitled to a decree limiting its liability. The master's negligence is not denied; indeed the owner proved that definite and peremptory instructions had been given him never to run when there was ice in the river. His disregard of these was the proximate cause of the disaster.

The right to limit liability turns upon whether such negligence was with the owner's privity or knowledge.[2] Both courts below, after painstaking examination of the evidence, found there was such privity or knowledge and accordingly ruled that the claim for limitation must be denied. We accept this concurrent finding. There was sufficient evidence to support it.[3]

The "Linseed King" was admittedly unfit to run through ice. This fact was known to the owner's executive officers, who had instructed one Stover, the works manager and representative of the company in charge of the Edgewater plant, that the boat should never be run through ice, and that as soon as ice showed itself in the river she was to be laid up for the winter. He was also directed that whenever there was a likelihood of the presence of ice all trips were to be made only in broad daylight, and even these were to be discontinued when ice definitely appeared. The decision as to when the ferry should be withdrawn for the winter rested with him.

In view of the weather conditions and the observation of ice in the river some days prior to the accident by several witnesses, amongst them one of Stover's own subordinates, he should not have rested upon the mere instruction to the master not to run through ice. Before allowing the ferriage operation he was under obligation to assure himself by inquiries or by personal inspection that the "Linseed King" should not incur the hazard of colliding, as she did, with ice floes in the river.

---

[2] R. S. § 4283; U. S. C., Tit. 46, § 183. "The liability of the owner of any vessel . . . for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

[3] *The Hypodame*, 6 Wall. 216, 223; *The North Star*, 106 U. S. 17, 18; *The Carib Prince*, 170 U. S. 655, 658; *Oelwerke Teutonia* v. *Erlanger*, 248 U. S. 521, 524.

We agree with the courts below that Stover's position as works manager of the Edgewater plant and the scope of his authority render his privity or knowledge that of the company. *Parsons* v. *Empire Trans. Co.,* 111 Fed. 202; *Oregon R. L. Co.* v. *Portland & A. S. S. Co.,* 162 Fed. 912; *Sanbern* v. *Wright & Cobb Co.,* 171 Fed. 449; aff'd 179 Fed. 1021; *Boston Towboat Co.* v. *Darrow-Mann Co.,* 276 Fed. 778. Compare *Craig* v. *Continental Ins. Co.,* 141 U. S. 638, 647. The owner was therefore chargeable with negligence in not taking measures for the safety of the passengers which the weather conditions required, *Texas & Gulf S. S. Co.* v. *Parker,* 263 Fed. 864; *The Virginia,* 264 Fed. 986; aff'd 278 Fed. 877.

It is said that the master, admittedly competent, had definite and postive instructions not to run through ice; that when he encountered ice on his trip from the New Jersey shore, it became his duty at once to abandon the trip and return to the Edgewater plant. The argument is that as the boat was seaworthy when there was no ice and instructions had been given to a competent master not to run her through ice, the owner did its full duty and cannot be held responsible as having privity or knowledge of a violation by the master of these explicit instructions. Cases such as *La Bourgogne,* 210 U. S. 95, which involved the master's failure to obey rules and instructions when on the high seas and disaster attributable to such fault, are cited. But there is a vast difference between the cases relied on and the instant one. The launch was used for ferriage over a distance of about a mile and a third. She was known to be unseaworthy and unfit if there was ice in the river. There is no analogy between such a situation and that presented in the cited cases where the emergency must be met by the master alone. In these there is no opportunity of consultation or coöperation or of bringing the proposed action of the master to the owner's knowledge. The latter must rely upon the master's obeying

rules and using reasonable judgment. The conditions on the morning in question could have been ascertained by Stover, if he had used reasonable diligence, and we think the evidence is adequate to support the finding that the negligence which caused the disaster was with his, and therefore with the owner's, privity or knowledge.

What was the duty of the admiralty court after it found the circumstances did not permit limitation of liability? Having found that certain claimants were within the scope of the workmen's compensation act the District Court refused them any awards and remitted them to the Compensation Bureau. This was approved by the Circuit Court of Appeals. But we think that the admiralty court, having taken jurisdiction and brought all claimants into concourse, should have given complete relief. *Hartford Accident & Indemnity Co.* v. *Southern Pacific Co.*, 273 U. S. 207. The petitioners in No. 444 maintain, first, that the state statute providing workmen's compensation is inapplicable to the maritime torts here in question and that they were entitled to relief under the maritime law or the death statutes of New York adopted as part of that system. Secondly, they say that the owner having invoked the jurisdiction of admiralty, enjoined prosecution of claims before the Workmen's Compensation Bureau, compelled claimants to appear in the admiralty court to try the question of limitation, and delayed for years any prosecution before the Bureau, has chosen its forum, forced them to litigate therein, and the jurisdiction so lawfully attaching cannot be surrendered in favor of that under the workmen's compensation law of the state. As we think the first contention well founded we have no occasion to pass upon the second.

Kellogg & Sons undertook the interstate carriage of passengers by water on a launch operated by its servants. This was a maritime matter. The ferriage was for the facilitation of the company's business and for its con-

venience as well as that of the employees.[4] The injury to the passengers resulted from negligence of the company's agents in the navigation of the launch. It was a maritime tort. The rights and obligations of the parties depended on and arose out of the maritime law. A proceeding to impose liability for such a tort is a cause in admiralty within the meaning of Article III, Sec. 2 of the Constitution, triable in the United States courts sitting in admiralty. *Leathers* v. *Blessing,* 105 U. S. 626, 630; *Workman* v. *New York,* 179 U. S. 552, 565; *Atlantic Transport Co.* v. *Imbrovek,* 234 U. S. 52, 58; § 9, Judiciary Act of 1789.[5] As the tort, though maritime, was committed upon the waters of the state of New York, the personal representatives of those who lost their lives were entitled to sue in admiralty and to recover as provided by the state statute giving a remedy for death by wrongful act. *American Steamboat Co.* v. *Chase,* 16 Wall. 522, 531; *Sherlock* v. *Alling,* 93 U. S. 99; *Western Fuel Co.* v. *Garcia,* 257 U. S. 233; *Washington* v. *Dawson,* 264 U. S. 219, 226.

The workmen's compensation law of New Jersey, the purpose of which was to supersede the common law redress in tort cases and statutory rights consequent upon death by wrongful act, and to substitute a commuted compensation for injury or death of an employee, irrespective of fault, is not applicable to the injuries and deaths under consideration.

The decisions hold that the remedy which the compensation statute attempts to give is of a character wholly unknown to the common law, incapable of enforcement

[4] In such circumstances the New Jersey Compensation Law is applied by the courts of that State, which hold that the relation of employer and employee exists during such transportation. *DePue* v. *Salmon Co.,* 92 N. J. L. 550; 106 Atl. 379; *Alberta Contracting Corp.* v. *Santomassimo,* 107 N. J. L. 7; 150 Atl. 830.

[5] 1 Stat. 76, 77; Jud. Code, §§ 24 and 256; U. S. C. Tit. 28, § 41 (3); § 371 Third.

by the ordinary processes of any court, and is not saved to suitors from the grant of exclusive jurisdiction to the courts of the United States of all civil cases of admiralty and maritime jurisdiction. *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, 218; *Chelentis* v. *Luckenbach S. S. Co.,* 247 U. S. 372; *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149; *Washington* v. *Dawson, supra.* None of the employees or the personal representatives here concerned could have proceeded in admiralty to enforce the workmen's compensation law of New Jersey. That law has not been recognized and taken up as part of the admiralty jurisprudence of the United States.

The compensation act is inapplicable to such a maritime tort, and the injured person is entitled to his remedy under rules recognized in admiralty. *Messel* v. *Foundation Co.,* 274 U. S. 427; *Warren* v. *Morse Drydock & Repair Co.,* 235 N. Y. 445, 447; 139 N. E. 569.

In the *Jensen* case, *supra,* this Court said:

"And finally this remedy [under the compensation act] is not consistent with the policy of Congress to encourage investments in ships manifested in the Acts of 1851 and 1884 (Rev. Stats., §§ 4283–4285; § 18, Act of June 26, 1884, c. 121, 23 Stat. 57) which declare a limitation upon the liability of their owners."

Kellogg & Sons sustained towards employees injured or killed the dual relationship of a carrier by water and a general employer at its Edgewater plant.[6] Under the federal statutes the company, acting in the first capacity, was entitled to a limitation of liability unless the claimants could prove negligence with the owner's privity or knowledge. They assumed the burden of proving such negligence. They sustained it and are entitled to recover according to the rules of the maritime law, including, of course, any applicable death statute.

---

[6] See note 4, *supra.*

The court below was right in refusing a limitation of liability and in holding that the applicants for employment who had been told to return on the morning in question were entitled to awards in this proceeding; but it erred in denying awards according to the rules recognized in admiralty to the surviving employees and personal representatives of deceased employees of Kellogg & Sons, and remitting them to their remedy under the New Jersey Compensation Act. The decree is therefore reversed and the cause remanded to the District Court for further proceedings in conformity with this opinion.

Reversed.

MR. JUSTICE BRANDEIS and MR. JUSTICE STONE join in so much of the opinion as holds that limitation of liability was rightly refused. They concur also in the conclusion that Kellogg & Sons are liable in this proceeding, but they do so upon the ground that the owner having invoked, as stated, the jurisdiction in admiralty, it cannot be surrendered in favor of that under the workmen's compensation law of the state.

MR. JUSTICE SUTHERLAND is of opinion that the petition in No. 444 is not well founded and that the decree should be affirmed.

MR. JUSTICE CARDOZO took no part in the consideration or decision of these cases.

CALLAHAN *v.* UNITED STATES.

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

No. 576. Argued March 14, 1932.—Decided April 11, 1932.

1. One who aids and abets importation of intoxicating liquor contrary to § 3 of Title II of the National Prohibition Act, which prohibits unlicensed importation, violates § 593 (b) of the Tariff

Act of 1922, which provides that if any person knowingly assists in importing into the United States any merchandise contrary to law, he shall be punished as therein specified. P. 516.

2. Section 29 of Title II of the National Prohibition Act, which provides that "Any person . . . who . . . violates any of the provisions of this chapter, for which offense a special penalty is not prescribed, shall be fined . . ." etc., is superseded as to forbidden importation of liquor (for which the Act does not otherwise prescribe a penalty) by § 593 (b) of the Tariff Act, a later statute fixing a special penalty. P. 517.

53 F. (2d) 467, affirmed.

CERTIORARI, 284 U. S. 614, to review a judgment affirming a conviction and sentence for violation of the Tariff Act of 1922 by aiding and abetting importation of intoxicating liquor contrary to law. See *United States* v. *Newton,* 36 F. (2d) 425.

Mr. Louis Halle, with whom *Mr. Milton R. Kroopf* was on the brief, for petitioner.

Assistant Attorney General Youngquist, with whom *Solicitor General Thacher* and *Mr. John J. Byrne* were on the brief, for the United States.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

The petitioner was indicted under § 593 (b) of the Tariff Act of 1922,[1] for aiding and abetting the importation of intoxicating liquors contrary to law, the specified illegality being violation of Title II, § 3, of the National Prohibition Act.[2] In support of a demurrer he asserted

[1] U. S. C., Tit. 19, § 497. "If any person fraudulently or knowingly imports or brings into the United States, or assists in so doing, any merchandise, contrary to law . . . the offender shall be fined in any sum not exceeding $5,000 nor less than $50, or be imprisoned for any time not exceeding two years, or both. . . ."

[2] U. S. C., Tit. 27, § 12. "No person shall . . . import . . . any intoxicating liquor except as authorized in this chapter. . . . Liquor

the indictment set forth an offense under the prohibition act and failed to charge one under the cited section of the tariff act; and was duplicitous as including offenses under both statutes. The demurrer was overruled, trial and conviction followed, and petitioner was sentenced under § 593 (b). The circuit court of appeals affirmed the judgment, and this court granted certiorari.

We are asked to hold that one who violates the prohibition act by importing liquor, may not be indicted, tried and sentenced under the tariff act, which makes the importation of "any merchandise[3] contrary to law" a criminal offense. The phrase "contrary to law" as used in the later act is unqualified and taken in its natural meaning signifies "contrary to any law," and hence contrary to the earlier prohibition act, so that a violation of that act would be an offense within the other.

The petitioner urges that the National Prohibition Act deals specifically with intoxicating liquor, prohibits its importation and provides a penalty therefor; whereas the tariff act is concerned with a wholly separate subject and the penal section 593 (b) aimed at unlawful importation should not be construed as repealing the earlier special statute. (*Ex parte Crow Dog,* 109 U. S. 556, 570; *Rodgers* v. *United States,* 185 U. S. 83, 87–89; *Washington* v. *Miller,* 235 U. S. 422, 428.) This argument overlooks the fact that the National Prohibition Act prescribes no special penalty for importation in violation of its provisions. Section 29 of Title II, an omnibus section fixing penalties for violations for which no special penalty is

---

for nonbeverage purposes . . . may be . . . imported . . . but only as herein provided, and the commissioner may, upon application, issue permits therefor. . . ."

[3] Section 401 of the Tariff Act (U. S. C., Tit. 19, § 231) provides: "The word 'merchandise' means goods, wares, and chattels of every description and includes merchandise the importation of which is prohibited."

prescribed, is the only one under which punishment could be imposed for illegal importation.[4] The language used is sufficiently broad to include specific penalties fixed in other sections of the statute and also such as might be imposed by separate legislation. The tariff act, a later statute, fixes a definite penalty for one of the violations grouped in the penal section of the earlier act. In this respect it superseded the general provisions of the prior statute embracing the same subject. *Cook County National Bank* v. *United States,* 107 U. S. 445; *Walla Walla* v. *Walla Walla Water Co.,* 172 U. S. 1, 22. The indictment charged an offense under the Tariff Act and the judgment must be affirmed.[5]

Affirmed.

UNITED STATES *v.* SCHARTON.

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

No. 621. Argued March 22, 1932.—Decided April 11, 1932.

Section 1110 (a) of the Revenue Act of 1926 sets a general limitation of three years upon the prosecution of "any of the various offenses arising under the internal revenue laws . . . *Provided,* That for offenses involving the defrauding or attempting to defraud the United States . . . in any manner, the period of limitation shall be six years. . . ." *Held:*

1. That the six year limitation is confined to cases in which fraud is made an ingredient by the statute defining the offense; and that it does not apply to the offense of wilfully attempting to evade

---

[4] U. S. C., Tit. 27, § 46. "Any person . . . who . . . violates any of the provisions of this chapter, for which offense a special penalty is not prescribed, shall be fined for a first offense not more than $500. . . ."

[5] See *Kurczak* v. *United States,* 14 F. (2d) 109; *Dickerson* v. *United States,* 20 F. (2d) 901; *Gorsuch* v. *United States,* 34 F. (2d) 279.

a tax, Revenue Act, 1926, § 1114 (b), though the attempt charged was by falsely understating taxable income. P. 520.

2. The "proviso" is really an excepting clause and therefore to be narrowly construed. P. 521.

3. The statute should be liberally interpreted in favor of repose. P. 522.

Affirmed.

APPEAL from a judgment sustaining a plea of the statute of limitations, and quashing the indictment.

Assistant Attorney General Youngquist, with whom *Solicitor General Thacher*, and *Messrs. Whitney North Seymour, Sewall Key*, and *John H. McEvers* were on the brief, for the United States.

An attempt to defeat or evade a tax not only is an attempt to deprive the Government of property or money to which it is entitled, *Capone* v. *United States,* 51 F. (2d) 609, 615, but also obstructs the collection of the revenue which "is essential to the very existence of Government." *McCulloch* v. *Maryland,* 4 Wheat. 316, 428. To obstruct the functions of any department of the Government is to defraud the Government. *Haas* v. *Henkel,* 216 U. S. 462, and like cases. "Evasion" implies avoidance by device or strategy or concealment where good faith requires disclosure (see *Murray v. American Yeomen,* 180 Iowa 626, 648; *State* v. *Bernstein,* 129 Iowa 520, 522); and "intent to defeat" is equivalent to "intent to defraud." *Laing* v. *Slingerland*, 12 Ont. Pr. 366.

The courts have continuously treated any attempt to evade or defeat a tax as an offense involving fraud. *Levy* v. *United States,* 271 Fed. 942; *Emmich* v. *United States,* 298 Fed. 5; *Guzik* v. *United States,* 54 F. (2d) 618, cert. den., *post,* p. 545; *Capone* v. *United States,* 51 F. (2d) 609; *United States* v. *LaFontaine,* 54 F. (2d) 371.

Where an attempt to defraud the United States is an ingredient of the offense, such offense falls under the

proviso of § 1110 (a), fixing a six-year period of limitation. *United States* v. *Noveck,* 271 U. S. 201, 204.

Mr. E. Mark Sullivan for appellee.

Mr. Justice Roberts delivered the opinion of the Court.

The appellee was indicted under § 1114 (b) of the Revenue Act of 1926,[1] the charge being attempts to evade taxes for 1926 and 1927 by falsely understating taxable income. In bar of the action he pleaded that the face of the indictment showed the offenses were committed more than three years prior to the return of a true bill. The plea was sustained and the indictment quashed, on the ground that the period of limitations is fixed by the first clause of § 1110 (a) of the Act,[2] and not, as the appellant contended, in the proviso thereof. The basis of this ruling was that the offense defined by use of the words "evade or defeat" does not involve defrauding or attempting to defraud within the intent of the proviso.

The appellant contends fraud is implicit in the concept of evading or defeating; and asserts that attempts to obstruct or defeat the lawful functions of any department of the Government (*Haas* v. *Henkel,* 216 U. S. 462, 479–480) or to cheat it out of money to which it is entitled

[1] U. S. Code, Supp. V, Title 26, § 1266. "Any . . . person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall . . . be guilty of a felony. . . ."

[2] U. S. Code, Supp. V, Title 18, § 585. "No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense: *Provided,* That for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, the period of limitation shall be six years. . . ."

(*Capone* v. *United States,* 51 F. (2d) 609, 615) are attempts to defraud the United States if accompanied by deceit, craft, trickery or other dishonest methods or schemes, *Hammerschmidt* v. *United States,* 265 U. S. 182, 188. Any effort to defeat or evade a tax is said to be tantamount to and to possess every element of an attempt to defraud the taxing body.

We are required to ascertain the intent of Congress from the language used and to determine what cases the proviso intended to except from the general statute of limitations applicable to all offenses against the internal revenue laws. Section 1114 (a) makes wilful failure to pay taxes, to make return, to keep necessary records, or to supply requisite information, a misdemeanor; and § 1114 (c) provides that wilfully aiding, assisting, procuring, counselling, or advising preparation or presentation of a false or fraudulent return, affidavit, claim, or document shall be a felony. Save for that under consideration these are the only sections in the Revenue Act of 1926 defining offenses against the income tax law. There are, however, numerous statutes expressly making intent to defraud an element of a specified offense against the revenue laws.[3] Under these, an indictment failing to aver that intent would be defective; but under § 1114 (b) such an averment would be surplusage, for it would be sufficient to plead and prove a wilful attempt to evade or defeat. Compare *United States* v. *Noveck,* 271 U. S. 201, 203.

As said in the *Noveck* case, statutes will not be read as creating crimes or classes of crimes unless clearly so intended, and obviously we are here concerned with one meant only to fix periods of limitation. Moreover, the concluding clause of the section, though denominated a proviso, is an excepting clause and therefore to be nar-

[3] See U. S. Code, Tit. 26, §§ 261, 306, 316, 555, 667, 775, 843, 1180, 1181, 1184, 1186.

rowly construed. *United States* v. *McElvain,* 272 U. S. 633, 639. And as the section has to do with statutory crimes it is to be liberally interpreted in favor of repose, and ought not to be extended by construction to embrace so-called frauds not so denominated by the statutes creating offenses. *United States* v. *Hirsch,* 100 U. S. 33; *United States* v. *Rabinowich,* 238 U. S. 78, 87–88; *United States* v. *Noveck, supra; United States* v. *McElvain, supra.* The purpose of the proviso is to apply the six year period to cases "in which defrauding or an attempt to defraud the United States is an ingredient under the statute defining the offense." *United States* v. *Noveck, supra.*

Judgment affirmed.

DECISIONS PER CURIAM, FROM FEBRUARY 16, 1932, TO AND INCLUDING APRIL 11, 1932 *

No. 593. VOSE *v.* U. S. CITIES CORP. Appeal from the Supreme Court of Oklahoma. Jurisdictional statement submitted February 15, 1932. Decided February 23, 1932. *Per Curiam:* The appeal herein is dismissed for the want of jurisdiction. Section 237 (a), Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 937). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari, as required by § 237 (c), Judicial Code as amended (43 Stat. 936, 938), certiorari is denied. *Mr. W. F. Wilson* for appellant. *Mr. James I. Phelps* for appellee. Reported below: 7 P. (2d) 132.

No. 19, original. EX PARTE COLORADO. Motion submitted February 17, 1932. Decided February 23, 1932. A rule is ordered to issue requiring the respondent to show cause on or before March 14th next why leave to file the petition for writ of mandamus should not be granted. *Mr. Clarence L. Ireland* for petitioner.

No. 694. UNITED STATES *v.* SMITH. On certificate from the Court of Appeals of the District of Columbia. Submitted February 15, 1932. Decided February 23, 1932. The joint motion to bring up the entire record and cause is granted. The motion of the Attorney General and Solicitor General of the United States for leave to participate in the oral argument of this case is granted. *Solicitor General Thacher* submitted both motions.

---

* For decisions on applications for certiorari, see *post*, pp. 531, 536.

No. 471. PUBLIC SERVICE COMMISSION OF MONTANA ET AL. *v.* GREAT NORTHERN UTILITIES CO. Appeal from the District Court of the United States for the District of Montana. Argued February 24, 1932. Decided February 29, 1932. *Per Curiam:* The order granting interlocutory injunction is affirmed, without prejudice to the consideration and determination at final hearing of all questions of law and fact, including the question of the reasonableness, in the circumstances disclosed, of the order which is the subject of the suit. *Alabama* v. *United States,* 279 U. S. 229, 230, 231. *Mr. Francis A. Silver,* with whom *Mr. L. A. Foot,* Attorney General of Montana, was on the brief, for appellants. *Mr. E. G. Toomey,* with whom *Mr. M. S. Gunn* was on the brief, for appellee. Reported below: 52 F. (2d) 802, 805.

No. 475. NEW YORK TITLE & MORTGAGE CO. *v.* TARVER ET AL. Appeal from the District Court of the United States for the Western District of Texas. Argued February 24, 1932. Decided February 29, 1932. *Per Curiam:* The order denying interlocutory injunction is affirmed, without prejudice to the consideration and determination at final hearing of all questions of law and fact, including the question of the standing of the complainant to maintain this suit. *Alabama* v. *United States,* 279 U. S. 229, 230, 231. *Mr. Nathan L. Miller,* with whom *Messrs. Robert A. Ritchie, George S. Parsons,* and *Charles A. Boston* were on the brief, for appellant. *Messrs. Ireland Graves* and *Albert DeLange,* with whom *Messrs. James V. Allred,* Attorney General of Texas, *Everett L. Looney,* Assistant Attorney General, *W. A. Tarver, W. S. Pope, Maco Stewart,* and *Charles L. Black* were on the brief, for appellees. Reported below: 51 F. (2d) 584.

No. 578. REEVES *v.* LOUISVILLE & NASHVILLE R. CO. Appeal from the Supreme Court of Ohio. Jurisdictional

statement submitted February 23, 1932. Decided February 29, 1932. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Loftus* v. *Pennsylvania R. Co.,* 107 Ohio State 352, 363; *Douglas* v. *New York, N. H. & H. R. Co.,* 279 U. S. 377; *LaTourette* v. *McMaster,* 248 U. S. 465. *Mr. David F. Anderson* for appellant. No appearance for appellee. Reported below: 124 Oh. St. 657.

No. —, original. Ex parte Dover. Submitted February 15, 1932. Decided February 29, 1932. The motions for leave to proceed *in forma pauperis* and for leave to file petition for writ of mandamus are denied. *Mr. Gordon Dover, pro se.*

No. 609. Slattery et al. *v.* Cochran et al. Appeal from the Supreme Court of Nebraska. Jurisdictional statement submitted February 29, 1932. Decided March 14, 1932. *Per Curiam:* The appeal herein is dismissed for the want of jurisdiction. Section 237(a) Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 936, 937). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by § 237(c), Judicial Code as amended (43 Stat. 936, 938), the petition for writ of certiorari is denied. *Mr. Allen G. Fisher* for appellants. *Messrs. C. A. Sorenson, E. D. Crites,* and *T. F. Neighbors* for appellees. Reported below: 121 Neb. 418; 237 N. W. 301.

No. 620. Southern Cities Distributing Co. *v.* Carter et al. Appeal from and on petition for writ of certiorari to the Supreme Court of Arkansas. Jurisdictional statement submitted February 29, 1932. Decided March 14, 1932. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. Section 237(a), Judicial Code, as amended by the Act of February 13, 1925

(43 Stat. 936, 937); *Wabash R. Co.* v. *Flannigan,* 192 U. S. 29; *Erie R. Co.* v. *Solomon,* 237 U. S. 427; *C. A. King & Co.* v. *Horton,* 276 U. S. 600; *Bank of Indianola* v. *Miller,* 276 U. S. 605; *Roe* v. *Kansas,* 278 U. S. 191. The petition for writ of certiorari is denied. *Messrs. Wm. H. Arnold, Wm. H. Arnold, Jr.,* and *David C. Arnold* for appellant. *Mr. Benjamin E. Carter* for appellees. Reported below: 184 Ark. 4; 44 S. W. (2d) 362.

No. —, original. Ex parte Pocono Pines Assembly Hotels Co. Submitted February 29, 1932. Decided March 14, 1932. The motion for leave to file petition for writ of mandamus and/or prohibition is denied. *Mr. Hiram B. Calkins* for petitioner. *Solicitor General Thacher* for the United States.

No. —, original. Ex parte Keogh. Submitted February 29, 1932. Decided March 14, 1932. The motion for leave to file petition for writ of mandamus is denied. *Mr. John W. Keogh, pro se.*

No. 401. American Surety Co. *v.* Greek Catholic Union. March 14, 1932. In this cause it is ordered that the word "then" be deleted from the first line of the third paragraph of the opinion announced on February 15, 1932; otherwise the opinion will stand as heretofore announced. See 284 U. S. 563, 566.

No. 526. Glenn *v.* Doyal, State Tax Commissioner. Appeal from the Supreme Court of Georgia. Argued March 18, 1932. Decided March 21, 1932. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Moffitt* v. *Kelly,* 218 U. S. 400, 404, 405; *Nickel* v. *Cole,* 256 U. S. 222, 226; *Iowa Central Ry.*

Co. v. *Iowa,* 160 U. S. 389, 393; *Castillo* v. *McConnico,* 168 U. S. 674, 683; *Lombard* v. *West Chicago Park Commissioners,* 181 U. S. 33, 42, 43; *French* v. *Taylor,* 199 U. S. 274, 277; *Rawlins* v. *Georgia,* 201 U. S. 638, 639, 640; *Hannis Distilling Co.* v. *Baltimore,* 216 U. S. 285, 294; *De Bearn* v. *Safe Deposit & Trust Co.,* 233 U. S. 24, 34; *McDonald* v. *Oregon Navigation Co.,* 233 U. S. 665, 669, 670; *St. Louis Land Co.* v. *Kansas City,* 241 U. S. 419, 427; *Hebert* v. *Louisiana,* 272 U. S. 312, 316, 317; *Sandel* v. *South Carolina,* 269 U. S. 532; *Boyd* v. *Smythe,* 270 U. S. 635. *Mr. John A. Sibley,* with whom *Messrs. Marion Smith* and *Herman Swift* were on the brief, for appellant. *Messrs. George M. Napier,* Attorney General of Georgia, *Orville A. Park,* and *John A. Smith* were on the brief for appellee. Reported below: 173 Ga. 482.

No. 646. STREIT *v.* LUJAN, STATE COMPTROLLER, ET AL. Appeal from the Supreme Court of New Mexico. Jurisdictional statement submitted March 14, 1932. Decided March 21, 1932. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Guaranty Trust Co.* v. *New York & Queens County Ry. Co.,* 282 U. S. 803; *Wabash R. Co.* v. *Flannigan,* 192 U. S. 29; *Erie R. Co.* v. *Solomon,* 237 U. S. 427; *C. A. King & Co.* v. *Horton,* 276 U. S. 600; *Bank of Indianola* v. *Miller,* 276 U. S. 605; *Roe* v. *Kansas,* 278 U. S. 191. *Mr. Charles Fahy* for appellant. *Messrs. E. K. Neumann* and *Sam G. Bratton* for appellees. Reported below: 35 N. M. 672; 6 P. (2d) 205.

No. 650. DEPAUW UNIVERSITY *v.* BRUNK, TREASURER OF MISSOURI, ET AL. Appeal from the District Court of the United States for the Western District of Missouri. Jurisdictional statement submitted March 14, 1932. Decided March 21, 1932. *Per Curiam:* The Court being of opinion that there is no jurisdiction in equity, the order

of the District Court dismissing the bill of complaint in this cause is affirmed. *First National Bank of Greely* v. *Board of County Commissioners,* 264 U. S. 450; *Gorham Mfg. Co.* v. *State Tax Commission,* 266 U. S. 265, 269, 270; *Henrietta Mills* v. *Rutherford County,* 281 U. S. 121. *Mr. Justin D. Bowersock* for appellant. *Messrs. John T. Barker* and *George W. Meyer* for appellees. Reported below: 53 F. (2d) 647.

No. 19, original. EX PARTE COLORADO. Submitted February 17, 1932. Decided March 21, 1932. Leave to file petition for writ of mandamus granted, and rule issued to respondents to show cause why the writ of mandamus should not issue as prayed. All questions presented are reserved until the return of such rule. *Mr. C. L. Ireland,* Attorney General of Colorado, for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Mahlon D. Kiefer* and *John J. Byrne* for the United States. See 286 U. S. 510.

No. —, original. EX PARTE RYAN. Submitted March 14, 1932. Decided March 21, 1932. The motions for leave to proceed *in forma pauperis* and for leave to file petition for writ of mandamus in this cause are denied. *Mr. Harry Joseph Ryan, pro se.*

No. 521. KANSAS CITY PUBLIC SERVICE CO. *v.* RANSON, COLLECTOR OF REVENUE. Appeal from the Supreme Court of Missouri. Argued March 18, 21, 1932. Decided March 28, 1932. *Per Curiam:* The appeal herein is dismissed for the want of a substantial federal question. *Glenn* v. *Doyal, ante,* p. 526; *Moffitt* v. *Kelly,* 218 U. S. 400, 404, 405; *Nickel* v. *Cole,* 256 U. S. 222, 226; *Castillo* v. *McConnico,* 168 U. S. 674, 683; *Lombard* v. *West Chicago Park Comm'rs,* 181 U. S. 33, 42, 43; *Rawlins* v. *Georgia,* 201 U. S. 638, 639, 640; *Hebert* v. *Louisiana,* 272 U. S. 312,

316, 317. *Mr. Powell C. Groner,* with whom *Messrs. Robert W. Otto* and *Henry N. Ess* were on the brief, for appellant. *Messrs. Henry L. McCune* and *E. H. Wright* were on the brief for appellee. Reported below: 328 Mo. 524; 41 S. W. (2d) 169.

No. 529. THOMSON ET AL. *v.* DANA ET AL. Appeal from the District Court of the United States for the District of Oregon. Argued March 22, 1932. Decided March 28, 1932. *Per Curiam:* Decree affirmed. *Manchester* v. *Massachusetts,* 139 U. S. 240; *Lawton* v. *Steele,* 152 U. S. 133; *Miller* v. *McLaughlin,* 281 U. S. 261; *Wampler* v. *LeCompte,* 282 U. S. 172; *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 79, 80; *Crescent Cotton Oil Co.* v. *Mississippi,* 257 U. S. 129, 137; *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245, 255; *Whitney* v. *California,* 274 U. S. 357, 369, 370. *Mr. W. Y. Masters* for appellants. *Mr. Chester E. McCarty,* Assistant Attorney General of Oregon, with whom *Mr. I. H. Van Winkle,* Attorney General, was on the brief, for appellees. Reported below: 52 F. (2d) 759.

No. 717. WHITMER *v.* LUCAS, COMMISSIONER OF INTERNAL REVENUE, ET AL. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit. Submitted March 21, 1932. Decided March 28, 1932. *Per Curiam:* The petition for writ of certiorari in this cause is granted. On consideration of the suggestion of the United States that this cause has abated, it is ordered that the decrees of the Circuit Court of Appeals for the Seventh Circuit and of the District Court of the United States for the Northern District of Illinois in this cause, be, and the same are hereby, vacated, and the cause is remanded to the District Court with directions to dismiss the proceeding as abated. *United States ex rel. Claussen* v. *Curran,* 276 U. S. 590; *Matheus* v. *United States ex rel. Cunningham,* 282 U. S. 802. *Mr. Lee D. Mathias* for

petitioner. *Solicitor General Thacher* and *Mr. W. Marvin Smith* for respondents. Reported below: 53 F. (2d) 1006.

No. 644. LAMB, DEPUTY SHERIFF, ET AL. *v.* NEW JERSEY EX REL. TIERNEY. Appeal from the Court of Common Pleas of Hudson County, New Jersey. Jurisdictional statement submitted March 21, 1932. Decided March 28, 1932. *Per Curiam:* The appeal herein is dismissed for the want of jurisdiction. Section 237 (a), Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 937). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari as required by § 237 (c), Judicial Code, as amended (43 Stat. 936, 938), certiorari is denied. *Mr. Max Rhoade* for appellants. No appearance for appellee.

No. 660. FARRINGTON *v.* CALIFORNIA. Appeal from the Supreme Court of California. Jurisdictional statement submitted March 28, 1932. Decided April 11, 1932. *Per Curiam:* The appeal herein is dismissed for the want of jurisdiction. Section 237 (a) Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 936, 937). Treating the papers whereon the appeal was allowed as a petition for writ of certiorari, as required by § 237 (c) Judicial Code, as amended (43 Stat. 936, 938), certiorari is denied. *Mr. Roland Becsey* for appellant. *Mr. U. S. Webb,* Attorney General of California, for appellee. Reported below: 213 Cal. 459; 2 P. (2d) 814.

No. 19, original. EX PARTE COLORADO. April 11, 1932. Return to the rule to show cause submitted by *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Mahlon D. Kiefer* and *John J. Byrne.*

DECISIONS GRANTING CERTIORARI, FROM FEBRUARY 16, 1932, TO AND INCLUDING APRIL 11, 1932

No. 649. ADAMS GREASE GUN CORP. *v.* BASSICK MFG. Co. February 23, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. The Chief Justice took no part in the consideration or decision of this application. *Mr. Alfred W. Kiddle* for petitioner. *Mr. Lynn A. Williams* for respondent. Reported below: 52 F. (2d) 36; 54 *id.* 285.

No. 639. BLAKEY, RECEIVER, v. BRINSON. February 23, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Messrs. George P. Barse* and *Henry Eastman Hackney* for petitioner. *Mr. L. I. Moore* for respondent. Reported below: 52 F. (2d) 821.

No. 664. PIEDMONT & NORTHERN RY. CO. *v.* INTERSTATE COMMERCE COMMISSION ET AL. March 14, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. The Chief Justice took no part in the consideration or decision of this application. *Messrs. W. S. O'B. Robinson, Jr.,* and *H. J. Haynsworth* for petitioner. *Messrs. Nelson Thomas* and *Daniel W. Knowlton* for the Interstate Commerce Commission, respondent. *Messrs. F. B. Grier, S. R. Prince, Carl H. Davis, Sidney S. Alderman,* and *E. S. Jouett* for the respondent carriers. Reported below: 51 F. (2d) 766.

No. 674. ST. LOUIS SOUTHWESTERN RY. CO. *v.* SIMPSON, ADMINISTRATRIX. March 14, 1932. Petition for writ of certiorari to the Supreme Court of Arkansas granted.

Messrs. Harold R. Small and *A. L. Adams* for petitioner. *Mr. Frank Pace* for respondent. Reported below: 184 Ark. 633; 43 S. W. (2d) 251.

No. 731. KOENIG ET AL. *v.* FLYNN, SECRETARY OF STATE, ET AL. March 15, 1932. Petition for writ of certiorari to the Supreme Court of New York granted. *Messrs. Abraham S. Gilbert* and *Benjamin L. Fairchild* for petitioners. *Messrs. John J. Bennett, John Godfrey Saxe, Henry Epstein, Robert F. Wagner,* and *John J. O'Connor* for respondents. Reported below: 141 Misc. 840, 253 N. Y. S. 554; 234 App. Div. 139, 254 N. Y. S. 339; 258 N. Y. 292, 179 N. E. 705.

No. 700. PAGE, TRUSTEE, *v.* ARKANSAS NATURAL GAS CORP. March 21, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit granted. *Messrs. Frank J. Looney, Judson M. Grimmet,* and *Yandell Boatner* for petitioner. *Messrs. Robert S. Sloan* and *John W. Davis* for respondent. Reported below: 53 F. (2d) 27.

No. 703. BALTIMORE & OHIO R. CO. *v.* BERRY. March 21, 1932. Petition for writ of certiorari to the Supreme Court of Missouri granted. *Messrs. Rudolph J. Kramer, Bruce A. Campbell, Morison R. Waite,* and *Wm. A. Eggers* for petitioner. *Messrs. Wm. H. Allen* and *John S. Marsalek* for respondent. Reported below: 43 S. W. (2d) 782.

No. 704. UNITED STATES *v.* KOMBST ET AL. March 21, 1932. Petition for writ of certiorari to the Court of Claims granted. *Solicitor General Thacher* for the United States. *Messrs. Clarence W. DeKnight* and *Frederick Schwertner* for respondents. Reported below: 72 Ct. Cls. 695; 52 F. (2d) 1030.

No. 672. PLANTERS COTTON OIL CO., INC., ET AL. *v.* HOPKINS, COLLECTOR. March 21, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Messrs. Joe A. Worsham, J. L. Gammon, W. A. Sutherland,* and *J. M. Burford* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Claude R. Branch, J. Louis Monarch,* and *Norman D. Keller* for respondent. Reported below: 53 F. (2d) 825.

No. 698. L'HOTE ET AL. *v.* CROWELL, DEPUTY COMMISSIONER, ET AL. March 21, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted limited to the question raised by the review of the Deputy Commissioner's finding as to the dependency of Zeb Payne. *Mr. Arthur A. Moreno* for petitioners. *Solicitor General Thacher, Assistant Attorney General St. Lewis,* and *Messrs. Claude R. Branch* and *W. Clifton Stone* for Crowell. Reported below: 54 F. (2d) 212.

No. 714. MACDONALD, TRUSTEE, *v.* PLYMOUTH COUNTY TRUST CO. March 21, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit granted. *Mr. Robert A. B. Cook* for petitioner. *Mr. Joseph B. Jacobs* for respondent. Reported below: 53 F. (2d) 827.

No. 730. LANG *v.* UNITED STATES. March 21, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Messrs. Charles Dickerman Williams* and *Jerome A. Strauss* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Claude R. Branch* and *Norman J. Morrisson* for the United States. Reported below: 55 F. (2d) 922.

No. 734. UNITED STATES *v.* COMMERCIAL CREDIT CO., INC. March 21, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit granted. *Solicitor General Thacher* for the United States. *Messrs. Duane R. Dills* and *Berthold Muecke, Jr.*, for respondent. Reported below: 53 F. (2d) 977.

No. 805. CARROLL *v.* BECKER, SECRETARY OF STATE. March 22, 1932. Petition for writ of certiorari to the Supreme Court of Missouri granted. *Messrs. E. F. Colladay* and *Hyman G. Stein* for petitioner. *Messrs. Stratton Shartel* and *Ray Weightman* for respondent. Reported below: 329 Mo. —; 45 S. W. (2d) 533.

No. 717. WHITMER *v.* LUCAS, COMMISSIONER OF INTERNAL REVENUE, ET AL. See same case, *ante*, p. 529.

No. 693. TAYLOR *v.* UNITED STATES. March 28, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit granted. *Mr. R. Palmer Ingram* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Mahlon D. Kiefer* and *W. Marvin Smith* for the United States. Reported below: 55 F. (2d) 58.

No. 795. UNITED STATES *v.* THE RUTH MILDRED; and No. 811. GENERAL IMPORT & EXPORT CO., INC. *v.* UNITED STATES. March 28, 1932. Petitions for writs of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Solicitor General Thacher* for the United States. *Messrs. Louis Halle* and *Milton R. Kroopf* for the Ruth Mildred and General Import & Export Co. Reported below: 56 F. (2d) 590.

No. 736. RUDE *v.* BUCHHALTER. March 28, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted. *Mr. Ernest Morris* for petitioner. *Mr. Henry E. Lutz* for respondent. Reported below: 54 F. (2d) 834.

Nos. 723 and 724. MOSHER *v.* PHOENIX. April 11, 1932. Petitions for writs of certiorari to the Circuit Court of Appeals for the Ninth Circuit granted, limited to the question of the jurisdiction of the District Court as a federal court. *Mr. John W. Ray* for petitioner. *Mr. Sidman D. Barber* for respondent. Reported below: 54 F. (2d) 777, 778.

No. 729. REICHELDERFER ET AL. *v.* QUINN ET AL. April 11, 1932. Petition for writ of certiorari to the Court of Appeals of the District of Columbia granted. *Messrs. Robert E. Lynch, Wm. W. Bride,* and *Vernon E. West* for petitioners. *Messrs. Joseph A. Burkhart, Henry I. Quinn,* and *George E. Sullivan* for respondents. Reported below: 60 App. D. C. 325; 53 F. (2d) 1079.

No. 739. UNITED STATES EX REL. STAPF *v.* CORSI, COMMISSIONER OF IMMIGRATION. April 11, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Harold Van Riper* for petitioner. *Solicitor General Thacher* and *Mr. Claude R. Branch* for respondent. Reported below: 54 F. (2d) 1086.

No. 752. CORTES, ADMINISTRATOR, *v.* BALTIMORE INSULAR LINE, INC. April 11, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Basil O'Connor* for petitioner. *Mr.*

George Whitefield Betts, Jr., for respondent. Reported below: 52 F. (2d) 22.

No. 767. SCHOENTHAL ET AL. *v.* IRVING TRUST CO., TRUSTEE. April 11, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit granted. *Mr. Horace London* for petitioners. *Mr. Saul J. Lance* for respondent. Reported below: 54 F. (2d) 1079.

DECISIONS DENYING CERTIORARI, FROM FEBRUARY 16, 1932, TO AND INCLUDING APRIL 11, 1932

No. 593. VOSE *v.* U. S. CITIES CORP. See same case, *ante*, p. 523.

No. 654. NALBANTIAN *v.* UNITED STATES. February 23, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit, and motion for leave to proceed further *in forma pauperis*, denied. *Mr. Edward H. S. Martin* for petitioner. No appearance for the United States. Reported below: 54 F. (2d) 63.

No. 594. CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC R. CO. *v.* CAMPBELL RIVER MILLS CO., LTD., ET AL. February 23, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. F. M. Dudley* and *C. S. Jefferson* for petitioner. *Mr. H. C. Brodie* for respondents. Reported below: 53 F. (2d) 69.

No. 596. ARKANSAS POWER & LIGHT CO. *v.* WEST MEMPHIS POWER & WATER CO. ET AL. February 23, 1932. Petition for writ of certiorari to the Supreme Court of

Arkansas denied. *Messrs. J. W. House* and *C. H. Moses* for petitioner. No appearance for respondents. Reported below: 184 Ark. 206; 41 S. W. (2d) 755.

No. 601. THOMAS *v.* MCFALL. February 23, 1932. Petition for writ of certiorari to the Supreme Court of Kansas denied. *Mr. George B. Webster* for petitioner. *Mr. A. C. Malloy* for respondent. Reported below: 133 Kan. 593; 1 P. (2d) 73; 3 P. (2d) 463.

No. 606. UNITED STATES FIDELITY & GUARANTY CO. *v.* LEONG DUNG DYE. February 23, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Messrs. E. C. Brandenburg* and *Louis M. Denit* for petitioner. *Mr. Charles B. Dwight* for respondent. Reported below: 52 F. (2d) 567.

No. 613. DES MOINES TERMINAL CO. *v.* DES MOINES UNION RY. CO. ET AL.; and

No. 614. CHICAGO GREAT WESTERN R. CO. ET AL. *v.* SAME. February 23, 1932. Petition for writs of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. J. G. Gamble* and *R. L. Read* for Des Moines Terminal Co. *Messrs. J. C. James* and *Donald Evans* for Chicago Great Western R. Co. *Messrs. Homer Hall* and *John N. Hughes* for respondents. Reported beported below: 52 F. (2d) 616.

No. 618. ADCOCK *v.* COMMISSIONER OF INTERNAL REVENUE. February 23, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Irvin H. Fathchild* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,*

Miss Helen R. Carloss, and *Messrs. Claude R. Branch* and *Sewall Key* for respondent. Reported below: 52 F. (2d) 779.

No. 623. GRIGG *v.* BOLTON, U. S. MARSHAL, ET AL. February 23, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. H. L. Maury* for petitioner. *Solicitor General Thacher,* and *Messrs. Claude R. Branch* and *Harry S. Ridgely* for respondents. Reported below: 53 F. (2d) 158.

No. 624. UNITED STATES *v.* BONWIT TELLER & Co. February 23, 1932. Petition for writ of certiorari to the Court of Claims denied. *Solicitor General Thacher* for the United States. *Mr. Arthur B. Hyman* for respondent. Reported below: 72 Ct. Cls. 559; 52 F. (2d) 904.

No. 626. WISCONSIN COCA COLA BOTTLING CO. ET AL. *v.* E. L. HUSTING Co. February 23, 1932. Petition for writ of certiorari to the Supreme Court of Wisconsin denied. *Mr. Charles F. Fawsett* for petitioners. *Mr. Wm. L. Tibbs* for respondent. Reported below: 205 Wis. 356; 237 N. W. 85.

No. 628. AMERICAN BOND & MORTGAGE CO. ET AL. *v.* UNITED STATES. February 23, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Homer H. Cooper* and *George W. Swain* for petitioners. *Solicitor General Thacher, Assistant to the Attorney General O'Brian,* and *Messrs. Claude R. Branch, Charles H. Weston,* and *Wm. H. Riley, Jr.,* for the United States. Reported below: 52 F. (2d) 318.

No. 629. LOWENSTEIN, TRUSTEE IN BANKRUPTCY, *v.* REIKES ET AL.; and

No. 630. SAME *v.* I. N. PLATT & CO., INC. February 23, 1932. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Jacob M. Zinaman* for petitioner. *Mr. Seymour J. Koff* for respondents. Reported below: 54 F. (2d) 481.

No. 632. WRIGHT ET AL. *v.* UNITED STATES. February 23, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. Felix E. Alley* for petitioners. *Solicitor General Thacher,* and *Messrs. Claude R. Branch, Aubrey Lawrence,* and *Nat M. Lacy* for the United States. Reported below: 53 F. (2d) 300.

No. 633. TILLMAN *v.* RUSSO-ASIATIC BANK. February 23, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Borris M. Komar* for petitioner. *Mr. Maurice Leon* for respondent. Reported below: 51 F. (2d) 1023.

No. 635. SPEAKMAN, ANCILLARY RECEIVER, *v.* BRYAN, STATE RECEIVER. February 23, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Selden Bacon, Robert C. Alston, Robert H. Richards, Paul B. Cromelin,* and *Gregory Hankin* for petitioner. *Messrs. W. E. Norvell, Jr., S. N. Evins,* and *James H. Anderson* for respondent. Reported below: 53 F. (2d) 463.

No. 637. SEABOARD AIR LINE RY. CO. *v.* SPENCER. February 23, 1932. Petition for writ of certiorari to the Supreme Court of North Carolina denied. *Mr. Murray*

Allen for petitioner. *Messrs. Clyde A. Douglass* and *Robert N. Simms* for respondent. Reported below: 201 N. C. 537; 160 S. E. 763.

No. 638. ERIE R. Co. *v.* DIDSBURY. February 23, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. George S. Hobart* for petitioner. *Messrs. Thomas G. Haight* and *John A. Hartpence* for respondent. Reported below: 54 F. (2d) 632.

No. 640. DULION *v.* S. A. LYNCH ENTERPRISE FINANCE CORP. February 23, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Winfield P. Jones* for petitioner. *Mr. Robert C. Alston* for respondent. Reported below: 53 F. (2d) 568.

No. 641. CRANDALL *v.* HABBE, SHERIFF. February 23, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. George T. Buckingham* for petitioner. *Messrs. Ashby M. Warren* and *John D. Welman* for respondent. Reported below: 53 F. (2d) 969.

No. 648. WOLFE *v.* PRUDENTIAL INSURANCE CO. February 23, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Ralph F. Lozier* for petitioner. *Messrs. Henry I. Eager* and *Charles M. Blackmar* for respondent. Reported below: 52 F. (2d) 537.

No. 651. CORKER *v.* HOWARD, RECEIVER. February 23, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Blair Fos-*

ter for petitioner. No appearance for respondent. Reported below: 53 F. (2d) 190.

No. 653. BANKERS UTILITIES CO., INC., ET AL. *v.* NATIONAL BANK SUPPLY CO., INC., ET AL. February 23, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Roy L. Daily* for petitioners. *Messrs. C. P. Goepel, Charles E. Townsend,* and *Wm. A. Loftus* for respondents. Reported below: 53 F. (2d) 432.

No. 662. SMITH-HAMBURG SCOTT WELDING CO. ET AL. *v.* BICKELL ET AL. February 23, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Charles H. Wilson* for petitioners. *Messrs. Dean S. Edmonds* and *Wm. H. Davis* for respondents. Reported below: 53 F. (2d) 356.

No. 663. HURT ET AL. *v.* NEW YORK LIFE INS. CO. February 23, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Austin M. Cowan* for petitioners. *Messrs. Charles M. Blackmar, Henry I. Eager, Richard E. Bird,* and *Louis H. Cooke* for respondent. Reported below: 51 F. (2d) 936; 53 *id.* 453.

No. 597. CHETKOVICH *v.* UNITED STATES. February 29, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. John A. Shelton* for petitioner. *Solicitor General Thacher, Assistant Attorney General St. Lewis,* and *Messrs. Claude R. Branch, W. Clifton Stone,* and *Wm. H. Riley, Jr.,* for the United States. Reported below: 53 F. (2d) 26. See also 47 F. (2d) 894.

No. 647. Aetna Life Insurance Co. *v.* Hagemyer et al. February 29, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Harry P. Lawther* for petitioner. No appearance for respondents. Reported below: 53 F. (2d) 636.

No. 655. Rodgers et al. *v.* Bromberg et al. February 29, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Allen Wright* for petitioners. *Mr. Paul Carrington* for respondents. Reported below: 53 F. (2d) 723.

No. 692. Davis, Director General of Railroads, *v.* Reed, Administrator. February 29, 1932. Petition for writ of certiorari to the Supreme Court of New York denied. *Mr. Louis L. Waters* for petitioner. *Mr. Paul Shipman Andrews* for respondent.

No. 619. Atlantic Refining Co. *v.* United States. February 29, 1932. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Ira Jewell Williams, Ira Jewell Williams, Jr., Charles L. Guerin,* and *John H. Stone* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Messrs. Claude R. Branch, J. Frank Staley, H. Brian Holland,* and *W. Marvin Smith* for the United States. Reported below: 72 Ct. Cls. 1.

No. 609. Slattery et al. *v.* Cochran et al. See same case, *ante,* p. 525.

No. 620. Southern Cities Distributing Co. *v.* Carter et al. See same case, *ante,* p. 525.

No. 721. FERRONI *v.* UNITED STATES. March 14, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Leslie P. Whelan* for petitioner. No appearance for the United States. Reported below: 53 F. (2d) 1013.

No. 631. CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC R. Co. *v.* NELLIS. March 14, 1932. Petition for writ of certiorari to the Supreme Court of Wisconsin denied. *Messrs. Rodger M. Trump, C. S. Jefferson,* and *Walter H. Bender* for petitioner. *Mr. Joseph Very Quarles* for respondent. Reported below: 205 Wis. 397; 236 N. W. 668.

No. 652. KERENS *v.* COLKET ET AL. March 14, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. James A. Reed* and *Arnold Just* for petitioner. *Messrs. Luther Ely Smith, Elmer E. Pearcy, Fred L. Williams,* and *Earl F. Nelson* for respondents. Reported below: 52 F. (2d) 390.

No. 622. RICHARDSON *v.* UNITED STATES. March 14, 1932. Petition for writ of certiorari to the Court of Claims denied. *Messrs. A. V. Cushman, T. T. Ansberry,* and *George E. Tew* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Messrs. Melville D. Church* and *H. Brian Holland* for the United States. Reported below: 72 Ct. Cls. 51.

No. 658. OLIVER *v.* UNITED STATES. March 14, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Wm. J. Hughes, Jr., George N. Murdock, Wm. E. Leahy,* and *Ed-*

ward J. Callahan for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, Sewall Key,* and *John H. McEvers* for the United States. Reported below: 54 F. (2d) 48.

No. 659. Northern Life Insurance Co. *v.* King. March 14, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. John L. McNab* for petitioner. *Mr. Ray T. Coughlin* for respondent. Reported below: 53 F. (2d) 613.

No. 661. Klein *v.* United States Fidelity & Guaranty Co. March 14, 1932. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Mr. Lawrence Koenigsberger* for petitioner. *Messrs. Edwin C. Brandenburg* and *Louis M. Denit* for respondent. Reported below: 60 App. D. C. 354; 54 F. (2d) 828.

No. 665. Brennen *v.* Smith, Warden. March 14, 1932. Petition for writ of certiorari to the Supreme Court of California denied. *Mr. Leo Brennen, pro se.* No appearance for respondent.

No. 666. Lehigh Valley R. Co. *v.* Russell. March 14, 1932. Petition for writ of certiorari to the Supreme Court of New York denied. *Messrs. Howard Cobb* and *Harold E. Simpson* for petitioner. *Mr. Ephraim J. Page* for respondent. Reported below: 231 App. Div. 779, 245 N. Y. S. 917; 257 N. Y. 596, 178 N. E. 810.

No. 669. Frigidaire Sales Corp. *v.* Marks. March 14, 1932. Petition for writ of certiorari to the Court of Ap-

peals of the District of Columbia denied. *Mr. Elwood H. Seal* for petitioner. *Mr. Henry Gilligan* for respondent. Reported below: 60 App. D. C. 359; 54 F. (2d) 974.

No. 670. DEPPE ET AL. *v.* GENERAL MOTORS CORP. March 14, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Messrs. Atlee Pomerene* and *Wm. J. Hughes* for petitioners. *Messrs. J. L. Stackpole* and *Melville Church* for respondent. Reported below: 52 F. (2d) 726.

No. 673. MANTLE LAMP CO. *v.* GEO. H. BOWMAN CO. March 14, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. George I. Haight* and *Thomas G. Steward* for petitioner. No appearance for respondent. Reported below: 53 F. (2d) 441.

No. 678. MORGAN LITHOGRAPH CO. *v.* WEZEL-NAUMANN AKTIENGESELLSCHAFT. March 14, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Drury W. Cooper* for petitioner. *Mr. Wm. Houston Kenyon* for respondent. Reported below: 54 F. (2d) 235.

No. 679. GOODYEAR TIRE & RUBBER CO. *v.* OVERMAN CUSHION TIRE CO., INC. March 14, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. F. O. Richey, Wm. B. Cockley,* and *Spencer Gordon* for petitioner. *Messrs. Robert W. Byerly* and *Wm. L. Day* for respondent. Reported below: 48 F. (2d) 215. See also 40 F. (2d) 460.

No. 680. GUZIK *v.* UNITED STATES. March 14, 1932. Petition for writ of certiorari to the Circuit Court of Ap-

peals for the Seventh Circuit denied. *Messrs. Wm. F. Waugh* and *Louis S. Posner* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Claude R. Branch, Sewall Key,* and *Carlton Fox* for the United States. Reported below: 54 F. (2d) 618.

No. 682. ERIE R. Co. *v.* STEELE. March 14, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Welles V. Moot* for petitioner. *Mr. Hamilton Ward* for respondent. Reported below: 54 F. (2d) 690.

No. 683. WABASH RY. CO. *v.* WHITCOMB, ADMINISTRATRIX. March 14, 1932. Petition for writ of certiorari to the Appellate Court of Indiana denied. *Messrs. Homer Hall* and *Charles H. Stuart* for petitioner. *Mr. Henry M. Dowling* for respondent. Reported below: 94 Ind. App. —.

No. 684. JABCZYNSKI ET AL. *v.* UNITED STATES. March 14, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. George K. Bowden* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Claude R. Branch, Mahlon D. Kiefer,* and *W. Marvin Smith* for the United States. Reported below: 53 F. (2d) 1014.

No. 685. MCFEE *v.* UNITED STATES. March 14, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit denied. *Mr. Harry H. Parsons* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Claude R. Branch, A. E. Gottschall,* and *W. Marvin Smith* for the United States. Reported below: 53 F. (2d) 553.

No. 690. STATE BANK & TRUST CO. *v.* LEE, TRUSTEE. March 14, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Louis S. Posner* for petitioner. *Mr. David Haar* for respondent. Reported below: 54 F. (2d) 518. See also 38 F. (2d) 45.

No. 738. MCCARTHY *v.* U. S. SHIPPING BOARD MERCHANT FLEET CORP. March 21, 1932. Petition for writ of certiorari to the Court of Appeals of the District of Columbia, and motion for leave to proceed further *in forma pauperis,* denied. *Miss Margaret M. McCarthy, pro se.* No appearance for respondent. Reported below: 60 App. D. C. 311; 53 F. (2d) 923.

No. 782. TAYLOR ET AL. *v.* LOUISIANA. March 21, 1932. Petition for writ of certiorari to the Supreme Court of Louisiana, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. Moses C. Scharff* for petitioners. No appearance for respondent. Reported below: 173 La. 1010; 139 So. 463.

No. 783. MICHIGAN EX REL. PALM *v.* JACKSON, WARDEN. March 21, 1932. Petition for writ of certiorari to the Circuit Court of Jackson County, Michigan, and motion for leave to proceed further *in forma pauperis,* denied. *Mr. A. Stanley Copeland* for petitioner. No appearance for respondent. Reported below: 255 Mich. 632; 238 N. W. 732.

No. 642. MILLS NOVELTY CO. *v.* UNITED STATES. March 21, 1932. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Weymouth Kirkland* and *Willis D. Nance* for petitioner. *Solicitor General Thacher, As-*

sistant Attorney General Rugg, and *Messrs. Whitney North Seymour, H. Brian Holland,* and *Wm. H. Riley, Jr.,* for the United States. Reported below: 72 Ct. Cls. 443; 50 F. (2d) 476.

No. 643. PHILIPSBORN *v.* UNITED STATES. March 21, 1932. Petition for writ of certiorari to the Court of Claims denied. *Mr. Clarence N. Goodwin* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Messrs. Whitney North Seymour, Bradley B. Gilman,* and *Wm. H. Riley, Jr.,* for the United States. Reported below: 72 Ct. Cls. 545; 53 F. (2d) 133.

No. 645. F. COUTHOUI, INC. *v.* UNITED STATES. March 21, 1932. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Charles H. LeFevre* and *Howard S. LeRoy* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Messrs. Claude R. Branch, H. Brian Holland,* and *Wm. H. Riley, Jr.,* for the United States. Reported below: 73 Ct. Cls. 363; 54 F. (2d) 158.

No. 656. ARMY & NAVY CLUB *v.* UNITED STATES. March 21, 1932. Petition for writ of certiorari to the Court of Claims denied. *Messrs. Benjamin B. Pettus, E. F. Colladay,* and *George W. Burleigh* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Messrs. Claude R. Branch, Fred K. Dyar, H. Brian Holland,* and *Wm. H. Riley, Jr.,* for the United States. Reported below: 72 Ct. Cls. 684; 53 F. (2d) 277.

No. 668. LINCOLN BANK & TRUST CO. ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. March 21, 1932. Petition for writ of certiorari to the Circuit Court of Ap-

peals for the Sixth Circuit denied. *Mr. Elwood Hamilton* for petitioners. *Solicitor General Thacher*, *Assistant Attorney General Youngquist*, and *Messrs. Claude R. Branch, J. Louis Monarch, A. H. Conner, Wm. H. Riley, Jr.*, and *Clarence M. Charest* for respondent. Reported below: 51 F. (2d) 78.

No. 675. FORD *v.* NEW YORK, NEW HAVEN & HARTFORD R. Co. March 21, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Thomas J. O'Neill* and *Charles D. Lewis* for petitioner. *Messrs. John M. Gibbons* and *Edward R. Brumley* for respondent. Reported below: 54 F. (2d) 342.

No. 686. CLIFTON HIGHLAND CO. ET AL. *v.* LAKEWOOD ET AL. March 21, 1932. Petition for writ of certiorari to the Supreme Court of Ohio denied. *Mr. Miles E. Evans* for petitioners. No appearance for respondents. Reported below: 124 Oh. St. 399, 178 N. E. 837; 179 N. E. 198.

No. 687. CZARLINSKY *v.* UNITED STATES. March 21, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. A. T. Hannett* for petitioner. *Solicitor General Thacher*, and *Messrs. Claude R. Branch, Harry S. Ridgely*, and *W. Marvin Smith* for the United States. Reported below: 54 F. (2d) 889.

No. 688. SOCIETE ENFANTS GOMBAULT ET CIE *v.* LAWRENCE-WILLIAMS CO. March 21, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Lanier McKee* and *James R. Garfield* for petitioner. *Mr. John F. Oberlin* for respondent. Reported below: 52 F. (2d) 774.

No. 691. BUFFALO *v.* UNITED STATES. March 21, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Herbert A. Hickman* for petitioner. *Solicitor General Thacher, Assistant Attorney General Richardson,* and *Messrs. Claude R. Branch* and *Wm. H. Riley, Jr.,* for the United States. Reported below: 54 F. (2d) 471.

No. 695. FAIRCLOTH *v.* UNITED STATES. March 21, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. T. Morris Wampler* for petitioner. *Solicitor General Thacher,* and *Messrs. Whitney North Seymour, Harry S. Ridgely,* and *W. Marvin Smith* for the United States. Reported below: 55 F. (2d) 655.

No. 696. TROMBETTA *v.* UNITED STATES. March 21, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Benjamin L. Stein* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, F. Cadmus Damrell,* and *W. Marvin Smith* for the United States. Reported below: 54 F. (2d) 924.

No. 697. ARD *v.* UNITED STATES. March 21, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Philip D. Beall* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Whitney North Seymour, A. E. Gottschall,* and *W. Marvin Smith* for the United States. Reported below: 54 F. (2d) 358.

No. 699. JAMES AKEROYD & SON *v.* UNITED STATES. March 21, 1932. Petition for writ of certiorari to the

Court of Customs and Patent Appeals denied. *Mr. J. Stuart Tompkins* for petitioner. *Solicitor General Thacher, Assistant Attorney General Lawrence,* and *Messrs. Claude R. Branch* and *Wm. H. Riley, Jr.,* for the United States. Reported below: 19 C. C. P. A. (Cust.) 249.

No. 701. MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RY. CO. *v.* GALVIN. March 21, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Henry S. Mitchell* for petitioner. *Mr. Werner W. Schroeder* for respondent. Reported below: 54 F.(2d) 202.

No. 702. TOLBERT *v.* NEW YORK LIFE INS. CO. March 21, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Messrs. Erskine R. Myer* and *Norton Montgomery* for petitioner. *Messrs. Louis H. Cooke* and *Henry McAllister* for respondent. Reported below: 55 F. (2d) 10.

No. 708. FLORIDA EAST COAST RY. CO. *v.* ACHESON. March 21, 1932. Petition for writ of certiorari to the Supreme Court of Florida denied. *Mr. Robert H. Anderson* for petitioner. *Mr. H. H. Taylor* for respondent. Reported below: 135 So. 551.

No. 709. TYSON *v.* UNITED STATES. March 21, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. J. Forrest McCutcheon* for petitioner. *Solicitor General Thacher,* and *Messrs. Whitney North Seymour, Harry S. Ridgely,* and *W. Marvin Smith* for the United States. Reported below: 54 F. (2d) 26.

No. 710. CHAS. H. PHILLIPS CHEMICAL CO., INC., *v.* MCKESSON & ROBBINS, INC. March 21, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Messrs. Edward S. Rogers, Wm. J. Hughes, Wm. J. Hughes, Jr.,* and *Norris E. Pierson* for petitioner. *Messrs. Harry D. Nims* and *Minturn DeS. Verdi* for respondent. Reported below: 53 F. (2d) 342, 1011.

No. 711. FRANCO ET AL., TRUSTEES, *v.* NEW YORK LIFE INS. CO. March 21, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Richard T. Rives* for petitioners. *Mr. Ray Rushton* for respondent. Reported below: 53 F. (2d) 562.

No. 715. SHORE *v.* UNITED STATES. March 21, 1932. Petition for writ of certiorari to the Court of Appeals of the District of Columbia denied. *Messrs. James F. Reilly, Wm. E. Leahy,* and *Wm. J. Hughes, Jr.,* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Mr. John J. Byrne* for the United States. Reported below: 60 App. D. C. 137; 49 F. (2d) 519.

Nos. 718 and 719. BURNET, COMMISSIONER OF INTERNAL REVENUE, *v.* HALL. March 21, 1932. Petition for writs of certiorari to the Court of Appeals of the District of Columbia denied. *Solicitor General Thacher* for petitioner. *Messrs. John A. Selby* and *Henry Ravenel* for respondent. Reported below: 60 App. D. C. 332; 54 F. (2d) 443.

No. 743. STEINMAN *v.* PENNSYLVANIA R. CO. March 21, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr.*

Samuel B. Kaufman for petitioner. *Messrs. Robert Carey* and *Harry Lane* for respondent. Reported below: 54 F. (2d) 1052.

No. 777. ALEOGRAPH CO. *v.* ELECTRICAL RESEARCH PRODUCTS, INC. March 21, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. J. B. Lewright* for petitioner. *Mr. W. L. Matthews* for respondent. Reported below: 55 F. (2d) 106.

No. 644. LAMB, DEPUTY SHERIFF, ET AL. *v.* NEW JERSEY EX REL. TIERNEY. See same case, *ante,* p. 530.

No. 636. WHITE, COLLECTOR OF INTERNAL REVENUE, *v.* HALL ET AL., EXECUTORS. March 28, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Solicitor General Thacher* for petitioner. No appearance for respondents. Reported below: 53 F. (2d) 210.

No. 689. ANDERSON, COLLECTOR OF INTERNAL REVENUE, *v.* GUINZBURG ET AL. March 28, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Solicitor General Thacher* for petitioner. *Mr. James Marshall* for respondents. Reported below: 54 F. (2d) 629.

No. 712. P. MCGRAW WOOL CO. *v.* UNITED STATES. March 28, 1932. Petition for writ of certiorari to the Court of Customs and Patent Appeals denied. *Messrs. Harry S. Mesirov, John G. Frazer, Samuel M. Richardson,* and *Albert MacC. Barnes* for petitioner. *Solicitor General Thacher, Assistant Attorney General Lawrence,*

and *Messrs. Claude R. Branch* and *Wm. H. Riley, Jr.*, for the United States. Reported below: 19 C. C. P. A. (Cust.) 205.

No. 713. SCONYERS *v.* UNITED STATES. March 28, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. J. Forrest McCutcheon* for petitioner. *Solicitor General Thacher,* and *Messrs. Claude R. Branch* and *Harry S. Ridgely* for the United States. Reported below: 54 F. (2d) 68.

No. 720. SCALA ET AL. *v.* UNITED STATES. March 28, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Mr. Elwood G. Godman* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Claude R. Branch* and *W. Marvin Smith* for the United States. Reported below: 54 F. (2d) 608.

No. 728. GIDLEY *v.* CHICAGO SHORT LINE RY. CO. March 28, 1932. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. Charles C. Spencer* for petitioner. *Messrs. Kemper K. Knapp, Wm. Beye,* and *Paul R. Conaghan* for respondent. Reported below: 346 Ill. 122, 178 N. E. 399.

No. 732. M. BERNSTEIN & SONS *v.* UNITED STATES. March 28, 1932. Petition for writ of certiorari to the Court of Customs and Patent Appeals denied. *Messrs. Albert MacC. Barnes* and *Robert Szold* for petitioner. *Solicitor General Thacher, Assistant Attorney General Lawrence,* and *Mr. Claude R. Branch* for the United States. Reported below: 19 C. C. P. A. (Cust.) 59, 242.

No. 735. BRANDYWINE HUNDRED REALTY CO. *v.* COTILLO. March 28, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit denied. *Mr. Charles F. Curley* for petitioner. *Mr. Reuben Satterthwaite, Jr.,* for respondent. Reported below: 55 F. (2d) 231.

No. 660. FARRINGTON *v.* CALIFORNIA. See same case, *ante,* p. 530.

No. 827. LOGAN *v.* UNITED STATES. April 11, 1932. Petition for writ of certiorari to the Court of Appeals of the District of Columbia, and motion for leave to proceed further *in forma pauperis,* denied. *Messrs. James A. O'Shea, John H. Burnett,* and *Alfred Goldstein* for petitioner. No appearance for the United States. Reported below: 56 F. (2d) 301.

No. 681. JONES ET AL. *v.* BOX ELDER COUNTY ET AL. April 11, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit denied. *Mr. Dan B. Shields* for petitioners. *Mr. Lewis Jones* for respondents. Reported below: 52 F. (2d) 340.

No. 671. ENDICOTT, TRUSTEE, *v.* UNITED STATES. April 11, 1932. Petition for writ of certiorari to the Court of Claims denied. *Mr. Merrill S. June* for petitioner. *Solicitor General Thacher, Assistant Attorney General Rugg,* and *Messrs. Claude R. Branch, Joseph H. Sheppard, Bradley B. Gilman,* and *Wm. H. Riley, Jr.,* for the United States. Reported below: 72 Ct. Cls. 323; 50 F. (2d) 299.

No. 733. WELCH INSURANCE AGENCY *v.* BRAST, COLLECTOR OF INTERNAL REVENUE. April 11, 1932. Peti-

tion for writ of certiorari to the Circuit Court of Appeals for the Fourth Circuit denied. *Mr. M. C. Hammond* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Claude R. Branch, J. Louis Monarch, John MacC. Hudson,* and *Wm. H. Riley, Jr.,* for respondent. Reported below: 55 F. (2d) 60.

No. 737. NASH ET AL. *v.* UNITED STATES. April 11, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. Charles H. Tuttle* for petitioners. *Solicitor General Thacher,* and *Messrs. Claude R. Branch, Harry S. Ridgely,* and *W. Marvin Smith* for the United States. Reported below: 54 F. (2d) 1006.

No. 740. NEW YORK TRUST CO., TRUSTEE, *v.* COMMISSIONER OF INTERNAL REVENUE. April 11, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. J. DuPratt White* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Claude R. Branch, Sewall Key,* and *Francis H. Horan* for respondent. Reported below: 54 F. (2d) 463.

Nos. 741 and 742. OSAKA SHOSEN KAISHA *v.* HABICHT BRAUN & CO. ET AL. April 11, 1932. Petition for writs of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. George C. Sprague* for petitioner. *Mr. Horace T. Atkins* for respondents. Reported below: 54 F. (2d) 265.

No. 745. CUTCLIFF *v.* UNITED STATES. April 11, 1932. Petition for writ of certiorari to the Circuit Court of Ap-

peals for the Fifth Circuit denied. *Mr. Paul L. Lindsay* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Claude R. Branch, A. E. Gottschall,* and *W. Marvin Smith* for the United States.

No. 747. Rosa, Monserrate Rafaela et al. *v.* Mediavilla et al. April 11, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the First Circuit denied. *Mr. Henry G. Molina* for petitioners. *Mr. Gabriel I. Lewis* for respondents. Reported below: 54 F. (2d) 588.

No. 750. Bunker *v.* United States. April 11, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Mr. Will C. Austin* for petitioner. *Solicitor General Thacher,* and *Messrs. Claude R. Branch* and *Harry S. Ridgely* for the United States. Reported below: 54 F. (2d) 1076.

No. 751. Gibson *v.* United States. April 11, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Mr. Charles T. Gibson, pro se. Solicitor General Thacher,* and *Messrs. Claude R. Branch, Harry S. Ridgely,* and *W. Marvin Smith* for the United States. Reported below: 53 F. (2d) 721.

No. 755. Florida ex rel. Woods-Young Co. *v.* Tedder, Judge, et al. April 11, 1932. Petition for writ of certiorari to the Supreme Court of Florida denied. *Mr. Carl A. Hiaasen* for petitioner. *Mr. Cary D. Landis* for respondents. Reported below: 138 So. 643.

No. 756. PHELPS, EXECUTRIX, *v.* COMMISSIONER OF INTERNAL REVENUE;

No. 757. NORTHERN TRUST CO., TRUSTEE, *v.* SAME; and

No. 758. PHELPS *v.* SAME. April 11, 1932. Petition for writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit denied. *Messrs. Herbert Pope* and *Benjamin M. Price* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Claude R. Branch, A. H. Conner,* and *F. Edward Mitchell* for respondent. Reported below: 54 F. (2d) 289.

No. 759. DEBONIS *v.* UNITED STATES. April 11, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. Union C. DeFord* for petitioner. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Claude R. Branch* and *John J. Byrne* for the United States. Reported below: 54 F. (2d) 3.

No. 760. PEOPLE EX REL. NEVE *v.* MULLIGAN, U. S. MARSHAL. April 11, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Second Circuit denied. *Mr. W. H. Crichton-Clarke* for petitioner. *Messrs. Francis L. Kohlman, Carl J. Austrian,* and *Saul J. Lance* for Irving Trust Co., trustee in bankruptcy, in opposition.

No. 761. KOGEN *v.* ILLINOIS EX REL. HARDING. April 11, 1932. Petition for writ of certiorari to the Supreme Court of Illinois denied. *Mr. John J. Kelly* for petitioner. *Mr. J. Kent Greene* for respondent. Reported below: 346 Ill. 307; 178 N. E. 414.

No. 763. MISSOURI EX REL. LOUISVILLE & NASHVILLE R. Co. *v.* OSSING ET AL. April 11, 1932. Petition for writ of certiorari to the Supreme Court of Missouri denied. *Messrs. Harold R. Small* and *Ashby M. Warren* for petitioner. *Mr. Chilton Atkinson* for respondents.

No. 764. ILLICK ET AL. *v.* TRUST COMPANY OF FLORIDA ET AL. April 11, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. *Messrs. Henry K. Gibson* and *Henry W. Anderson* for petitioners. *Messrs. Mitchell D. Price, Robert S. Florence, D. H. Redfearn, Cary D. Landis,* and *H. P. Adair* for respondents. Reported below: 54 F. (2d) 286.

No. 768. MAHONING COAL R. CO. ET AL. *v.* UNITED STATES;

No. 769. MAHONING COAL R. CO. *v.* SAME;

No. 770. SAME *v.* ROUTZAHN, COLLECTOR OF INTERNAL REVENUE; and

No. 771. SAME *v.* UNITED STATES. April 11, 1932. Petition for writs of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Messrs. Charles C. Paulding* and *William Mann* for petitioners. *Solicitor General Thacher, Assistant Attorney General Youngquist,* and *Messrs. Claude R. Branch, Sewall Key,* and *Andrew D. Sharpe* for respondents. Reported below: 51 F. (2d) 208. See also 54 F. (2d) 922.

No. 772. COLLETTI *v.* UNITED STATES. April 11, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit denied. *Mr. E. O. Ricketts* for petitioner. *Solicitor General Thacher,* and *Messrs. Claude R. Branch, Harry S. Ridgely,* and *W. Marvin Smith* for the United States. Reported below: 53 F. (2d) 1017.

No. 793. KINGSTON *v.* AMERICAN CAR & FOUNDRY CO. ET AL. April 11, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Eighth Circuit denied. *Messrs. Jacob Chasnoff* and *George C. Willson* for petitioner. *Messrs. Wm. R. Gentry* and *Noah A. Stancliffe* for respondents. Reported below: 55 F. (2d) 132.

No. 744. JOHN WANAMAKER NEW YORK, INC., *v.* COMFORT ET AL. April 11, 1932. Petition for writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit denied. Mr. Justice Roberts took no part in the consideration or decision of this application. *Mr. W. K. Miller* for petitioner. *Messrs. Boykin Wright, A. Pratt Adams,* and *Lansing B. Lee* for respondents. Reported below: 53 F. (2d) 751.

INDEX

ACTIONS.

Form. Suit by owner of tow against tug for damage caused by negligence was *ex delicto* and not *ex contractu. Stevens* v. *The White City,* 195.

ADEQUATE REMEDY. See **Injunction.**

ADMINISTRATION OF ESTATES. See **Taxation, III.**

ADMINISTRATIVE DECISIONS. See **Statutes, 1–2.**

Findings of Fact. How far may administrative findings in admiralty cases involving claims of employees against employers for injuries under an Act of Congress be made conclusive; and how far must they be subject to revision by the federal judicial power? *Crowell* v. *Benson,* 22.

ADMIRALTY. See **Constitutional Law, III, 1–2; VIII; Jurisdiction I, 4; IV, 2; Longshoremen's Act.**

As to necessity of jury trial in admiralty, see *Crowell* v. *Benson,* 22.

1. *Admiralty and Maritime Jurisdiction.* Extent of. *Crowell* v. *Benson,* 22.

2. *Towage. Negligence.* Liability of tug for injury to tow; burden of proof; sufficiency of evidence. *Stevens* v. *The White City,* 195.

3. *Suits Between Foreigners. Jurisdiction.* District Court did not abuse discretion in refusing to retain jurisdiction, though cause of action arose out of collision in United States waters. *Canada Malting Co.* v. *Paterson Steamships,* 413.

4. *Limiting Liability. Maritime Tort.* Company operating vessel for ferrying its employees to and from work could not limit liability under R. S. § 4283, where negligence in navigation which resulted in personal injuries and loss of life was with its privity or knowledge; negligence was maritime tort entitling claimants to relief in admiralty, including remedy under applicable death statute; state workmen's compensation law not applicable. *Spencer Kellogg & Sons* v. *Hicks,* 502.

ADVERTISING. See **Constitutional Law,** IV, 3; IX, (B), 4.

AFFILIATED COMPANIES. See **Constitutional Law,** IV, 2; **Public Utilities.**

AGENCY. See **Carriers.**

Imputing Knowledge to Principal. Knowledge of factory manager as to danger of operating vessel used to ferry employees, under prevailing weather conditions, held knowledge of company. *Spencer Kellogg & Sons* v. *Hicks,* 502.

ALIENS. See **Admiralty,** 3.

AMENDMENTS. See **Constitutional Law.**

ANTI-CIGARETTE LAWS. See **Constitutional Law,** IV, 3; IX, (B), 4.

APPEAL. See **Judgments; Jurisdiction,** I, 1–3; II, 2; III; IV, 3.

ARREST. See **Constitutional Law,** VI, 3.

ASSESSMENTS. See **Banks and Banking,** 1.

ATTORNEYS AT LAW. See **Contempt,** 2; **Lis Pendens; Process,** 2.

ARMY. See **Public Lands.**

ASSIGNMENTS. See **Partnership.**

ASSIGNMENTS OF ERROR. See **Jurisdiction,** III.

AVIATION.

As to state tax on gasoline used by air transport company in interstate commerce, see *Eastern Air Transport* v. *South Carolina Tax Comm.,* 147.

BAILMENT.

Towage contract as bailment, see *Stevens* v. *The White City,* 195.

BANKRUPTCY.

1. *Examination.* Court without power to issue writ of *ne exeat* against absconding officer of bankrupt corporation. *D. Ginsberg & Sons* v. *Popkin,* 204.

2. *Summary Jurisdiction.* Petition for reclamation does not submit petitioner to summary jurisdiction in respect of unrelated matters; effect of General Order xxxvii and Equity Rule 30. *Daniel* v. *Guaranty Trust Co.,* 154.

BANKS AND BANKING.

1. *Assessments on Stockholders.* Validity and enforcement. *Shriver* v. *Woodbine Savings Bank,* 467.

2. *Payment of Forged Checks.* Release of right to recoup from depositor releases bank's indemnitor. *Aetna Casualty Co.* v. *Phoenix Nat. Bank & T. Co.,* 209.

BILLBOARDS. See **Constitutional Law,** IV, 3; IX, (A), 6; IX, (B), 4.

BILL OF EXCEPTIONS. See **Jury,** 2.

BILLS OF LADING. See **Carriers.**

BOARD OF TAX APPEALS. See **Jurisdiction,** I, 3.

BONDS. See **Constitutional Law,** I, 8; V, 1.

BURDEN OF PROOF. See **Admiralty,** 2; **Contitutional Law,** I, 5–6; **Insurance,** 4; **Sureties.**

"BUSINESS AFFECTED WITH PUBLIC INTEREST." See *New State Ice Co.* v. *Liebman,* 262.

CALIFORNIA. See **Constitutional Law,** V, 1–2; IX, (A), 3–4.

CALIFORNIA DEBRIS COMMISSION. See **Public Lands.**

CAPITAL STOCK TAX. See **Taxation,** IV, 1–2.

CARRIERS. See **Negligence; Public Lands.**

1. *Connecting Carriers. Liability for Loss.* Evidence of delivery; liability under through bill of lading of carrier furnishing necessary link in transportation though not named in bill; carrier could not escape liability on ground that it was agent of carrier to which it made delivery, or that under its own tariff it was not liable. *Galveston Wharf Co.* v. *Galveston, H. & S. A. Ry. Co.,* 127.

2. *Liability Under State Workmen's Compensation Acts.* See *Boston & Maine R. Co.* v. *Armburg,* 234.

CENSUS. See **Elections.**

CHARTER. See **Corporations,** 3.

CHECKS. See **Banks and Banking,** 1.

CIGARETTES.

See *Packer Corporation* v. *Utah,* 106.

CLASSIFICATION. See **Constitutional Law**, IX, (B), 1-4.

COLLISION. See **Admiralty**, 3.

COMMON LAW REMEDIES. See **Corporations**, 1.

COMPENSATION ACTS. See **Constitutional Law**, IV, 4.

CONCLUSIVE PRESUMPTION. See **Constitutional Law**, VII, 5–7.

CONDEMNATION. See **Constitutional Law**, VII, 8.

CONGRESS. See **Constitutional Law**, I, 3–4; II, 1–2; VII, 1; **Elections.**

CONNECTING CARRIERS. See Carriers.

CONSPIRACY. See **Constitutional Law**, VI, 3; **Prohibition Act**, 2.

CONSTITUTIONAL LAW. See **Elections**, 1–3; **Public Utilities.**

I. In General, p. 564.
II. Legislative Department, p. 565.
III. Judicial Power, p. 565.
IV. Commerce Clause, p. 566.
V. Contract Clause, p. 566.
VI. Fourth Amendment, p. 566.
VII. Fifth Amendment, p. 567.
VIII. Seventh Amendment, p. 567.
IX. Fourteenth Amendment.
(A) Due Process Clause, p. 567.
(B) Equal Protection Clause, p. 568.

I. In General.

1. *Principles of Construction.* Constitution is to be construed with regard to principles on which it was established; scope of provisions not measured by direct operation or literal meaning of words. *United States* v. *Lefkowitz*, 452.

2. *Id.* Rule giving weight to practical construction is especially applicable to constitutional provision governing exercise of political rights. *Smiley* v. *Holm*, 355.

3. *Id. Acts of Congress.* In passing upon validity of Act of Congress regard must be had to substance rather than form. *Crowell* v. *Benson*, 22.

4. *Id.* Acts will be construed so as to avoid doubts of constitutionality. *Id.*

5. *Attacking Statute.* Burden is on party assailing statute to establish its invalidity. *Boston & Maine R. Co.* v. *Armburg*, 234.

CONSTITUTIONAL LAW—Continued.

6. *Id.* Stockholder attacking statute specifically authorizing suit against stockholders to collect deficiencies after sale of their shares to pay assessments, upon the ground that it imposed a liability to which he was not subject under the statute in force when he acquired his stock, failed to sustain burden of establishing invalidity. *Shriver* v. *Woodbine Savings Bank,* 467.

7. *State Constitutions.* Decision of state supreme court construing and applying state constitution and laws not binding here when contract clause of Federal Constitution is involved. *Coombes* v. *Getz,* 434.

8. *Id.* In absence of applicable decisions of state court, extent of tax exemption of municipal bonds under state constitution determined here by general principles of construction. *Pacific Co.* v. *Johnson,* 480.

9. *Intrumentality of State.* Federal income tax upon income of lessee of lands granted by United States to State and leased by it for benefit of public schools, invalid. *Burnet* v. *Coronado Oil & Gas Co.,* 393.

10. *Administrative Decisions.* As aid or invasion of judicial power to determine facts in private controversies. *Crowell* v. *Benson,* 22.

II. Legislative Department.

1. *Elections of Representatives. State Laws.* Function of state legislature in prescribing time, place and manner of holding elections under Art. I, § 4, is that of law making, and veto power of governor participates. *Smiley* v. *Holm,* 355; *Koenig* v. *Flynn,* 375; *Carroll* v. *Becker,* 380.

2. *Insular Possessions. Legislation.* Congress has power to legislate, or provide for legislation, on substantive law of trademarks in Philippine Islands. *American Trading Co.* v. *H. E. Heacock Co.,* 247.

III. **Judicial Power.** See **Jurisdiction.**

1. *Admiralty Jurisdiction.* Congress can not exceed constitutional limits of admiralty and maritime jurisdiction; equipping admiralty courts with power of injunction to enforce maritime law valid. *Crowell* v. *Benson,* 22.

2. *Administrative Determinations. Longshoremen's Act.* Federal courts can not constitutionally be deprived of jurisdiction to decide facts upon which validity of application of statute depends; but in other respects administrative finding of fact may be made conclusive if based on evidence. *Id.*

CONSTITUTIONAL LAW—Continued.

IV. **Commerce Clause.**

1. *State Taxation.* Tax on sales of gasoline within State, as applied to gasoline used by air transport company in interstate commerce, whether viewed as property tax or as excise, valid. *Eastern Air Transport* v. *South Carolina Tax Comm.*, 147.

2. *State Regulation. Public Utilities.* In fixing local gas rates, state authority may inquire into reasonableness of price paid for gas by distributing company to pipe-line company with which it was affiliated, although charge of latter was for interstate service. *Western Distributing Co.* v. *Public Service Comm.*, 119.

3. *Id. Local Advertising.* Statute forbidding billboard advertising of cigarettes and tobaccos, though preventing display of posters shipped from another State, valid. *Packer Corporation* v. *Utah*, 105.

4. *Workmen's Compensation Acts.* Massachusetts Act, construed to apply to employees of carrier while engaged at time of injury in intrastate commerce, valid; insurance provisions not shown to burden interstate commerce. *Boston & Maine R. Co.* v. *Armburg*, 234.

V. **Contract Clause.** See IX, (A), 1, *infra.*

1. *Tax-Exempt Bonds. Extent of Immunity.* Tax immunity granted state and municipal bonds by California constitution held not to extend to tax on corporate franchise of bondholder measured by net income, though statute showed specific intent to include interest from such bonds in measure of tax. *Pacific Co.* v. *Johnson*, 480.

2. *Impairment. Contractual Obligation.* Right of creditor to enforce liability imposed by provision of constitution of California making directors liable for misappropriation of moneys by officers of corporation *held* within protection of contract clause and not destroyed by repeal of provision of state constitution. *Coombes* v. *Getz*, 434.

3. *Id. Corporations.* Reserved power of State over corporations can not be used to impair the obligations of contracts of third persons. *Id.*

VI. **Fourth Amendment.**

1. *How Construed.* Amendment forbids every search that is unreasonable, and is construed liberally to safeguard the right of privacy. *United States* v. *Lefkowitz*, 452.

2. *Id.* Decisions distinguish general exploratory search of home, office, papers or effects to get evidence to convict of crime, from

CONSTITUTIONAL LAW—Continued.

searches for stolen or smuggled goods and searches for articles to prevent commission of crime. *Id.*

3. *General Search. Arrest.* General exploratory search of office incident to arrest of person on warrant for conspiracy to violate Prohibition Act, but made solely to find evidence of guilt of crime, held unreasonable and unconstitutional. *Id.*

VII. **Fifth Amendment.**

1. *Scope.* Restraint imposed by due process clauses of Fourteenth and Fifth Amendments is the same. *New State Ice Co.* v. *Liebmann,* 262.

2. *Longshoremen's Act.* Validity of substantive and procedural provisions; power of Congress to fix liability of employer for injury of employee on navigable waters. *Crowell* v. *Benson,* 22.

3. *Self-Incrimination. Immunity.* Admission of evidence obtained by general exploratory search of office, incident to arrest of person on warrant, but made solely to find evidence of guilt of crime, unconstitutional. *United States* v. *Lefkowitz,* 452.

4. *Income Tax. Partnership Income.* Tax on partner for his distributive share, though wife had derivative interest, valid. *Burnet* v. *Leininger,* 136.

5. *Estate Tax. Conclusive Presumption.* Provision of § 302 (c) of Revenue Act of 1926, creating conclusive presumption that gifts made within two years of death were made in contemplation of death, invalid; tax can not be sustained as gift tax. *Heiner* v. *Donnan,* 312; *Handy* v. *Delaware Trust Co.,* 352.

6. *Id.* Necessity of preventing frauds and evasions can not justify conclusive presumption denying constitutional rights. *Id.*

7. *Id.* Conclusive presumption created by § 302 (c) invalid whether regarded as rule of evidence or of substantive law. *Id.*

8. *Eminent Domain. Compensation.* Payment in advance of taking not required. *Hurley* v. *Kincaid,* 95.

VIII. **Seventh Amendment.**

Jury Trial. Maritime Actions. Jury trial not required in determination of claims governed by maritime law. *Crowell* v. *Benson,* 22.

IX. **Fourteenth Amendment.**

(A) **Due Process Clause.** See VII, 1, *supra.*

1. *Scope of Due Process.* Claim of stockholder that statute creates obligation to pay assessments to which he was not subject when he acquired stock invokes due process and not contract clause. *Shriver* v. *Woodbine Savings Bank,* 467.

CONSTITUTIONAL LAW—Continued.

2. *Experimentation.* Statute infringing constitutional guarantee of liberty can not be upheld as experiment. *New State Ice Co.* v. *Liebmann,* 262.

3. *Vested Rights. Contracts.* Right of creditor to enforce liability imposed by provision of constitution of California making directors liable for misappropriaton of moneys by officers of corporation held within protection of due process clause and not destroyed by repeal of provision of state constitution. *Coombes* v. *Getz,* 434.

4. *Id.* Decisions of Supreme Court of California prior to date of contracts held not to require conclusion that cause of action was extinguished by repeal of constitutional provision. *Id.*

5. *Id.* Reserved power of State over corporations can not be used to destroy vested rights of third persons. *Id.*

6. *Regulation. Billboards.* Statute forbidding billboard advertising of cigarettes and tobaccos, admittedly within police power, not invalid because curtailing liberty of contract. *Packer Corporation* v. *Utah,* 106.

7. *Id. Ice Business.* Statute which forbids anyone to engage in business of manufacture, sale or distribution of ice without license, and authorizes denial of license where existing facilities are sufficient, invalid. *New State Ice Co.* v. *Liebmann,* 262.

8. *"Business Affected With Public Interest."* Definition of. *New State Ice Co.* v. *Liebmann,* 262.

9. *Procedural Matters. Remedies.* Mere variations of remedy or creation of new ones, for enforcement of pre-existing obligations, valid. *Shriver* v. *Woodbine Savings Bank,* 467.

(B) **Equal Protection Clause.**

1. *Classification. Generally.* Action taken by State to observe one prohibition of Constitution does not entail violation of another. *Packer Corporation* v. *Utah,* 106.

2. *Id.* That legislative power extends to persons in certain situations and not to others is reasonable ground of classification. *Id.*

3. *Id.* Legislature may recognize degrees of evil and adapt its legislation accordingly. *Id.*

4. *Regulation of Business. Tobacco Advertising.* Statute forbidding advertising of cigarettes and tobaccos on billboards, but not in newspapers and periodicals, valid. *Id.*

CONTEMPT. See **Jurisdiction,** I, 2.

1. *Nature of Proceeding.* Same conduct may be both civil and criminal contempt; purpose of punishment determines. *Lamb* v. *Cramer,* 217.

CONTEMPT—Continued.

2. *Proceeding in Aid of Equity Suit.* Attorney's retention, after decree, of property received as fee in pending suit involving the property was contempt, and he may be proceeded against civilly. *Id.*

CONTRACTS. See **Constitutional Law**, V, 1–3; IX, (A), 1, 3–5; **Corporations**, 3; **Insurance**, 1–2.

CONVEYANCES. See **Contempt**, 2; **Lis Pendens.**

CORPORATIONS. See **Bankruptcy**, 1; **Banks and Banking**; **Constitutional Law**, I, 6; IV, 2; V, 1–3; IX, (A), 1, 3–5; **Interstate Commerce Acts**, 2; **Public Utilities**; **Taxation**, IV, 1–2.

1. *Stockholders Liability. Remedies.* Where statutory remedy not exclusive, obligation may be enforced by common-law action of debt; mere fact that statute creates special remedy does not imply that it is exclusive; enactment of statute specifically authorizing suit for deficiencies is not legislative determination that theretofore common-law remedy did not exist. *Shriver* v. *Woodbine Savings Bank*, 467.

2. *Directors' Liability* to creditors for defaults of officers. *Coombes* v. *Getz*, 434.

3. *Reserve Power* of State to amend charter can not be used to destroy rights of third persons. *Id.*

COSTS. See **Public Utilities.**

Printing Record. Party causing unnecessary parts of record to be printed may be charged with cost thereof. *Stevens* v. *The White City*, 195.

COUNTERCLAIM.

See *Daniel* v. *Guaranty Trust Co.*, 154.

COURTS. See **Admiralty**, 3; **Bankruptcy**, 1; **Constitutional Law**, III, 1–2; IX, (A), 4; **Costs**; **Jurisdiction**; **Process**, 1–2; **Taxation**, I.

CRIMINAL LAW. See **Constitutional Law**, VI, 1–3; **Contempt**, 1; **Indictment**, 1–2; **Mails**; **Prohibition Act**, 1–2.

1. *Use of Mails. Filthy Letters.* Depositing in mail filthy letters relating to sexual matters is offense under Criminal Code, § 211. *United States* v. *Limehouse*, 424.

2. *Use of Mails to Defraud. Indictment.* Upon objection first made by motion in arrest, indictment, though not specifically

CRIMINAL LAW—Continued.

alleging delivery, held sufficient to charge offense committed within jurisdiction to which letter was addressed. *Hagner* v. *United States*, 427.

3. *Tariff Act. Intoxicating Liquor.* Unlicensed importation contrary to Prohibition Act was violation of Tariff Act. *Callahan* v. *United States*, 515.

4. *Offenses Under Revenue Acts. Limitations.* Period of limitation applicable to offense of wilfully attempting to evade tax was three years, not six years. *United States* v. *Scharton*, 518.

5. *Id.* The proviso in § 1110 (a) of the Revenue Act of 1926, which applies to cases involving fraud against the United States a limitation of six instead of three years, is an excepting clause and to be narrowly construed. *Id.*

6. *Id.* Statutes of limitations applicable to statutory crimes are to be liberally interpreted in favor of repose. *Id.*

CRIMINAL PROCEDURE. See **Criminal Law**, 2; **Indictment**, 1–2.

CUSTOMS. See **Criminal Law**, 3.

DAMAGES. See **Admiralty**, 4.

DEATH. See **Admiralty**, 4; **Constitutional Law**, VII, 5; **Taxation**, III.

DEBT.

Action on stockholders' liability. See **Corporations.**

DELIVERY. See **Carriers**; **Criminal Law**; **Evidence**; **Mails.**

DEPARTMENTAL REGULATIONS. See **Statutes**, 2.

DIRECTORS. See **Constitutional Law**, V, 2; **Corporations**, 2.

DISCRIMINATION. See **Constitutional Law**, IX, (B), 1–4.

DISTRICT OF COLUMBIA. See **Jurisdiction**, IV, 1.

DUE PROCESS. See **Constitutional Law**, VII, 1–7; IX, (A), 1–9.

DUTIES. See **Criminal Law**, 3.

ELECTIONS. See **Constitutional Law**, II, 1.

1. *Congressional Elections. Reapportionment.* Where number of representatives to which State is entitled under new apportionment pursuant to Act of 1929 remains the same, and districts are

ELECTIONS—Continued.

unchanged, elections may be conducted as before. *Smiley* v. *Holm*, 355.

2. *Id. Increase.* Where number of representatives under new apportionment is increased, and State has not been redistricted, additional representatives may be elected by State at large. *Smiley* v. *Holm*, 355; *Koenig* v. *Flynn*, 375.

3. *Id. Decrease.* Where number of representatives under new apportionment is decreased, they must be elected by State at large until new districts are created. *Smiley* v. *Holm*, 355; *Carroll* v. *Becker*, 380.

4. *Effect of Earlier Act.* Act of 1929, as construed, not inconsistent with any policy declared in Act of 1911. *Smiley* v. *Holm*, 355.

EMBEZZLEMENT. See **Corporations**, 2.

EMINENT DOMAIN. See **Constitutional Law**, VII, 8; **Injunction.**

EMPLOYER AND EMPLOYEE. See **Admiralty**, 4; **Constitutional Law**, IV, 4; VII, 2; **Longshoremen's Act.**

EMPLOYERS' LIABILITY ACT.
See *Boston & Maine R. Co.* v. *Armburg*, 234.

EQUAL PROTECTION. See **Constitutional Law**, IX, (B), 1–4.

EQUITY. See **Bankruptcy**, 2; **Constitutional Law**, III, 1; **Contempt; Injunction; Lis Pendens.**

EQUITY RULES. See **Bankruptcy**, 2.

ESTATES. See **Constitutional Law**, VII, 5; **Taxation**, III.

EVIDENCE. See **Admiralty**, 2; **Carriers; Constitutional Law**, VI, 2–3; VII, 3, 5–7; **Insurance**, 3–4; **Negligence; Prohibition Act**, 2.
Presumptions. Mailing Letter. Mailing of letter properly directed creates presumption of delivery, though receipt subject sender to penalty. *Hagner* v. *United States*, 427.

EXECUTIVE. See **Constitutional Law**, II, 1.

EXECUTORS AND ADMINISTRATORS. See **Taxation**, 3.

EXPERIMENTAL LEGISLATION. See **Constitutional Law**, IX, (A), 2.

EXPLORATORY SEARCH. See **Constitutional Law**, VI, 1–3; VII, 3.

FERRIES. See **Interstate Commerce Acts**, 2.

FIRE INSURANCE. See **Insurance.**

FLOOD CONTROL ACT. See **Injunction**, 1.

FOREIGN COUNTRY. See **International Law**; **Taxation**, II, 2.

FORGERY. See **Banks and Banking.**

FRANCHISE TAX. See **Constitutional Law**, V, 1.

FRAUD. See **Banks**, 2; **Constitutional Law**, VII, 6; **Criminal Law**, 2, 5.

FRAUDULENT CONVEYANCES.
See *Lamb* v. *Cramer*, 217.

GAS COMPANIES. See **Public Utilities.**

GASOLINE TAX. See **Constitutional Law**, IV, 1.

GIFT TAX. See **Constitutional Law**, VII, 5.

GOVERNOR. See **Constitutional Law**, II, 1.

GUARANTY. See **Insurance**, 1.

HARBOR WORKERS' ACT.
See *Crowell* v. *Benson*, 22.

HUSBAND AND WIFE. See **Constitutional Law**, VII, 4; **Partnership**; **Taxation**, II, 1.

ICE BUSINESS. See **Constitutional Law**, IX, (A), 7.

IMMUNITY. See **Constitutional Law**, VII, 3; **Process**, 1–2; **Taxation**, I.

IMPAIRMENT OF CONTRACTS. See **Constitutional Law**, V, 1–3.

IMPORTS. See **Criminal Law**, 3.

INDEMNITY. See **Sureties.**

INDICTMENT. See **Criminal Law**, 2.

1. *Formal Defects.* R. S. § 1025, though not dispensing with necessity of alleging essential elements of offense, authorizes court to disregard merely loose or inartificial forms of averment. *Hagner* v. *United States*, 427.

2. *Id.* In proceedings after verdict it is sufficient if necessary facts appear in any form, or by fair construction can be found within terms of indictment. *Id.*

INHERITANCE TAXES. See **Taxation**, III.

INJUNCTION. See **Constitutional Law**, III, 1; **Interstate Commerce Acts**, 2; **Jurisdiction**, IV, 1.

1. *Adequate Remedy at Law.* Landowner claiming that United States must first acquire flowage rights, not entitled to enjoin work under Mississippi River Flood Control Act. *Hurley* v. *Kincaid*, 95.

2. *In Admiralty Cases.* See *Crowell* v. *Benson*, 22.

INSTRUCTIONS TO JURY. See **Jury**, 2.

INSTRUMENTALITY OF GOVERNMENT. See **Constitutional Law**, I, 9.

INSULAR POSSESSIONS. See **Constitutional Law**, II, 2; **Jurisdiction**, II, 2; **Trade Marks**, 1–2.

INSURANCE. See **Constitutional Law**, IV, 4; **Jury**, 1; **Taxation**, IV, 1–2.

1. *Nature of Contract.* The guaranty of payment of principal and interest of mortgage loans is insurance. *Bowers* v. *Lawyers Mortgage Co.*, 182; *United States* v. *Home Title Ins. Co.*, 191.

2. *Fire Insurance. Warranties.* Construction of prohibited-articles and increase-of-hazard warranties. *St. Paul Fire & Marine Ins. Co.* v. *Bachmann*, 112.

3. *Id. Violation. Evidence.* Court could not take judicial notice that operation of stills was more hazardous than bottling automobile oils or say that it was not a mercantile purpose. *Id.*

4. *Actions on Policies. Defenses.* Where rider altered prohibition against gasoline to permit use for bottling automobile oils or other mercantile purposes not more hazardous, determination of fact whether occupancy at time of fire was more hazardous was necessary to maintain defense under prohibited-articles warranty as well as increase-of-hazard warranty; burden of proof. *Id.*

INSURANCE—Continued.

5. *Id. Pleading.* Allegation in specification of defense under prohibited-articles warranty, charging insured with knowledge and control, held surplusage. *Id.*

INTEREST. See **Constitutional Law**, V, 1.

INTERNATIONAL LAW. See **Admiralty**, 3; **Taxation**, II, 2.

Foreign Country. Meaning. Meaning of term "foreign country" determined by reference to purpose of statute employing it. *Burnet* v. *Chicago Portrait Co.*, 1.

INTERPRETATION. See **Statutes.**

INTERSTATE COMMERCE ACTS. See **Carriers; Constitutional Law**, IV, 1–4; **Jurisdiction**, IV, 1.

1. *Application of Act.* Paragraphs 18, 19 and 20, respecting extension and new construction of railroads, are restricted to carriers engaged in interstate commerce; effect on intrastate commerce only incidental. *Claiborne-Annapolis Ferry Co.* v. *United States*, 382.

2. *Extension of Line. Party in Interest. Injunction.* Ferry company was "party in interest" entitled to sue to set aside order of Commission and to enjoin railroad from extending line by establishing ferry, where action might adversely affect company and change transportation situation; in such suit order can not be attacked on ground that railroad was without corporate power to operate ferry; that order was within jurisdiction of Commission and supported by evidence was complete defense. *Id.*

INTOXICATING LIQUORS. See **Constitutional Law**, VI, 3; **Criminal Law**, 3; **Jury**, 1; **Prohibition Act.**

JUDGMENTS. See **Jurisdiction**, I, 1–2.

When Judgment Joint. In determining questions of jurisdiction on appeal, a judgment is deemed joint when it is joint on its face. *Hartford Accident & Indemnity Co.* v. *Bunn*, 169.

JUDICIAL NOTICE. See **Insurance**, 3.

JUDICIAL POWER. See **Administrative Decisions; Constitutional Law**, III, 1–2; **Jurisdiction; Process**, 1.

JURISDICTION. See **Admiralty**, 1, 3; **Bankruptcy**, 1–2; **Constitutional Law**, III, 1–2; **Interstate Commerce Acts**, 2; **Judgments.**

I. In General, p. 575.
II. Jurisdiction of this Court, p. 576.
III. Jurisdiction of Circuit Courts of Appeals, p. 576.
IV. Jurisdiction of District Courts, p. 576.

References to particular subjects under this title:

Administrative Decisions, IV, 3.
Admiralty, IV, 2.
Aliens, IV, 2.
Appeal, I, 1–3.
Assignments of Error, III.
Board of Tax Appeals, I, 3.
Circuit Courts of Appeals, III.
Contempt, I, 2.
Court of Appeals, D. C., IV, 1.
District Courts, IV, 1.
District of Columbia, IV, 1.
Error, III.
Findings, I, 3.
Insular Courts, II, 2.
Interstate Commerce Comm'n, IV, 1.
Joint Judgment, I, 1.
Judgment, I, 1.
Longshoremen's Act, IV, 3.
Parties, I, 1.
Philippine Courts, II, 2.
Raising Question, II, 1.
Severance, I, 1.
Supreme Court, D. C., IV, 1.
Three Judge Court, IV, 2.
Time for Appeal, I, 1.
Trial De Novo, IV, 3.
Urgent Deficiencies Act, IV, 1.

I. In General.

1. *Appeal. Joint Judgment. Parties.* Both parties must join in appeal unless there is a summons and severance; timeliness of appeal; when judgment deemed joint. *Hartford Accident & Indemnity Co.* v. *Dunn*, 169.

2. *Appeal. Civil Contempt.* Order of district court in contempt proceeding brought in aid of suit in equity held final and independently appealable. *Lamb* v. *Cramer*, 217.

JURISDICTION—Continued.

3. *Board of Tax Appeals.* Conclusiveness of findings on review. *Burnet* v. *Leininger,* 136.

4. *Administrative Decisions.* How far may decisions of fact, by an executive board, under an Act of Congress fixing compensation as between employer and employee for injuries on navigable waters of the United States, be made binding on the federal courts? *Crowell* v. *Benson,* 22.

II. **Jurisdiction of this Court.**

1. *Presenting Question Below.* Question of law as to whether state tax deductible in computing federal estate tax *held* properly raised. *Leach* v. *Nichols,* 165.

2. *Over Insular Courts.* This Court will not overrule decision interpreting local law of Philippines, except for cogent reasons. *American Trading Co.* v. *H. E. Heacock Co.,* 247.

III. **Jurisdiction of Circuit Courts of Appeals.**

Assignments of Error. Held construable as asserting grounds of reversal adopted below; Circuit Court of Appeals may reverse upon error appearing upon face of record, though unassigned. *Lamb* v. *Cramer,* 217.

IV. Jurisdiction of District Courts. See *Admiralty.*

1. *Statutory Court. District of Columbia.* In suit under U. S. C., Tit. 28, § 47, to set aside order of Interstate Commerce Commission, Supreme Court of District is "district court" and judges of Court of Appeals are "circuit judges." *Claiborne-Annapolis Ferry Co.* v. *United States,* 382.

2. *Admiralty Cases.* District Court's exercise of discretion in refusing to retain jurisdiction of suit between foreigners will not be disturbed unless abused. *Canada Malting Co.* v. *Paterson Steamships,* 413.

3. *Administrative Decisions.* Court properly awarded trial *de novo* on issue of employment in proceeding under Longshoremen's and Harbor Workers' Compensation Act. *Crowell* v. *Benson,* 22.

JURY. See **Constitutional Law,** VIII.

1. *Questions of Fact.* In action on policy of fire insurance, question whether business of operating still was more hazardous than bottling automobile oils was for jury. *St. Paul Fire & M. Ins. Co.* v. *Bachmann,* 112.

2. *Instructions.* Failure to request proper instructions does not cure error in those given and to which exceptions were taken. *Id.*

JUST COMPENSATION. See **Constitutional Law**, VII, 8.

LAND GRANT ACTS. See **Public Lands.**

LEASE. See **Constitutional Law**, I, 9.

LIBERTY. See **Constitutional Law**, IX, (A), 2.

LICENSE. See **Constitutional Law**, IX, (A), 7.

LIENS.

See *Lamb* v. *Cramer*, 217.

LIMITATIONS. See **Criminal Law**, 4–6.

LIS PENDENS.

Conveyance to Attorney. Attorney receiving property involved in pending suit as fee for services to defendant takes subject to equities alleged in the bill and to the decree. *Lamb* v. *Cramer*, 217.

LOAN COMPANIES. See **Insurance**, 1; **Taxation**, IV, 1–2.

LONGSHOREMEN'S ACT. See **Constitutional Law**, III, 1–2; VII, 2.

Construction. Procedural Requirements. Trial *de novo* on issue of employment. *Crowell* v. *Benson*, 22.

MAILS. See **Criminal Law**, 1–2.

Presumption of Delivery. Mailing of letter properly directed creates presumption of delivery, though receipt subject sender to penalty. *Hagner* v. *United States*, 427.

MARITIME JURISDICTION. See **Admiralty**; **Constitutional Law**, III, 1; VIII.

MASSACHUSETTS. See **Constitutional Law**, IV, 4; **Taxation**, III,

MASTER AND SERVANT. See **Administration Decisions**; **Admiralty**, 4; **Agency**; **Carriers**; **Constitutional Law**, VII, 2; **Longshoremen's Act.**

MORTGAGES. See **Insurance**, 1.

MOTION IN ARREST. See **Criminal Law**, 2; **Indictment**, 2.

MUNICIPAL CORPORATIONS. See **Constitutional Law**, V, 1.

NATURAL GAS. See **Constitutional Law**, IV, 2; **Public Utilities.**

137818°—32——37

NAVIGABLE WATERS. See **Admiralty**, 1–4.

NAVIGATION. See **Admiralty**, 4.

NE EXEAT. See **Bankruptcy**, 1.

NEGLIGENCE. See **Admiralty**, 2, 4; **Agency**; **Carriers.**

Evidence. Finding of negligence on part of railroad in derailment of train held unwarranted. *Atlantic Coast Line* v. *Temple*, 143.

NEGOTIABLE INSTRUMENTS. See **Banks**, 2.

NEW SOUTH WALES. See **Taxation**, II, 2.

NEWSPAPERS. See **Constitutional Law**, IX, (B), 4.

NOTICE. See **Agency**; **Insurance**, 5.

NUISANCE. See **Prohibition Act**, 1–2.

OBSCENITY. See **Criminal Law**, 1.

PARTIES. See **Admiralty**, 3; **Interstate Commerce Acts**, 2; **Jurisdiction**, I, 1.

PARTNERSHIP. See **Constitutional Law**, VII, 4; **Taxation**, II, 1, 3.

New Members. Consent. Agreement between partner and wife could not make her member of partnership without consent of other partners. *Burnet* v. *Leininger*, 136.

PAYMENT. See **Constitutional Law**, VII, 8.

PENALTIES. See **Evidence.**

PHILIPPINE ISLANDS. See **Constitutional Law**, II, 2; **Jurisdiction**, II, 2; **Trade-Marks**, 1–2.

PIPE-LINE COMPANIES. See **Constitutional Law**, IV, 2; **Public Utilities.**

PLEADING. See **Criminal Law**, 2; **Indictment**; **Insurance**, 5.

POLICE POWER. See **Constitutional Law**, IX.

POSTER ADVERTISING. See **Constitutional Law**, IV, 3; IX, (A), 6; IX, (B), 4.

POST OFFICE. See **Criminal Law**, 1–2; **Mails.**

PRESUMPTIONS. See **Constitutional Law**, VII, 5–7; **Evidence**; **Mails.**

PRINCIPAL AND AGENT. See **Agency.**

PROCEDURE. See **Admiralty**, 4; **Bankruptcy**, 1–2; **Constitutional Law**, III, 1–2; VII, 3; VIII; IX, (A), 9; **Contempt**, 2; **Corporations**, 1; **Indictment**, 1–2; **Insurance**, 5; **Interstate Commerce Acts**, 2; **Jurisdiction**; **Jury**, 2.

PROCESS.

1. *Immunity from Service. Attendance at Court.* Rule of immunity while in attendance at court is founded upon convenience not of individuals but of court itself, and should be applied only as judicial necessities require. *Lamb* v. *Schmitt*, 222.

2. *Id.* Nonresident attorney not exempt under supplemental bill seeking to restore to court property transferred to him by client while main suit involving property was pending. *Id.*

PROHIBITION ACT. See **Constitutional Law**, VI, 3; **Criminal Law**, 3.

1. *What Constitutes Nuisance.* Use of room merely to solicit orders for liquor and make collections therefor did not constitute maintenance of nuisance. *United States* v. *Lefkowitz*, 452.

2. *Id. Evidence.* Facts alleged held insufficient to sustain charge that conspiracy or nuisance was being committed. *Id.*

PROVISO. See **Criminal Law**, 5; **Statutes**, 6.

PUBLIC LANDS.

Transportation of Troops. Deductions under land grant acts and agreements do not apply to engineer officers of War Department on duty in connection with rivers and harbors and California Debris Commission. *Southern Pacific Co.* v. *United States*, 240.

PUBLIC UTILITIES. See **Constitutional Law**, IV, 2; IX, (A), 7.

Rates. Costs. Affiliated Companies. Local gas company which bought supply in interstate commerce from affiliated pipe-line company *held* not to have made prima facie showing as to reasonableness of latter's charge for service, and therefore not entitled to rate increase. *Western Distributing Co.* v. *Public Service Comm.*, 119.

RAILROADS. See **Carriers**; **Interstate Commerce Acts**, 1–2; **Negligence**; **Public Lands.**

RATES. See **Public Lands**; **Public Utilities.**

REAPPORTIONMENT. See **Constitutional Law**, II, 1; **Elections**, 1–4.

RECORD. See **Costs.**

REDISTRICTING. See **Constitutional Law**, II, 1; **Elections**, 1–4.

RE-ENACTMENT. See **Statutes**, 4.

REGISTRATION. See **Trade Marks.**

REPEAL. See **Constitutional Law**, V, 2; **Statutes**, 5.

REPRESENTATIVES. See **Elections.**

RESERVED POWER. See **Constitutional Law**, V, 3.

REVENUE ACTS. See **Criminal Law**, 4–5; **Taxation.**

RULES. See **Bankruptcy**, 2; **Costs.**

RULES OF DECISION. See **Constitutional Law**, IX, (A), 4.

SEARCH AND SEIZURE. See **Constitutional Law**, VI, 1–3; VII, 3.

SEARCH WARRANT. See **Constitutional Law**, VI, 3.

SELF-INCRIMINATION. See **Constitutional Law**, VII, 3.

SERVICE OF PROCESS. See **Process.**

STATES. See **Constitutional Law**, I, 7–9; II, 1; IV, 1–3; V, 3; IX; **Elections**, 1–3.

STATUTES. See **Constitutional Law**, I, 1–8; II, 1–2; IV, 1, 3–4; V, 1–2; VII, 2, 5–7; IX, (A), 1–9; IX, (B), 1–4; **Corporations**, 1–2; **Criminal Law**, 4–6; **Elections**, 4; **International Law**; **Interstate Commerce Acts**, 1–2; **Longshoremen's Act**; **Prohibition Act**; **Taxation**, I.

1. *Administrative Construction.* Where not uniform and consistent, will be taken into account only to extent supported by valid reasons. *Burnet* v. *Chicago Portrait Co.*, 1.

2. *Id.* Ambiguous departmental regulations are of little value as aid to interpretation. *Id.*

3. *Saving Clause.* Effect of. *Crowell* v. *Benson*, 22.

4. *Re-enactment.* Inclusion of earlier statutory provision in United States Code does not operate as re-enactment. *Smiley* v. *Holm*, 355.

STATUTES—Continued.

5. *Repeal.* Does not destroy rights previously vested. *Coombes* v. *Getz,* 434.

6. *Excepting Clause.* Strict construction of. *United States* v. *Scharton,* 518.

STOCKHOLDERS. See **Constitutional Law,** I, 6; IX, (A), 1; **Corporations.**

SUBPŒNA. See **Process,** 1–2.

SUBROGATION. See **Sureties.**

SUCCESSION TAX. See **Taxation,** III.

SUMMARY PROCEEDINGS. See **Bankruptcy,** 2.

SURETIES.

Appeal from joint judgment on bond, see *Hartford Accident Co.* v. *Bunn,* 169.

Subrogation. Bank's relinquishment of right against depositor relieved indemnitor of liability arising out of payment of forged check; burden was on it to show that relinquished right was unsubstantial. *Aetna Casualty & S. Co.* v. *Phoenix Nat. Bank & T. Co.,* 209.

TARIFF ACTS. See **Criminal Law,** 3.

TAXATION. See **Constitutional Law,** I, 8–9; IV, 1; V, 1; VII, 4–7; **Criminal Law,** 4–5; **Jurisdiction,** II, 1.

I. In General, p. 581.
II. Income Tax, p. 581.
III. Estate Tax, p. 582.
IV. Special Taxes, p. 582.

I. In General.

Construction of Tax Statutes. Exemptions. Grants of immunity from taxation are strictly construed; where no decisions of state court applicable, extent of exemption determined by general principles of construction. *Pacific Co.* v. *Johnson,* 480.

II. Income Tax.

1. *Partnership Income.* Distributive share of partner taxable to him individually though wife had derivative interest. *Burnet* v. *Leininger,* 136.

TAXATION—Continued.

2. *Credits. Taxes Paid to Foreign Country.* New South Wales as "foreign country" within § 238 (a) and (e) of Act of 1921, permitting credit of income taxes paid "to any foreign country." *Burnet* v. *Chicago Portrait Co.,* 1.

3. *Reductions Under 1924 Act.* Partner making individual return for calendar year 1924 not entitled to 25% reduction, though distributive share attributable in part to 1923 portion of partnership fiscal year. *Shearer* v. *Burnet,* 228.

III. **Estate Tax.**

Deductions. State Taxes. Tax imposed by Massachusetts statute was succession tax in effect, and not deductible as "charge against the estate" under Revenue Act of 1916. *Leach* v. *Nichols,* 165.

IV. **Special Taxes.**

1. *Capital Stock Tax.* Corporation in whose business during tax years insurance was only incidental held subject to capital stock tax and not taxable as "insurance company" under § 246 of 1921 Act. *Bowers* v. *Lawyers Mortgage Co.,* 182.

2. *Insurance Companies.* Corporation deriving more than three-fourths of income from title insurance and mortgage guaranty business and services incident thereto, held exempt from capital stock tax and taxable as "insurance company" under 1921 and 1924 Acts. *United States* v. *Home Title Ins. Co.,* 191.

TAX-EXEMPT BONDS. See **Constitutional Law,** I, 8; V, 1; **Taxation,** I.

TITLE INSURANCE. See **Taxation,** IV, 2.

TOBACCO.

See *Packer Corporation* v. *Utah,* 106.

TOWAGE. See **Admiralty,** 2.

TRADE MARKS. See **Constitutional Law,** II, 2.

As to general effect of Act of 1905, see *American Trading Co.* v. *H. E. Heacock Co.,* 247.

1. *Philippine Act. Registration. Validity and Effect.* Registration under Philippine Act of name "Rogers," which had acquired secondary meaning in local trade in connection with flatware, was valid to prevent local selling of similar goods imported from the United States and bearing the name "Rogers,"

TRADE MARKS—Continued.

although manufacturer of latter goods had name registered under Federal Act. *American Trading Co.* v. *H. E. Heacock Co.*, 247.

2. *Id.* Philippine Act No. 666 of 1903 not superseded by Trade Mark Act of 1905; continued in force by Organic Act of 1916. *Id.*

TRIAL. See **Constitutional Law**, VIII; **Jurisdiction**, IV, 3; **Jury**, 1–2; **Lis Pendens.**

TROOPS. See **Public Lands.**

TUCKER ACT.

See *Hurley* v. *Kincaid*, 95.

UNFAIR COMPETITION. See **Trade Marks.**

UNITED STATES. See **Elections**; **Public Lands.**

UNITED STATES CODE. See **Statutes**, 4.

URGENT DEFICIENCIES ACT. See **Jurisdiction**, IV, 1.

VENUE. See **Criminal Law**, 2.

VESTED RIGHTS. See **Constitutional Law**, IX, (A), 3; **Corporations**, 3; **Statutes**, 5.

VETO POWER. See **Constitutional Law**, II, 1.

WAR DEPARTMENT. See **Public Lands.**

WARRANTS. See **Constitutional Law**, VI, 3.

WARRANTY. See **Insurance**, 2–5.

WATERS. See **Admiralty.**

WHARFINGERS.

Liability of. See *Galveston Wharf Co.* v. *Galveston, H. & S. A. Ry. Co.*, 127.

WILLS. See **Taxation**, III.

WITNESSES. See **Process**, 1.

WORKMEN'S COMPENSATION ACTS. See **Admiralty**, 4; **Carriers**, 2; **Constitutional Law**, IV, 4; **Longshoremen's Act.**

○